

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

September 16, 1983

Grow Lunch, Inc.
and Oscar Kimmeldorf, Indiv. & as Officer
2154 8th Avenue
New York, NY 10026

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, 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
Gerard Zwirn
Krongold and Zwirn
277 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Grow Lunch, Inc. :
and Oscar Kimmeldorf, Indiv. & as Officer : 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 :
12/1/72-5/31/76. :

State of New York
County of Albany

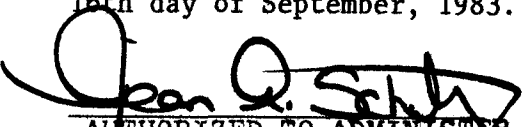
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of September, 1983, she served the within notice of Decision by certified mail upon Grow Lunch, Inc., and Oscar Kimmeldorf, Indiv. & as Officer the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Grow Lunch, Inc.
and Oscar Kimmeldorf, Indiv. & as Officer
2154 8th Avenue
New York, NY 10026

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
16th day of September, 1983.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Grow Lunch, Inc. :
and Oscar Kimmeldorf, Indiv. & 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 12/1/72-5/31/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

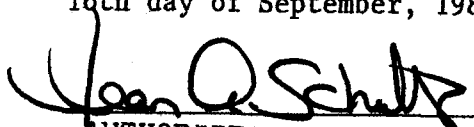
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of September, 1983, she served the within notice of Decision by certified mail upon Gerard Zwirn the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Gerard Zwirn
Krongold and Zwirn
277 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
16th day of September, 1983.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GROW LUNCH, INC.	:	
AND	:	
OSCAR KIMMELDORF	:	DECISION
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, 1972	:	
through May 31, 1976.	:	

Petitioners, Grow Lunch, Inc. and Oscar Kimmeldorf, individually and as officer, 2154 8th Avenue, New York, New York 10026, 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, 1972 through May 31, 1976 (File No. 16992).

A formal hearing was held before Melvin S. Barash, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 14, 1978 at 2:45 P.M. Petitioners appeared by Irving Kimmeldorf, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

The hearing was reopened and continued before Robert Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on April 19, 1982 at 10:40 A.M., on April 20, 1982 at 2:00 P.M., and on May 27, 1982 at 10:00 A.M. Petitioners appeared by Krongold & Zwirn, Esqs. (Gerald Zwirn, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the audit of the vendor's books and records and the resulting findings were proper and correct.

FINDINGS OF FACT

1. On March 14, 1976, petitioner Grow Lunch, Inc., a registered vendor, executed a consent extending the period of limitation within which to issue an assessment under Articles 28 and 29 of the Tax Law for the taxable period December 1, 1972 through August 31, 1975, to December 20, 1976.

2. On September 24, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Grow Lunch, Inc. and Oscar Kimmeldorf, individually and as officer, for the period December 1, 1972 through May 31, 1976 in the amount of \$13,921.98, plus penalty and interest of \$5,328.32, for a total of \$19,250.30. Petitioners timely filed a petition for revision of the notice of determination.

3. The determination was based on a field audit of the books and records of petitioner Grow Lunch, Inc., operator of a bar and grill located at 8th Avenue and 116th Street, New York, New York. Petitioner Oscar Kimmeldorf, is the sole officer.

4. On audit, the Audit Division performed mark-up tests for liquor and beer using purchase invoices and selling prices for November, 1975. The test disclosed a combined liquor and wine mark-up of 182.8 percent and a beer mark-up of 131.11 percent. A food markup of 100 percent was estimated.

5. After a conference with petitioners, the Audit Division revised the liquor-wine markup to 142.28 percent. It then applied the markups to purchases petitioner Grow Lunch, Inc. made in the audit period which resulted in additional taxable sales of \$183,250.00 and tax due thereon of \$13,921.98.

6. The Audit Division considered that most drinks were sold two for one. They allowed 1 1/8 ounces of liquor per serving. Fifteen percent was allowed for spillage except for beer, which was sold by the bottle only. There was no credit allowed for free or courtesy drinks or drinks by bartenders, since petitioners failed to present proof of the amount of such drinks.

7. The Audit Division stipulated that the shot glass used by Grow Lunch, Inc. was capable of holding 1 1/4 ounces. Petitioner Oscar Kimmeldorf testified that the bartenders always filled the shot glasses to the brim.

8. At the hearing, petitioners pointed out two errors made on the Audit Division's workpapers which reduce to 138.79 percent the liquor-wine markup. No other substantial evidence was offered to show that the Audit Division erred in making its determination.

9. Petitioners showed that what the Audit Division held to be sales of meals were actually payments to its bartenders for their lunch.

10. Petitioner argued that every third bottle of beer served was not sold but given free to the customer, and that a serving of wine contained 1 1/2 ounces. Petitioner offered no substantial evidence in support of these arguments.

11. Petitioner Grow Lunch, Inc.'s books and records were inadequate for the Audit Division to determine the exact amount of sales tax due.

12. Petitioners did not willfully attempt to evade the tax.

CONCLUSIONS OF LAW

A. That since petitioner Grow Lunch, Inc.'s recordkeeping was insufficient, the audit procedures and tests adopted by the Audit Division to determine the vendor's taxable sales and sales tax due were proper pursuant to section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That petitioner did serve its customers 1½ ounce servings of liquor; that petitioner did point out two errors made by the Audit Division pursuant to Finding of Fact "8"; and that petitioner did not sell food but instead paid its bartenders lunch money.

C. That except for Conclusion of Law "B", petitioner failed to sustain the burden of showing error. (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).


D. That the Audit Division is directed to modify and recompute the determination in accordance with Conclusion of Law "B", together with interest computed at the minimum statutory rate.

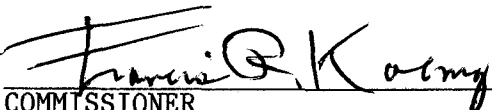
E. That the petition of Grow Lunch, Inc. and Oscar Kimmeldorf is granted in accordance with Conclusions of Law "B" and "D" and is, in all other respects, denied.

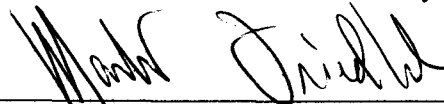
DATED: Albany, New York

SEP 16 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER