

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

May 6, 1983

Pine Ridge Associates, Inc.
and John Piazza
c/o George Zimmermann
2100 Main Place Tower
Buffalo, NY 14202

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 Laws 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
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
George M. Zimmermann
Albrecht, Maguire, Heffern & Gregg
2100 Main Place Tower
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Pine Ridge Associates, Inc. :
and John Piazza :

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 12/1/70-11/30/73 & 12/28/73.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon George M. Zimmermann the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George M. Zimmermann
Albrecht, Maguire, Heffern & Gregg
2100 Main Place Tower
Buffalo, NY 14202

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
6th day of May, 1983.

David Parchuck

Conrad R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Showboat Restaurant Inc.
and John J. Piazza

:

:

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 12/1/70-6/30/72.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Showboat Restaurant Inc., and John J. Piazza the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Showboat Restaurant Inc.
and John J. Piazza
c/o George Zimmermann
2100 Main Place Tower
Buffalo, NY 14202

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
6th day of May, 1983.

David Parchuck

Ann M. R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Showboat Restaurant Inc. :
and John J. Piazza :

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 12/1/70-6/30/72.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon George M. Zimmermann the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George M. Zimmermann
Albrecht, Maguire, Heffern & Gregg
2100 Main Place Tower
Buffalo, NY 14202

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
6th day of May, 1983.

David Parchuck

James P. [Signature]

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Showboat Restaurant Inc.
and John J. Piazza
c/o George Zimmermann
2100 Main Place Tower
Buffalo, NY 14202

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 Laws 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
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
George M. Zimmermann
Albrecht, Maguire, Heffern & Gregg
2100 Main Place Tower
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
PINE RIDGE ASSOCIATES, INC. :
AND JOHN J. PIAZZA :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods December 1, 1970 :
through November 30, 1973 and December 28, 1973. :
DECISION

In the Matter of the Petition :
of :
SHOWBOAT RESTAURANT, INC. :
AND JOHN J. PIAZZA :
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, 1970 :
through June 30, 1972. :

Petitioners, Pine Ridge Associates, Inc. and John J. Piazza, c/o George M. Zimmermann, Esq., 2100 Main Place Tower, Buffalo, New York 14202, 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 periods December 1, 1970 through November 30, 1973 and December 28, 1973 (File Nos. 17771 and 17772).

Petitioners, Showboat Restaurant, Inc. and John J. Piazza, c/o George M. Zimmermann, Esq., 2100 Main Place Tower, Buffalo, New York 14202, 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, 1970 through June 30, 1972 (File No. 10350).

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 May 10, 1982 at 1:15 P.M. Petitioners appeared by George M. Zimmermann, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether a vessel affixed to land and used as a restaurant constituted a capital improvement to real property.

II. Whether petitioner Pine Ridge Associates, Inc. is liable for sales tax on receipts ascertained to be uncollectible.

III. Whether petitioner John J. Piazza was a person required to collect tax on behalf of Pine Ridge Associates, Inc. and Showboat Restaurant, Inc. and thus personally liable for sales taxes due from said corporations.

FINDINGS OF FACT

1. On February 4, 1974, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners, Pine Ridge Associates, Inc. and John J. Piazza, individually as a responsible officer, covering the period June 1, 1972 through November 30, 1973 for taxes due of \$4,200.00, plus penalty and interest of \$593.60, for a total of \$4,793.60. Said Notice indicated that the taxes were determined to be due on the rental of showboat and equipment and fixtures to Thomas J. and Peter C. Hayes.

2. On March 12, 1974, a second Notice was issued to petitioners, Pine Ridge Associates, Inc. and John J. Piazza, covering the period December 1, 1970 through August 31, 1972 for taxes due of \$4,600.00, plus penalty and interest of \$1,415.20, for a total of \$6,015.20. Said Notice indicated that the taxes

were determined due on the rental of showboat and equipment and fixtures to Showboat Restaurant, Inc.

