

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PARKSIDE CATERERS, INC.	:	DECISION
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, 1971	:	
through August 31, 1974.	:	

Petitioner, Parkside Caterers, Inc., 108-23 65th Road, Forest Hills, New York 11375, 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, 1971 through August 31, 1974 (File No. 10551).

A formal hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York on August 11, 1977 before Frank Romano, Hearing Officer. Continued hearings were held at the same location on February 17, 1978 before Michael Alexander, Hearing Officer; on October 27, 1978 before William Dean, Hearing Officer; on December 11, 1978 before Julius Braun, Hearing Officer; on March 23, 1979 before James Prendergast, Hearing Officer and on December 15, 1980 before Robert Couze, Hearing Officer. Petitioner appeared by Bernard Chwast, CPA and Dudley Gaffin, Esq. The Audit Division appeared by Peter Crotty and Ralph Vecchio, Esqs. (Laurence Stevens and Samuel Freund, Esqs., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use taxes due from petitioner, Parkside Caterers, Inc., for the period June 1, 1971 through August 31, 1974.

FINDINGS OF FACT

1. Petitioner, Parkside Caterers, Inc., operated a Jewish catering house in the Bronx until the end of August, 1974, when it moved to the Forest Park Jewish Center in Queens.

2. On September 10, 1974, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against petitioner for the period June 1, 1971 through May 31, 1974. The notice assessed an estimated tax due of \$79,688.28 plus penalty and interest. It resulted from petitioner's failure to produce its books and records for audit.

3. On November 10, 1975, another Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued. This notice, for the period September 1, 1972 through August 31, 1974, assessed an additional tax due of \$403,542.96 plus penalty and interest. The tax due was based on purchases reported on petitioner's federal income tax returns being marked up 175 percent due to the Audit Division's findings that petitioner's sales records were incomplete.

4. Petitioner in its appearance at a pre-hearing conference held October 19, 1976 was apprised of the books and records required by the Audit Division to complete its audit. Since then, records, books and information have been provided which caused the Audit Division to revise petitioner's tax liability for the period June 1, 1971 through August 31, 1974. The last revision was introduced at the hearing of March 23, 1979 and reflects sales and use tax due of \$118,595.00.

5. The Audit Division in its revision of petitioner's tax liability to \$118,595.00 took into account various findings. An unaccountable difference of \$787,906.00 between the receipts recorded in the cash receipts journal and

gross sales per sales and use tax returns (ST-100's) was considered additional taxable "affair" income. A test of available sales invoices for June 1973 of "affair" and "rental" sales resulted in the disallowance of 4.3 percent or \$25,115.00 of alleged nontaxable sales. A test of purchases for June and July 1973 resulted in the disallowance of \$698,934.00 in "retail" sales. A review of a worksheet prepared by petitioner's accountant on leasehold improvements resulted in the disallowance of \$53,407.00 of said purchases. A review of disbursements in the cash disbursements journal and available purchase invoices for July 1973 resulted in the disallowance of \$104,995.00 of recurring expense (supply) purchases.

6. The above disallowances totaling \$1,670,357.51 represent an error ratio of 328.34 percent of reported taxable sales of \$508,728.00. The additional taxes due per sales tax quarter are as follows:

<u>PERIOD ENDED</u>	<u>ADDITIONAL TAXABLE SALES AND/OR PURCHASES SUBJECT TO USE TAX</u>	<u>ADDITIONAL TAXES DUE</u>
August 31, 1971	\$ 102,491.33	\$ 7,276.55
November 30, 1971	97,142.67	6,897.13
February 29, 1972	88,980.14	6,317.58
May 31, 1972	148,511.46	10,544.28
August 31, 1972	164,931.75	11,710.15
November 30, 1972	112,522.12	7,989.07
February 28, 1973	108,460.55	7,700.70
May 31, 1973	148,961.29	10,576.25
August 31, 1973	162,328.01	11,525.29
November 30, 1973	129,933.99	9,225.31
February 28, 1974	117,040.08	8,309.85
May 31, 1974	80,742.09	5,732.69
August 31, 1974	208,312.03	14,790.15
TOTAL	<u>\$1,670,357.51</u>	<u>\$118,595.00</u>

7. Morris Wolofsky, president of petitioner, testified that its "affair" income came from its catering activities, that its "rental" income was from the use of rooms in its building as a place of assembly, and that its "retail" sales represented the sale of unprepared foods (i.e. chickens, livers).

8. Petitioner offered no documentary or other substantial evidence in support of its testimony or to show that the recomputed additional taxes due did not reflect its additional sales and use tax liability.

9. Petitioner did not maintain sufficient books and records for the Audit Division to determine the exact amount of tax due.

10. Petitioner did not raise as an issue the imposition of penalty and interest.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides that it shall be presumed that all receipts from property are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax.

B. That petitioner, Parkside Caterers, Inc., failed to sustain the burden of proof required by section 1132(c) with respect to the unaccountable difference detected by the Audit Division in receipts per cash receipts books and gross sales per sales and use tax returns.

C. That section 1138(a) of the Tax Law provides that if a return is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available.

D. That the tests and methods employed by the Audit Division as described in Finding of Fact "5" are proper and in accordance with the provisions of section 1138(a).

E. That the petition of Parkside Caterers, Inc. is granted to the extent that the additional taxes due for the periods ended August 31, 1971, November 30, 1971, May 31, 1972 and August 31, 1972 are limited to the amount assessed on

the Notice issued September 10, 1974. Section 1147(b) of the Tax Law provides for a three year statute of limitations for assessing additional taxes.

F. That the petition of Parkside Caterers, Inc. is granted to the extent that the additional taxes due for the period ended February 29, 1972 are reduced to \$6,317.58.

G. That petitioner Parkside Caterers, Inc.'s sales and use tax liability for the period June 1, 1971 through August 31, 1974 is \$108,729.65 in accordance with Conclusions of Law "E" and "F" above.

H. That the petition of Parkside Caterers, Inc. is granted to the extent indicated in Conclusions of Law "E", "F" and "G". The Audit Division is accordingly directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 10, 1974 and November 11, 1975 with penalty and interest. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

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

August 4, 1982

Parkside Caterers, Inc.
108-23 65th Rd.
Forest Hills, NY 11375

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
Dudley Gaffin
233 Broadway
New York, NY 10007
Taxing Bureau's Representative

Bernard V. Chwast
410 Jericho Turnpike
Jericho, NY 11753

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Parkside Caterers, Inc.

:

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 6/1/71-8/31/74.

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Bernard V. Chwast, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard V. Chwast
410 Jericho Turnpike
Jericho, N.Y. 11753

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
4th day of August, 1982.

Bernie A. Hagedorn

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Parkside Caterers, Inc.

:

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 6/1/71-8/31/74.

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Dudley Gaffin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dudley Gaffin
233 Broadway
New York, NY 10007

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
4th day of August, 1982.




STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Parkside Caterers, Inc. : 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 6/1/71-8/31/74. :

State of New York
County of Albany

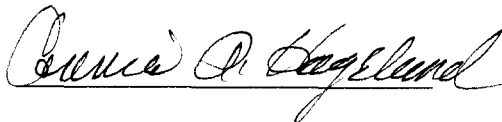
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon Parkside Caterers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

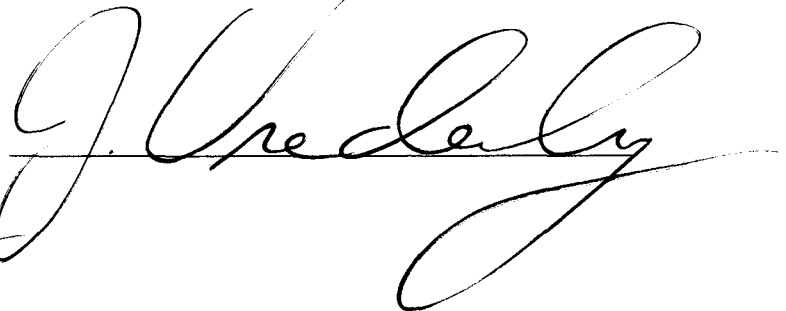
Parkside Caterers, Inc.
108-23 65th Rd.
Forest Hills, NY 11375

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
4th day of August, 1982.





P 230 842 693
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>Dudley Haffin</i>		
STREET AND NO.		<i>235 Broadway</i>		
P.O., STATE AND ZIP CODE		<i>New York, NY 10017</i>		
POSTAGE		\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢		
	SPECIAL DELIVERY	¢		
	RESTRICTED DELIVERY	¢		
	OPTIONAL SERVICES RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢	
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢	
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢	
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢	
TOTAL POSTAGE AND FEES		\$		
POSTMARK OR DATE				

P 230 842 692
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>Perkins Catering Inc.</i>		
STREET AND NO.		<i>108-23 65th Rd.</i>		
P.O., STATE AND ZIP CODE		<i>Forest Hills NY 11375</i>		
POSTAGE		\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢		
	SPECIAL DELIVERY	¢		
	RESTRICTED DELIVERY	¢		
	OPTIONAL SERVICES RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢	
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢	
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢	
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢	
TOTAL POSTAGE AND FEES		\$		
POSTMARK OR DATE				

PS Form 3800, Apr. 1976

CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢		
	SPECIAL DELIVERY	¢		
	RESTRICTED DELIVERY	¢		
	OPTIONAL SERVICES RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢	
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢	
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢	
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢	
TOTAL POSTAGE AND FEES		\$		
POSTMARK OR DATE				

P 230 842 694
RECEIPT FOR CERTIFIED MAIL
 NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO	<i>Perkins V. Abbott</i>
STREET AND NO.	<i>1100 Avenue C</i>
P.O., STATE AND ZIP CODE	<i>Brooklyn, NY 11213</i>
POSTAGE	\$