

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
John Mineo
Officer of Basil Leaf, Ltd.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the Period
6/1/75 - 11/30/77.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of June, 1982, he served the within notice of Decision by certified mail upon John Mineo, Officer of Basil Leaf, Ltd. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Mineo
Officer of Basil Leaf, Ltd.
2066 E. 61 St.
Brooklyn, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of June, 1982.

G. A. Haglund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
John Mineo
Officer of Basil Leaf, Ltd.

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for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the
Period 6/1/75 - 11/30/77. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of June, 1982, he served the within notice of Decision by certified mail upon Jack Sterngass the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Sterngass
26 Court St.
Brooklyn, NY 11242

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
18th day of June, 1982.

Annie A. [Signature]

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

June 18, 1982

John Mineo
Officer of Basil Leaf, Ltd.
2066 E. 61 St.
Brooklyn, NY

Dear Mr. Mineo:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jack Sternfass
26 Court St.
Brooklyn, NY 11242
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| JOHN MINEO | : | DECISION |
| Officer of BASIL LEAF, LTD. | : | |
| | : | |
| for Revision of a Determination or for Refund of | : | |
| Sales and Use Taxes under Articles 28 and 29 of | : | |
| the Tax Law for the Period June 1, 1975 through | : | |
| November 30, 1977. | : | |

Petitioner, John Mineo, 2066 East 61st Street, Brooklyn, New York, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1975 through November 30, 1977 (File No. 25232).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 22, 1981 at 2:45 P.M. Petitioner appeared by Jack Sterngass, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

- I. Whether petitioner is personally liable for sales taxes due from Basil Leaf, Ltd. for the period June 1, 1975 through November 30, 1977.
- II. Whether the Audit Division notified petitioner of its determination of sales taxes due.
- III. Whether the Audit Division properly determined additional sales taxes due from Basil Leaf, Ltd.

FINDINGS OF FACT

1. Basil Leaf, Ltd. operated a luncheonette and candy store located at 4022 Farragut Road, Brooklyn, New York.

2. On October 10, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, John Mineo, Officer of Basil Leaf, Ltd. covering the period June 1, 1975 through November 30, 1977 for taxes due of \$2,988.26, plus penalty and interest of \$1,404.33, for a total of \$4,392.59. The amount of tax due resulted from a field audit of the books and records of Basil Leaf, Ltd. which disclosed additional taxable sales. Petitioner's liability was predicated on him being a financially responsible officer of Basil Leaf, Ltd.

3. Basil Leaf, Ltd. was incorporated on or about May 7, 1973. Joseph Basile was president and sole stockholder until the corporation was dissolved on November 28, 1977. On August 13, 1974, Joseph Basile employed petitioner to manage the operation of the business. He was given the title of Treasurer. Petitioner was to pay the outstanding balance on two bank loans owed by Mr. Basile, amounting to approximately \$8,000.00 to \$9,000.00. In addition, petitioner agreed to pay the rent for the premises and the utilities. Upon satisfaction of Mr. Basile's indebtedness, petitioner was to have ownership of the business. Petitioner paid the loans on Mr. Basile's behalf with corporation funds; however, he never obtained ownership of the corporation.

4. Petitioner as well as Joseph Basile were signatories on the business bank account.

5. During the period at issue, petitioner was involved in the day to day financial affairs and management of the corporation. Petitioner maintained the

books and records, signed checks, made purchases, and paid the bills. He also signed and filed sales tax returns and corporation income tax returns as Treasurer of Basil Leaf, Ltd.

6. The audit of the books and records of Basil Leaf, Ltd. by the Audit Division consisted of applying estimated mark-up percentages to purchases of merchandise that would result in a taxable sale when sold. The Audit Division thereby determined taxable sales of \$73,936.45. Basil Leaf, Ltd. reported taxable sales of \$36,582.00 leaving additional taxable sales of \$37,354.45 and taxes due thereon of \$2,988.26.

7. Basil Leaf, Ltd. estimated the taxable sales reported on sales tax returns filed during the period at issue. The books and records maintained by Basil Leaf, Ltd. were insufficient for the Audit Division to verify the accuracy of taxable sales reported or to determine such sales with any exactness.

8. Petitioner admitted he received the notice referred to in Finding of Fact "2".

9. Petitioner argued that all taxable sales were reported on sales tax returns filed by Basil Leaf, Ltd. Petitioner offered no evidence to show that the Audit Division's determination of additional sales taxes due from Basil Leaf, Ltd. was incorrect.

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law provides:

"'Persons required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;... Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

B. That section 1133(a) of the Tax Law provides that "...every person required to collect any tax imposed... shall be personally liable for the tax imposed, collected or required to be collected...".

C. That petitioner, John Mineo, was a "person required to collect tax" for the period at issue within the meaning and intent of section 1131(1) of the Tax Law; therefore, he is personally liable for the tax determined due from Basil Leaf, Ltd. pursuant to section 1133(a) of the Tax Law.

D. That the books and records of Basil Leaf, Ltd. were inadequate to determine the exact amount of tax due. Therefore, the Audit Division properly determined additional sales taxes due from such information as was available, in accordance with section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44, 411 N.Y.S 2d 41).

That pursuant to Finding of Fact No. 8, the issue of whether the Audit division notified petitioner of its determination is moot.

E. That the petition of John Mineo is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 10, 1978 is sustained.

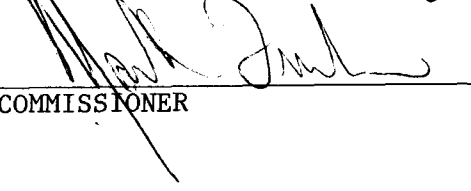
DATED: Albany, New York

JUN 18 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER