

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

September 30, 1983

C & C Catering Service Ltd.
Attn: Mr. Frances Cutaneo
7715 - 18th Ave.
Brooklyn, NY 11214

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) 4 months 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 Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
C & C CATERING SERVICE LTD.	:	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 December 1, 1976	:	
through November 30, 1979.	:	

Petitioner, C & C Catering Service Ltd., 7715-18th Avenue, Brooklyn, New York 11214, 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, 1976 through November 30, 1979 (File No. 33116).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 23, 1982 at 2:45 P.M. All evidence was to be submitted by October 22, 1982. Petitioner appeared by Nicholas Cutaneo, president and Frances Cutaneo, secretary-treasurer. The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly held petitioner's purchases of paper and plastic products subject to tax.

FINDINGS OF FACT

1. On November 20, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against C & C Catering Service Ltd. for the period December 1, 1976 through November 30, 1979. The Notice was issued as a result of a field audit and asserted sales and use tax due of \$1,847.97, plus interest of \$281.38, for a total of \$2,129.35.

2. Petitioner, by signature of its president, Nicholas Cutaneo, consented to extend the period of limitation for the issuance of an assessment for the period December 1, 1976 through November 30, 1979 to March 20, 1981.

3. Petitioner operates a food catering service for off-premises consumption. In its charges to its customers, it bills for the food and service based on the number of persons for which food is provided. Along with the selection ordered, petitioner provides complete paper and plastic service such as dinner plates, napkins, forks, knives, cups, serving utensils and a table cover. The petitioner also purchased disposable trays and platters, as well as lids to cover said trays and platters, which it used to deliver food to its customers.

4. On audit, the Audit Division held the purchases of the aforesaid paper and plastic products subject to the sales and use tax imposed by sections 1105(a) and 1110 of the Tax Law. It was the Audit Division's position that these products were retail sales by the vendors selling to petitioner in that no separate charge for these paper and plastic products was made by petitioner to its customers.

The auditor and the petitioner agreed to the use of a test period to determine paper products purchased during the audit period. The auditor therefore reviewed purchases in the paper products account for the period June through August, 1979 and determined that 97.97 percent of the purchases in that account were taxable paper and plastic products. It applied 97.97 percent to the purchases in that account for the audit period and thereby determined purchases subject to use tax of \$23,099.73 and the tax due thereon of \$1,847.97.

5. Petitioner argued that the paper and plastic products provided to its customers were as much an integral component part of its sales as that of the food itself. Petitioner included the cost of the paper and plastic products

provided in its pricing structure of the food served and charged the sales tax thereon. Petitioner therefore argued that if it is required to pay sales tax on its purchases of these products, the tax would be paid twice.

Petitioner contended that an adjustment to the selling price of food service provided was made on occasions where the customer did not require the paper and plastic service.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i), in pertinent part, defines retail sales as:

"(4) Retail sales. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property...." (emphasis added)

B. That petitioner's purchases of containers, wrappers and packaging materials, including paper cups, dinner plates, disposable trays and platters, and lids to cover said trays and platters were purchases "for resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law; and that therefore the purchases of said items by petitioner are excluded from the sales and use taxes. (Matter of Burger King, Inc. v. State Tax Commission, 51 N.Y. 2d 614).


C. That the napkins, forks, knives, serving utensils and table covers purchased by petitioner and transferred to its customers with the sale of prepared food were not purchased for resale to said customers within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law. Petitioner's customers did not purchase said items for resale as such or as a physical component part of tangible personal property, but rather received them only as an incident to the purchase of prepared food. That the purchase of said items is therefore subject to the sales and use tax.


D. That the petition of C & C Catering Service Ltd. is granted to the extent indicated in Conclusion of Law "B" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on November 20, 1980; and that except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 20 1982


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

C & C Catering Service 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:
12/1/76-11/30/79.

State of New York
County of Albany

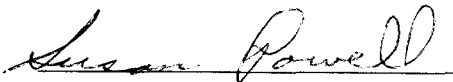
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon C & C Catering Service Ltd., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

C & C Catering Service Ltd.
Attn: Mr. Frances Cutaneo
7715 - 18th Ave.
Brooklyn, NY 11214

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
30th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 470 316 038

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to C + C Catering Service Ltd.	
Attn: Mr. Frances Cutaneo	
Street and No.	
7715-18th Ave.	
P.O., State and ZIP Code	
Brooklyn, NY 11214	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982