

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

December 20, 1983

Nobody's Inc. d/b/a Harvey's Seafood House
and Seymour Ellis, Individually and as Officer
122 E. 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 :
Nobody's Inc. d/b/a Harvey's Seafood House :
and Seymour Ellis, Individually and as Officer :
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. :

AFFIDAVIT OF MAILING

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 Nobody's Inc. d/b/a Harvey's Seafood House and Seymour Ellis, Individually and as Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nobody's Inc. d/b/a Harvey's Seafood House
and Seymour Ellis, Individually and as Officer
122 E. 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

William A. Hyland
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nobody's Inc. d/b/a Harvey's Seafood House :
and Seymour Ellis, Individually and as Officer :
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. :

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

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.

Daniel Parchuck

Emilio D. Heyland
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
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of	:	
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NOBODY, INC.	:	
d/b/a HARVEY'S SEAFOOD HOUSE	:	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, Nobody, Inc., d/b/a Harvey's Seafood House, 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. 22212).

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 Nobody, Inc. computed on audit should be adjusted downward to take cognizance of coffee cart sales, sales made to United Nations personnel, and gratuities.

FINDINGS OF FACT

1. On March 14, 1978, the Audit Division issued to Nobody, Inc., doing business as Harvey's Seafood House, 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 \$29,849.89, plus interest and penalty of \$14,585.09, for a total due of \$44,434.98. On June 16, 1977, Mr. Ellis, president of Nobody, Inc., 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.

Audited taxable sales	\$2,811,790.19
Taxable sales reported by Nobody, Inc.	<u>2,613,905.00</u>
Additional taxable sales	\$ 197,885.19
Tax on additional taxable sales	\$ 15,754.11
Tax due to overcollections of sales tax	<u>636.08</u>
Revised assessment	\$ 16,390.19

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

3. During the period under consideration, Nobody, Inc. operated a seafood restaurant at 34th Street and Third Avenue, New York, New York, a location approximately ten blocks from the United Nations building. Because of the restaurant's fine reputation, it "did a lot of U.N. business," in the words of Mr. Ellis. Nobody, Inc. also operated a coffee cart during this period.

4. Nobody, Inc.'s coffee cart sales totalled \$184,313.00 for the period June 1, 1974 through May 31, 1977. Items offered for sale included coffee, half-pint containers of milk, small cans of juice, half-pint cups of ice cream, cellophane-wrapped brownies and cookies, sandwiches and hot soup. Petitioners

instructed employees assigned to the cart regarding which items were subject to sales tax and which were not. Petitioners assert that 50 percent, or \$92,157.00, of coffee cart sales should be estimated as nontaxable sales, and that recognition should be given the fact that coffee was not a popular item since most offices had their own coffee-making machines.

5. Petitioners estimate that approximately 1 percent of the restaurant's sales, or \$28,117.00, were to United Nations personnel, most of whom, 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). In accordance with the directions given by petitioners, restaurant employees were to request each customer claiming a diplomatic or consular exemption to execute such a certificate; however, because Mr. Ellis spent nearly all his time at another restaurant he owned, the execution of the certificates was rather lax. Completed certificates were retained and filed by petitioners but were apparently misplaced or discarded when the restaurant changed hands.

6. Finally, petitioners estimate that 10 percent of the restaurant's charge account sales, or \$114,022.00, should be deemed nontaxable in order to eliminate from such sales gratuities left by customers. 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 Nobody, Inc. employees. This total amount inclusive of gratuity was consistently treated in the corporation's books and records as the amount of that sale; and sales reported on Nobody, Inc.'s federal corporation income tax return likewise encompassed charge customers' gratuities. (After the audit, this practice was amended.)

Petitioners offered in evidence 11 daily summaries, randomly chosen from the period September through November, 1979, of sales paid via customers' American Express charge accounts, with photocopies of charge summaries submitted by Nobody, Inc. to the American Express Company. These summaries show that tips represented between 10.14 and 11.62 percent of charge sales. Nobody, Inc. also accepted payment by use of Diners Club cards.

Mr. Ellis testified of his own knowledge that Nobody, Inc. employees received every gratuity to which they were entitled.

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...:

* * *

"(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."

Some of the items dispensed from the Nobody, Inc. coffee cart, e.g., the canned juices, appear to satisfy the criteria contained in clauses (A) and (B) quoted above and are therefore excepted from sales tax; other items, e.g., hot soup, are not so excepted. Petitioners offered no documents or any other basis, however, for an allocation of the coffee cart sales of \$184,313.00 between the taxable and nontaxable categories. Consequently, their claim that 50 percent of such sales should be considered nontaxable cannot be sustained.

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 produced no documents (in the form of exemption certificates or otherwise) and established no foundation for their estimate that 1 percent of the restaurant's sales were made to United Nations personnel. Such receipts must thus be considered taxable pursuant to section 1105(d).

C. That given the daily summaries, which show gratuities representing approximately 10 percent of sales paid via American Express charge account, and the testimony of Mr. Ellis that the restaurant employees in fact received the gratuities to which they were entitled, \$114,022.00 of the restaurant's charge sales may reasonably be considered nontaxable. See 20 NYCRR 527.8(1).

D. 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.

E. That the petition of Nobody, Inc., doing business as Harvey's Seafood House, and Seymour Ellis, individually and as an officer, is granted to the extent indicated in Conclusions of Law "C" and "D"; that the Audit Division is directed to modify the assessment accordingly; and that except as so modified,

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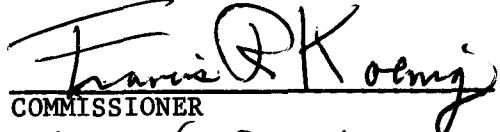
the assessment issued on March 14, 1978 and subsequently revised to \$16,390.19 is sustained.

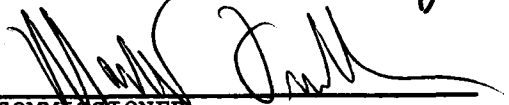
DATED: Albany, New York

DEC 20 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 187

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Nobody's Inc.</i>	
Street and No. <i>122 E. 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 470 315 186

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Harold S. Rogal</i>	
Street and No. <i>109 New Drop Plaza</i>	
P.O., State and ZIP Code <i>Staten Island, NY 10306</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
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PS Form 3800, Feb. 1982