

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
PLYMOUTH STEAK PUB, INC.	:	DECISION
and DAVID FINKENBERG, INDIVIDUALLY	:	
AND AS OFFICER	:	
	:	
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 December 1, 1974	:	
through May 31, 1974.	:	

Petitioner, David Finkenberg, 202 Whitman Drive, Brooklyn, New York 11234, 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 December 1, 1974 through May 31, 1975 (File No. 11090).

Petitioner, Plymouth Steak Pub, Inc., 78 Clark Street, Brooklyn, New York 11201, 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 March 1, 1970 through February 28, 1974 (File No. 11090).

A consolidated formal hearing was commenced before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 23, 1977 at 1:15 P.M. Petitioner David Finkenberg appeared by Epstein & Epstein, Esqs. (Sanders I. Epstein, Esq., of counsel). Petitioner Plymouth Steak Pub, Inc. did not appear. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel). The hearing as to petitioner David Finkenberg was severed and proceeded to conclusion. The hearing as to petitioner Plymouth Steak Pub, Inc. was continued.

The proceeding as to petitioner Plymouth Steak Pub, Inc. was noticed for formal hearing at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 16, 1977 at 10:45 A.M. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel). Petitioner Plymouth Steak Pub, Inc. did not appear at said formal hearing, notwithstanding the service of notice thereof upon said petitioner and its representative. Petitioner Plymouth Steak Pub, Inc. is presently in default and, accordingly, there is no issue to be determined with respect to said petitioner in this proceeding.

ISSUE

Whether petitioner David Finkenberg, as a director of Plymouth Steak Pub, Inc., is a person required to collect sales and use taxes within the meaning and intent of section 1131(1) of the Tax Law and, if so required, whether said petitioner is personally liable, within the meaning and intent of section 1133(a) of the Tax Law, for failing to collect sales and use taxes assessed to and unpaid by said corporation for the periods in question.

FINDINGS OF FACT

1. On January 2, 1976, a Notice and Demand for Payment of Sales and Use Taxes Due (No. 90,116,662) was issued to petitioner David Finkenberg, and three others, Rachel Finkenberg, Charlotte Finkenberg and Harry Finkenberg, in the amount of \$2,325.20 for sales taxes, plus \$487.51 in penalties and interest, making a total of \$2,812.71 due and owing for the period December 1, 1974 through May 31, 1975, on the grounds that, as officers and/or directors of Plymouth Steak Pub, Inc., they were persons required to collect sales and use taxes pursuant to section 1131(1) of the Tax Law and were personally liable

for such taxes assessed against said corporation pursuant to section 1133(a) of the Tax Law.

2. On or about February 11, 1976, the State Tax Commission issued a warrant, filed in the office of the Clerk of Kings County on February 13, 1976, against petitioner David Finkenberg, and the three above-named persons, in the total amount of \$2,812.71.

3. By letter dated July 22, 1976, petitioner David Finkenberg, protested the judgment and jeopardy warrant and made application that same be vacated and annulled. The July 22, 1976 letter shall be deemed herein as said petitioner's perfected petition pursuant to section 1138 of the Tax Law and section 601.5 of the Rules of Practice and Procedure of the State Tax Commission. No such communication was received by the State Tax Commission from Rachel Finkenberg, Harry Finkenberg and Charlotte Finkenberg and, accordingly, there are no issues to be determined with respect to them in this proceeding.

4. For the periods in question, Plymouth Steak Pub, Inc. owned and operated a restaurant at 78 Clark Street, Brooklyn, New York, having the following persons as its officers, directors and shareholders:

Rachel Finkenberg	- President, Director, Shareholder
Charlotte Finkenberg	- Secretary, Director, Shareholder
David Finkenberg	- Director
Harry Finkenberg	- Director

5. Rachel Finkenberg was the wife of petitioner David Finkenberg, and Harry Finkenberg, his brother. Charlotte Finkenberg was Harry's wife.

6. Rachel Finkenberg, Charlotte Finkenberg and Harry Finkenberg (now deceased) were active in the operation of the restaurant, drawing weekly

salaries in the amounts of \$300.00, \$150.00 and \$150.00, respectively.

Petitioner David Finkenberg infrequently was present at the restaurant and solely when necessitated by his wife's illness.

7. Petitioner David Finkenberg was semi-retired and received a disability pension from the Federal government by reason of his service in the United States Army and had also suffered a heart attack from which he was recovering.

8. Petitioner David Finkenberg was never active in the operation of the restaurant; he was a nominal Director of the corporation merely to facilitate the issuance of a liquor license; he never attended Board of Directors' meetings and received no fees or other compensation for such directorship; he did not invest in the corporation and never held any of its shares; he neither signed checks nor had authority to do so; he never signed any documents (including tax returns) on behalf of the corporation; he was never an employee of the corporation and did not receive wages, cash distributions or compensation of any kind or nature whatsoever; he did not participate in the preparation or payment of payroll; and, he was never an officer of the corporation.

9. Plymouth Steak Pub, Inc. is now defunct, having been dispossessed from the premises at which it conducted its business. It did not, however, file a petition in bankruptcy.

CONCLUSIONS OF LAW

A. That Plymouth Steak Pub, Inc. was a vendor as defined in section 1101(b)(8) of the Tax Law and was subject to the sales tax imposed by section 1105 of the Tax Law.

B. That Plymouth Steak Pub, Inc. was required to collect the sales tax on the purchase price at the time of sale of its merchandise at retail pursuant to section 1132(a) of the Tax Law.

C. That petitioner David Finkenberg was not a person required to collect sales and use taxes within the meaning and intent of section 1131(1) of the Tax Law and is not personally liable for such taxes within the meaning and intent of section 1133(a) of the Tax Law.

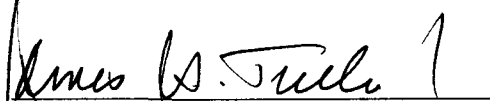
D. That the petition of David Finkenberg is granted and the Notice and Demand (No. 90,116,662) issued on January 2, 1976 hereby cancelled with respect to said petitioner; and that since petitioner Plymouth Steak Pub, Inc. has defaulted, its petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against it is sustained.

E. That the warrant issued February 11, 1976 against petitioner David Finkenberg shall be vacated and annulled as to said petitioner.

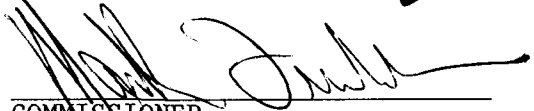
DATED: Albany, New York

JUN 04 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 230 840 247
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

SENT TO		<i>Myron Gordon</i>	
STREET AND NO.		<i>Post & Epstein</i>	
P.O. STATE AND ZIP CODE		<i>150 Nassau St New York, N.Y. 10038</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	¢
		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

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		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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Plymouth Steak Pub, Inc. :
and David Finkenberg, Individually & as Officer :
: 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 :
12/1/74-5/31/74. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

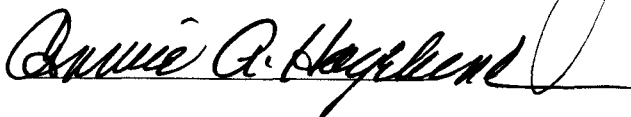
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon Plymouth Steak Pub, Inc., and David Finkenberg, Individually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

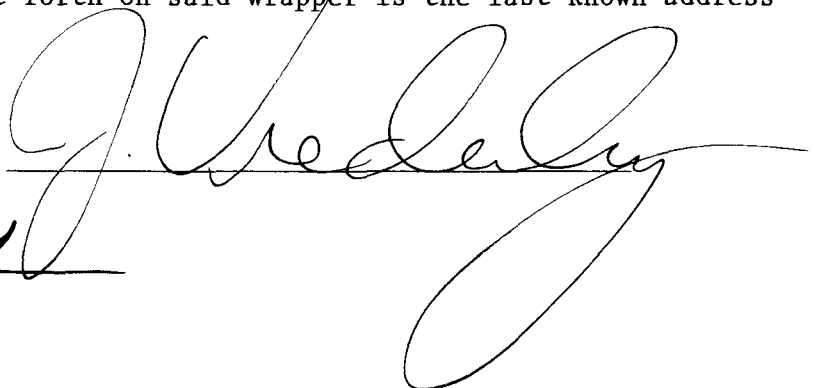
Plymouth Steak Pub, Inc.
and David Finkenberg, Individually & as Officer
202 Whitman Dr.
Brooklyn, NY 11234

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 June, 1982.


Annie G. Haydon



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Plymouth Steak Pub, Inc. :
and David Finkenberg, Individually & as Officer :
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 :
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AFFIDAVIT OF MAILING

State of New York
County of Albany

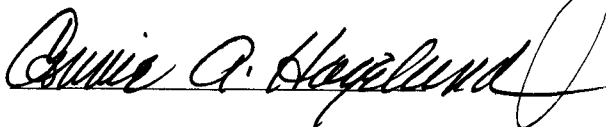
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon Myron Epstein the representative of the petitioner in the within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

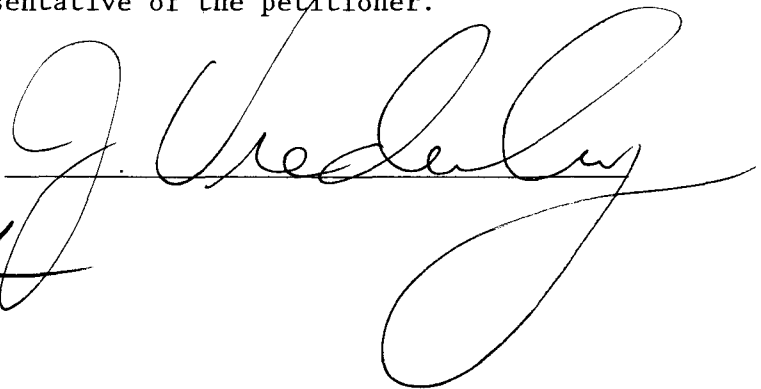
Myron Epstein
Epstein & Epstein
150 Nassau St.
New York, NY 10038

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 June, 1982.


Commissioner of Taxation and Finance


Jay Vredenburg

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

June 4, 1982

Plymouth Steak Pub, Inc.
and David Finkenberg, Individually & as Officer
202 Whitman Dr.
Brooklyn, NY 11234

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
Myron Epstein
Epstein & Epstein
150 Nassau St.
New York, NY 10038
Taxing Bureau's Representative