

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

May 20, 1983

Joseph C. Endres
d/b/a McDonalds of University Plaza
11467 Warner Hill Rd.
South Wales, NY 14139

Dear Mr. Endres:

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, 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 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
Robert N. Ettlinger
45 E. Putnam Ave.
Greenwich, CT 06830
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph C. Endres :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period 3/1/78-8/31/80. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Anthony Disturco :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or a Refund of :
Sales & Use Tax under Article 28 & 29 of the Tax :
Law for the Period 3/1/78-8/31/80. :

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Joseph C. Endres, d/b/a McDonalds of University Plaza the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph C. Endres
d/b/a McDonalds of University Plaza
11467 Warner Hill Rd.
South Wales, NY 14139

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
20th day of May, 1983.

David Parchuck

James A. Hagedorn

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph C. Endres :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period 3/1/78-8/31/80. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Anthony Disturco :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or a Refund of :
Sales & Use Tax under Article 28 & 29 of the Tax :
Law for the Period 3/1/78-8/31/80. :

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Robert N. Ettlinger the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert N. Ettlinger
45 E. Putnam Ave.
Greenwich, CT 06830

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
20th day of May, 1983.

David Parchuck

James R. Sigel

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph C. Endres :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period 3/1/78-8/31/80. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Anthony Disturco :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or a Refund of :
Sales & Use Tax under Article 28 & 29 of the Tax :
Law for the Period 3/1/78-8/31/80. :

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Anthony Disturco, d/b/a McDonalds of University Plaza the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony Disturco
d/b/a McDonalds of University Plaza
108 University Plaza
Amherst, NY 14226

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
20th day of May, 1983.

David Parchuck

James A. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph C. Endres :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period 3/1/78-8/31/80. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Anthony Disturco :
d/b/a McDonalds of University Plaza :
for Revision of a Determination or a Refund of :
Sales & Use Tax under Article 28 & 29 of the Tax :
Law for the Period 3/1/78-8/31/80. :

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Thomas A. Morris the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas A. Morris
Sunshine, Morris & Co.
5500 Main St.
Williamsville, NY 14221

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
20th day of May, 1983.

David Parchuck

James A. Shepard
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 20, 1983

Anthony Disturco
d/b/a McDonalds of University Plaza
108 University Plaza
Amherst, NY 14226

Dear Mr. Disturco:

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, 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 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
Thomas A. Morris
Sunshine, Morris & Co.
5500 Main St.
Williamsville, NY 14221
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ANTHONY DISTURCO : DECISION
d/b/a MC DONALDS OF UNIVERSITY PLAZA :
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, 1978 :
through August 31, 1980. :

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York on September 14, 1982 at 10:45 A.M. Petitioner Joseph C. Endres appeared by

Robert N. Ettlinger, Esq. and petitioner Anthony DiSturco by Thomas A. Morris, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Audit Division correctly determined the value of tangible assets transferred in a bulk sale transaction.

II. Whether the value determined by the Audit Division for tangible assets included any real property.

FINDINGS OF FACT

1. Petitioner Joseph C. Endres d/b/a Mc Donalds of University Plaza operated a Mc Donalds restaurant until August 31, 1980, at which time petitioner Anthony DiSturco purchased all of the business assets related to or used in connection with the operation of the restaurant.

2. Petitioner DiSturco notified the Department of Taxation and Finance of the above sale and remitted a bulk sales tax of \$1,800.00.

3. The Audit Division conducted an audit of Endres' books and records and as a result, on February 19, 1981, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period March 1, 1978 through August 31, 1980 for taxes due of \$5,968.04, plus interest of \$342.78, for a total of \$6,310.82. On July 16, 1981, a revised notice was issued to reflect a payment of \$1,061.32 made by Endres. The unpaid tax, \$5,035.50, represents the difference between the bulk sales tax determined due on audit (\$6,935.50) and the \$1,800.00 previously paid.

4. On the same dates as above, notices identical to those issued against Endres were issued to DiSturco. DiSturco, as purchaser in a bulk sales

transaction, was held liable for the taxes determined due from Endres pursuant to section 1141(c) of the Tax Law.

5. The tax paid by DiSturco was determined on the basis that the tangible personal property transferred in the sale had a fair market value of \$25,700.00. The Audit Division found that the value placed on the assets in DiSturco's books and records at the time of acquisition was \$97,650.00.

6. The Purchase and Sale Agreement between Endres and DiSturco provided that Endres agreed to grant, convey, sell, assign, transfer and deliver to DiSturco all the assets, tangible and intangible, of every kind and description used in the conduct of the restaurant, excluding only cash on hand and in banks, leasehold improvements, real estate, accounts and notes receivable, vehicles, office supplies, certificates of deposit, other investment securities, prepaid expenses and Texas Instruments Terminals and Time Recorders. The purchase price for the assets was \$225,000.00. The agreement did not differentiate between the sales price for the tangible assets and the intangible franchise right.

7. Petitioner Endres purchased the Mc Donald's franchise and the same assets that are at issue herein from the Mc Donalds Corporation on November 1, 1977 for \$235,000.00. At that time, the undepreciated cost of the tangible assets was \$138,679.00 and balance of the purchase price, \$96,321.00, was allocated to the cost of the franchise.

When the business was sold to DiSturco, the book value of the tangible assets on Endres' books and records was \$63,492.00 and amortized franchise cost was \$82,673.00. The tangible assets represent 43 percent of the combined total.

Petitioner DiSturco determined the value of the tangible assets, for accounting purposes, by applying the 43 percent as computed above to the purchase price of \$225,000.00.

8. Petitioner DiSturco argued that the fair market value of the tangible assets at the time he purchased the restaurant business was \$25,000.00. The basis for such argument was his inquiry to Mc Donalds Corporation and an appraisal made by Meyer SFS Niagara, Inc., a supplier of food service equipment.

Mc Donalds Corporation would not provide DiSturco with a written appraisal. The appraisal furnished by Meyer did not indicate the specific equipment that it appraised or any details on how it arrived at a value of \$25,000.00.

CONCLUSIONS OF LAW

A. That petitioners failed to establish that the value of the tangible assets transferred in the bulk sale of the Mc Donalds restaurant business was less than the value placed on such assets for accounting purposes.

That in the absence of any substantial evidence to the contrary, the Audit Division properly used the value recorded in petitioner DiSturco's books and records as a basis for determining the tax due, (Matter of Sunvet Gift Shop, Inc., STC June 26, 1981, Matter of WEBR, Inc. v. State Tax Commission, 58 AD2d 471, 397 NYS2d 200).

B. That petitioners failed to establish that any real property was part of the sale. Moreover, the Purchase and Sale Agreement referred to in Finding of Fact "6" specifically provides that real estate and leasehold improvements were excluded from the sale.

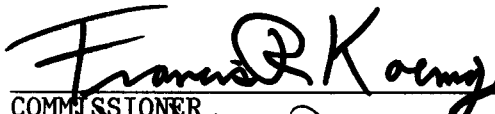
C. That the petitions of Joseph C. Endres d/b/a Mc Donalds of University Plaza and Anthony DiSturco d/b/a Mc Donalds of University Plaza are denied and the notices of determination and demand for payment of sales and use taxes due issued February 19, 1981 and revised July 16, 1981 are sustained.

DATED, Albany, New York

MAY 20 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 801

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Joseph C. Endres</u>	
Street and No. <u>11467 Warner Hill Rd.</u>	
P.O., State and ZIP Code <u>South Wales, NY 14139</u>	
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	

Form 3800, Feb. 1982

P 481 207 799

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Anthony Disturco</u>	
Street and No. <u>108 University Plaza</u>	
P.O., State and ZIP Code <u>Amherst, NY 14226</u>	
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 481 207 802

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Robert N. Ettlinger</u>	
Street and No. <u>45 E. Putnam Ave.</u>	
P.O., State and ZIP Code <u>Greenwich, CT 06830</u>	
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 481 207 800

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Thomas A. Morris</u>	
Street and No. <u>5500 Main St</u>	
P.O., State and ZIP Code <u>Williamsville, NY 14221</u>	
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