

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
96-01 Jamaica Realty Corp. and Frank D'Orazi, :
James Spack & Frank Atria, Indiv. and as Officers : 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 :
9/1/73 - 11/30/76. :

State of New York
County of Albany

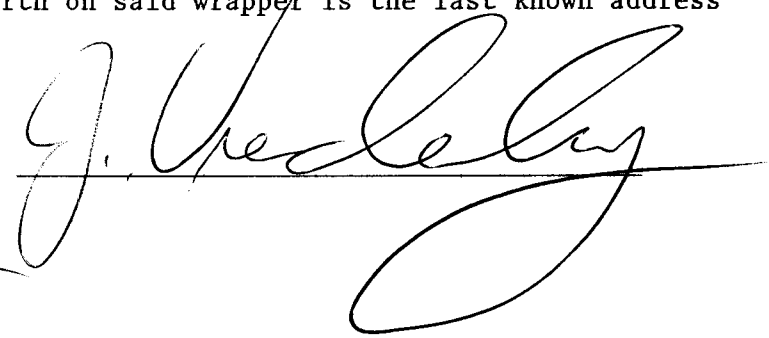
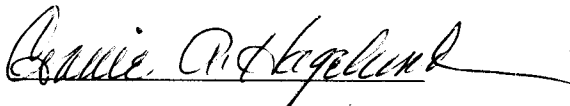
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon 96-01 Jamaica Realty Corp. and Frank D'Orazi, James Spack & Frank Atria, Indiv. and as Officers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

96-01 Jamaica Realty Corp. and Frank D'Orazi,
James Spack & Frank Atria, Indiv. and as Officers
96-01 Jamaica Ave.
Woodhaven, NY 11421

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
9th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
96-01 Jamaica Realty Corp. and Frank D'Orazi, :
James Spack & Frank Atria, Indiv. and as Officers :
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 9/1/73 - 11/30/76. :

AFFIDAVIT OF MAILING

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 9th day of November, 1982, he served the within notice of Decision by certified mail upon Salvatore T. Abruzzo the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Salvatore T. Abruzzo
Struhman, Blitzer & Gelfard
63-37 75th St.
Middle Village, NY 11379

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
9th day of November, 1982.

Connie R. Haglund

J. Vredenburg

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

November 9, 1982

96-01 Jamaica Realty Corp. and Frank D'Orazi,
James Spack & Frank Atria, Indiv. and as Officers
96-01 Jamaica Ave.
Woodhaven, NY 11421

Gentlemen:

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
Salvatore T. Abruzzo
Struhman, Blitzler & Gelfard
63-37 75th St.
Middle Village, NY 11379
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
96-01 JAMAICA REALTY CORP.	:	DECISION
Frank D'Orazi, James Stack and	:	
Frank Atria, Individually and as Officers	:	
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 September 1, 1973	:	
through November 30, 1976.	:	

Petitioners, 96-01 Jamaica Realty Corp., Frank D'Orazi, James Stack and Frank Atria, individually and as officers, 96-01 Jamaica Avenue, Woodhaven, New York 11421, 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 September 1, 1973 through November 30, 1976 (File No. 21175).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 26, 1981 and continued to conclusion on June 1, 1981. Petitioners appeared by Salvatore T. Abruzzo, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioners' sales and use tax liability for the period September 1, 1973 through November 30, 1976.

II. Whether the Audit Division properly disallowed certain Exempt Organization Certifications.

FINDINGS OF FACT

1. On November 23, 1976, petitioners executed a consent to extend the time within which to issue an assessment for sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1973 through August 31, 1976 to December 19, 1977.

2. On November 9, 1977, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1973 through November 30, 1976, in the amount of \$33,130.90 tax due, plus penalty and interest of \$16,129.87.

3. Petitioners operated a catering business in Woodhaven, New York, known as Le Cordon Bleu Caterers.

4. The petitioners maintained adequate books and records from which the exact amount of tax liability could be determined. These records included sales invoices for both taxable and nontaxable sales for the entire audit period.

5. The auditor analyzed nontaxable sales for the test period March 1, 1976 through May 31, 1976 and found that of \$114,647.75 nontaxable sales for said period, \$48,097.35 or 41.95 percent were disallowed because the exemption certificates were improperly executed or no exemption certificates were available. The auditor applied the 41.95 percentage of disallowance to nontaxable sales for the entire audit period and determined additional sales tax due of \$28,808.95.

6. As the result of a pre-hearing conference, the auditor extended the test period. The auditor tested nontaxable sales for the periods January 1, 1976 through February 29, 1976 and June 1, 1976 through November 30, 1976 totalling \$191,649.55 and determined that \$34,768.90 should be disallowed.

Nontaxable sales disallowed for the test period January 1, 1976 through November 30, 1976 totalled \$82,866.25 or 27.05 percent of nontaxable sales reported.

7. At the hearing the petitioners presented properly executed exemption certificates for sales totalling \$59,476.05 of those sales which were previously disallowed. The petitioners failed to present exemption certificates or any substantial evidence that tax was paid on the remaining disallowed nontaxable sales in the amount of \$23,390.20 as follows:

<u>DATE</u>	<u>CUSTOMER</u>	<u>AMOUNT</u>
3/10/76	Not Specified	\$ 1,513.00
4/2/76	Livingstone College	3,080.00
5/23/76	Young Womens Civic League	2,607.00
6/6/76	Friends of John L. Edmonds	6,475.00
9/10/76	Knoxville College	2,719.50
10/31/76	Omega Psi Phi Fraternity	5,287.50
11/14/76	Napoleon H. Revers-Bey	1,708.20
	Total	<u>\$23,390.20</u>

8. Sales and Use Taxes on expense purchases totalling \$1,110.20 and fixed assets totalling \$2,267.56 were also found to be due. Petitioners' representative, at the hearing, acknowledged that these taxes were due and owing.

9. The petitioners offered no evidence regarding taxes of \$944.39 determined to be due on overcollections.

10. The application of penalties and interest was not raised by petitioners.

CONCLUSIONS OF LAW

A. That the use of a test period to determine sales tax liability over a period of years, when petitioners' sales invoices for the entire period under review were available for examination, was improper. "(R)esort to this method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit." Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41. Consequently, only that portion of the assessment based

on an actual audit of petitioners' nontaxable sales invoices can be sustained. The portion based only on the test is cancelled.

B. That the disallowed nontaxable sales are further reduced, pursuant to Finding of Fact "7", to \$23,390.20.

C. That the additional taxes found due on expense purchases, fixed assets and overcollections are sustained in full.

D. That the petition of 96-01 Jamaica Realty Corp., Frank D'Orazi, James Stack and Frank Atria, individually and as officers, is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on November 9, 1977; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 09 1982

STATE TAX COMMISSION

Robert T. Purchase
Acting PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER