

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

December 20, 1983

Ellis Enterprises, Inc.
and Seymour Ellis, Individually & as Officer
122 East 42nd St.
New York, NY 10017

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 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Aaron S. Rogal
Lennox, Lempel, Rogal & Nasser
109 New Dorp Plaza
Staten Island, NY 10306
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ellis Enterprises, Inc. :
and Seymour Ellis, Individually & as Officer : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Period :
6/1/74-5/31/77. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Ellis Enterprises, Inc. and Seymour Ellis, Individually & as Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ellis Enterprises, Inc.
and Seymour Ellis, Individually & as Officer
122 East 42nd St.
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.

David Parchuck

James A. Hargrave
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ellis Enterprises, Inc.	:	
and Seymour Ellis, Individually & as Officer	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/74-5/31/77.	:	

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Aaron S. Rogal, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Aaron S. Rogal
Lennox, Lempel, Rogal & Nasser
109 New Dorp Plaza
Staten Island, NY 10306

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of December, 1983.

David Parchuck

Billie A. DeGroot
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ELLIS ENTERPRISES, INC.	:	DECISION
AND SEYMOUR ELLIS,	:	
INDIVIDUALLY AND AS AN 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 June 1, 1974	:	
through May 31, 1977.	:	

Petitioners, Ellis Enterprises, Inc., and Seymour Ellis, individually and as an officer, 122 East 42nd Street, New York, New York 10017, 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, 1974 through May 31, 1977 (File No. 22213).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 9, 1983 at 9:15 A.M. Petitioners appeared by Lennox, Lempel, Rogal and Nasser (Aaron S. Rogal, CPA). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the taxable sales of petitioner Ellis Enterprises, Inc. computed on audit should be adjusted downward to take cognizance of take-out sales, sales made to United Nations personnel, and gratuities.

FINDINGS OF FACT

1. On March 14, 1978, the Audit Division issued to Ellis Enterprises, Inc. ("Enterprises"), doing business as Howard Johnson's, and Seymour Ellis,

individually and as an officer of the corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1974 through May 31, 1977 in the amount of \$26,251.97, plus interest and penalty of \$13,006.10, for a total due of \$39,258.07. On June 16, 1977, Mr. Ellis, president of Enterprises, had executed on its behalf a consent extending the period of limitation for assessment of sales and use taxes for the period in question to September 20, 1978.

2. After examining additional information furnished by petitioners subsequent to the assessment, the Audit Division revised the assessment, as reflected below.

Taxable sales computed by the Audit Division, taking account of additional information	\$3,629,340.32
Taxable sales reported by Enterprises	<u>3,384,833.00</u>
Additional taxable sales	\$ 244,507.32
Tax on additional taxable sales	\$ 19,474.15
Tax due to overcollections of sales tax	1,197.90
Tax on recurring purchases	<u>729.90</u>
Revised assessment	\$ 21,401.95

Petitioners maintain that the computation of the revised assessment improperly and erroneously fails to consider and allow for nontaxable take-out sales, sales to United Nations personnel, and gratuities.

3. During the period under consideration, Enterprises operated a Howard Johnson's restaurant at 42nd Street and Lexington Avenue, New York, New York, a location approximately two blocks from the United Nations building. The restaurant was and is the largest Howard Johnson's in the world.

4. Enterprises' sales of "take-out" items totalled \$210,566.24 during the period June 1, 1974 through May 31, 1977. Petitioners offered in evidence a list of carry-out items currently available at the Howard Johnson's restaurant

(now operated by another licensee); with the exception of one or two products introduced after the audit period and one or two products eliminated between the audit period and the present, these were the same products which were available for carry-out during the period June 1, 1974 through May 31, 1977. The items and the quantities in which they were offered for sale are set forth below.

	<u>QUANTITY</u>
Thousand Island, French, blue cheese, Italian and cole slaw dressing	14 oz.
Creamy Italian dressing	15 oz.
Cocktail sauce	15 oz.
Barbecue sauce	14 oz.
Barbecue relish	14 oz.
Clam chowder	15 oz.
Brown gravy	15 oz.
Boston baked beans	16 oz.
Boston brown bread	12 oz.
Coffee, vanilla and strawberry syrup	14 oz.
Chocolate syrup	15 oz.
Pineapple topping	17 oz.
Butterscotch sauce	19 oz.
Haddock au gratin (frozen)	10 oz.
Macaroni and cheese (frozen)	10 oz., 19 oz.
Fried clams (frozen)	5 oz.
Shrimp croquettes (frozen)	12 oz.
Chicken croquettes (frozen)	12 oz.
Orange, blueberry and corn toastees (frozen)	7½ oz.
Brownies (frozen)	2¼ oz.
Lemonade concentrate (frozen)	14 oz.
Ice cream	pt., qt., ½ gal.
Sherbet	pt.
Chocolate chip cookie	1 3/4 oz.
Assorted jellies	12 oz., 4½ oz.
Nougatines	6 oz.
Assorted creams	6¼ oz.
Coconut fudge	5 3/4 oz.
Pecanos	5¼ oz.
Crispettes	6 oz.
Buttercrunch	5½ oz.
Crunchettes	4½ oz.
Fiesta	7½ oz.
Honey nougat	5½ oz.
Creamy caramels	8 oz.
Brazil nut toffee	8 oz.

Petitioners assert that the only taxable category, namely, candy, should be estimated at 10 percent of take-out sales; and that, accordingly, 90 percent of take-out sales, or \$189,509.00, were nontaxable.

5. Petitioners estimate that approximately 1 percent of the restaurant's sales, or \$36,290.00, were to United Nations personnel, who, on the occasion of the sales, completed and submitted to the restaurant New York State and Local Sales Tax Certificates of Diplomatic and Consular Tax Exemption (Form ST-126). These certificates were retained and filed by petitioners but were apparently misplaced or discarded when the restaurant changed hands.

6. Finally, petitioners estimate that 0.3 percent of total sales should be considered nontaxable in order to eliminate from taxable sales gratuities left by charge account customers: \$3,629,340.00 total taxable sales X 3% (estimated) charge account sales X 10% (estimated) gratuity = \$10,888.00 nontaxable gratuities. When a customer paying by charge card left a gratuity so designating it on the charge slip, the total amount of the sale of food and drink plus the gratuity was erroneously rung up on the cash register by Enterprises' employees. This total amount inclusive of gratuity was consistently treated in Enterprises' books and records as the amount of that sale; and sales reported on Enterprises' federal corporation income tax return likewise encompassed charge customers' gratuities. (After the audit, this practice was amended.)

CONCLUSIONS OF LAW

A. That Tax Law section 1105, subdivision (d), paragraph (i) imposes sales tax upon:

"The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any...other charge made to patrons or customers...:

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

[illegible]

1. $\mathcal{R}^{(1)} = \mathcal{R}^{(0)}$ and $\mathcal{R}^{(2)} = \mathcal{R}^{(1)} \cup \mathcal{R}^{(1)}$.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being investigated. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being investigated. This is done by the investigator who is responsible for the study.

* * *

"(3) in those instances where the sale is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten."

Petitioners did not produce cash register tapes, daily summaries or any other documents to support their claim that 90 percent of the carry-out items offered by the restaurant were nontaxable. However, given that the first 32 of the 44 items enumerated in Finding of Fact "4" satisfy the criteria in clauses (A) and (B) quoted above (and are therefore not subject to sales tax), 50 percent of Enterprises' carry-out sales may reasonably be considered nontaxable.

B. That section 1132, subdivision (c) creates a presumption that all receipts for property or services of any type mentioned in (among other provisions) section 1105(d) are subject to tax unless the contrary is established, and imposes the burden of proving that any receipt is not taxable upon the person required to collect tax (or the customer). Section 1132(c) further provides:

"Unless...a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased...for some use by reason of which the sale is exempt from tax..., the sale shall be deemed a taxable sale at retail. Where such a certificate...has been furnished to the vendor, the burden of proving that the receipt...is not taxable shall be solely upon the customer."

Petitioners have produced no documentation and have established no foundation for their estimates that \$36,290.00 of the restaurant's sales were made to United Nations personnel and that \$10,888.00 of sales represent gratuities. Consequently, these amounts must be treated as taxable receipts under section 1105(d).

C. That there has been no gross negligence or willful intent to disobey the tax laws on petitioners' part; therefore, all penalties in excess of that amount of interest prescribed by statute are remitted. 20 NYCRR 536.1.


D. That the petition of Ellis Enterprises, Inc. and Seymour Ellis, individually and as an officer, is granted to the extent indicated in Conclusions of Law "A" and "C"; that the Audit Division is directed to modify the assessment accordingly; and that except as so modified, the assessment issued on March 14, 1978 and subsequently revised to \$21,401.95 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 20 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 178

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Ellis Enterprises, Inc.</i>	
Street and No. <i>122 East 42nd St.</i>	
P.O., State and ZIP Code <i>NY, NY 10017</i>	
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

P 470 315 179

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Aaron S. Rogal</i>	
Street and No. <i>109 New Dorp Plaza</i>	
P.O., State and ZIP Code <i>Staten Island, NY 10314</i>	
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