3. On May 30, 1974, the Audit Division issued a third Notice to petitioners, Pine Ridge Associates, Inc. and John J. Piazza, asserting a bulk sales tax of \$14,000.00 on the sale of the showboat, equipment and fixtures to Mar-Lou Farms, Inc.

4. On March 12, 1974, the Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners, Showboat Restaurant, Inc. and John J. Piazza, individually as a responsible officer, covering the period December 1, 1970 through June 30, 1972 for taxes due of \$27,435.51, plus penalty and interest of \$8,987.73, for a total of \$36,423.24. Subsequently, the Audit Division adjusted the taxes due to \$4,600.00, which is the tax on the same rental transaction referred to in Finding of Fact "2".

5. Petitioner John J. Piazza was President and sole stockholder of Pine Ridge Associates, Inc. for the entire period at issue and of Showboat Restaurant, Inc. for the period December 1, 1970 through June 30, 1972.

6. In July 1970, Pine Ridge Associates, Inc. ("Pine Ridge") purchased a vessel, which had been converted into a restaurant, (hereinafter referred to as "showboat") in Chicago, Illinois and had it towed to Buffalo, New York for the purpose of operating a restaurant and lounge. Pine Ridge leased the showboat to Showboat Restaurant, Inc. until June 30, 1972 at which time John J. Piazza sold 100 percent of the stock of Showboat Restaurant, Inc. to Thomas J. and Peter C. Hayes. Pine Ridge leased the showboat to the Hayeses until September, 1973 when they ceased business operations. On September 28, 1973, Pine Ridge

sold the showboat to Mar-Lou Farms, Inc. (Mar-Lou). Mar-Lou subsequently went bankrupt and moved the showboat to Toronto, Canada.

The last full month for which Pine Ridge received rent from the Hayeses was May, 1973; \$3,000.00 was paid for June, 1973.

Mar-Lou paid only the following amounts of the purchase price: \$4,000.00 down on the contract, \$16,000.00 on closing, and \$9,759.10 in mortgage payments, for a total of \$29,759.10.

Pine Ridge was unsuccessful in its attempts to collect the delinquent rent from the Hayeses and the balance of the mortgage from Mar-Lou.

7. The showboat was a former Mississippi riverboat. It was four stories in height, about 165 feet long and 33 feet in width; it drew four feet of water.

The showboat was affixed to the land under a Berthing and Land Use Agreement executed with Rich Marina Corp. which provided that Pine Ridge had the right to berth, keep and maintain the showboat at and on the water at One Hertal Avenue. Said agreement was for a term of 7 years with one renewal option for an additional three years.

8. The showboat was affixed to the land in the following manner:

1. A series of four steel H-beams, each 35 feet long, were driven 20 feet deep into the riverbed alongside the steel piling which formed the bulkhead on the land.

2. The H-beams were then fastened to the steel piling in two ways:

(a) Both sides of each H-beam were welded to the steel piling by a vertical weld five to six feet long.

(b) Each H-beam was bolted to a two-inch steel rod which ran back three feet underground from the piling a distance of 35 to 40 feet to a "dead man" consisting of crossed pieces of railroad track.

3. The showboat was then fastened to the land by four steel roller assemblies. These were bolted and welded to the steel deck of the boat. The steel rollers fitted around the H-beams so that the showboat could move up and down with the level of the water, but could not move laterally.

9. The showboat was connected with the customary utilities -- sewer, water, gas and electricity.

Pine Ridge was required to install a sewer main running 700 feet at a cost in excess of \$20,000.00. A flexible pipe running from the sewer line to the showboat was attached at both ends by a bell and hub assembly. The water and gas had similar connections.

Severance of the showboat from the land would require cutting away the roller assembly and disconnecting the utility hookups.

10. The City of Buffalo assessed the showboat as real property. The Division of Buildings of the City of Buffalo required a building permit to place and use the showboat. It was necessary to obtain suspension of a City ordinance which limited the height and area of a wooden frame structure.

11. The Erie County Alcoholic Beverage Control Board approved an application for a liquor license submitted by the Showboat Restaurant, Inc. on the condition that the applicant certify that the showboat was permanently moored at One Hertel Avenue and that it was a permanent structure, not capable of being moved.

12. Pine Ridge was unable to get the showboat insured as a vessel. Instead, it was necessary to obtain normal insurance for a building.

13. The agreement between Pine Ridge Associates, Inc. and Mar-Lou Farms, Inc. describes the showboat as real property and allocated \$190,500.00 of the purchase price to real property and the balance of \$9,500.00 to furniture, fixtures, furnishing and equipment. Mar-Lou Farms, Inc. paid \$20,000.00 towards the purchase price. The balance was secured by a bond and mortgage and a chattel mortgage.

14. Petitioner John J. Piazza spent the majority of his time as the administrator of the Ransomville General Hospital and Nursing Home. He also devoted some time to his interests in retirement homes in Lockport, New York and Sarasota, Florida. Only a minimal amount of Mr. Piazza's time was devoted to the operation of Pine Ridge and Showboat Restaurant, Inc. Mr. Piazza employed a vice president of operations to manage the day-to-day affairs of Pine Ridge and Showboat Restaurant, Inc. Mr. Piazza was an authorized signatory for the business bank account of both corporations; however, he only signed checks occasionally if the vice president of operations was not available. Mr. Piazza did not sign tax returns and, except for a bill which was out of the ordinary, did not determine what bills would be paid.

Mr. Piazza did not receive a salary from either corporation.

15. Reasonable cause existed for petitioners' failure to collect and pay over the taxes at issue.

16. It is the position of petitioners that the showboat was real property based on Matter of Consolidated Edison Co. of N.Y. v. City of New York, 44 N.Y.2d 536, which held that barges affixed to a pier in a similar manner as the showboat were real property as structures affixed to land under section 102(12)(b) of the Real Property Tax Law.

17. Included in petitioners' brief were proposed findings of fact, as to which this Commission makes the following rulings:

a) Proposed findings 1 and 7 (except for the characterization permanently), 2, 3, 4, 5, 8 through 14, 18 through 24, 28 through 31, 32, 34, 35, 37 through 42, 44, 45, 49, 50, 57, 58, 59, 60, 63, 64 are adopted and have been incorporated into this decision.

b) Proposed findings 15, 33, 61, 62 are rejected as not established by the evidence. Proposed findings 6, 16, 17, 25, 26, 27, 36, 43, 47, 48, 51 through 56, are rejected as irrelevant.

c) Proposed finding 46 is rejected as being conclusory in nature.

CONCLUSIONS OF LAW

A. That the showboat was not affixed to the real property with the degree of permanency required to constitute a capital improvement within the meaning and intent of section 1105(c)(3) of the Tax Law.

That the showboat was capable of being moved without causing any material damage to it or the underlying real property, and, in fact, was moved twice in four years. Moreover, the Berthing and Land Use Agreement referred to in Finding of Fact "7" is for a fixed term and upon termination or cancellation Pine Ridge is permitted to remove the showboat. Under such circumstances, the installation does not constitute a permanent addition to real property (Matter of Central Office Alarm Co., Inc. v. State Tax Commission, 58 A.D.2d 162).

That although the showboat may be classified as real property under section 102(12)(b) of the Real Property Tax Law, it is not determinative of the status of the showboat under the Sales Tax Law (Matter of Broadway Mobile Home Sales Corp. v. State Tax Commission, 67 A.D.2d 1029).

That the showboat retained its identity as tangible personal property as defined in section 1101(b)(6) of the Tax Law and that the receipts for the rental and sale thereof are subject to the tax imposed pursuant to section 1105(a) of the Tax Law.

B. That the delinquent rent for the period June, 1973 through September, 1973 and the unpaid balance of the mortgage (Finding of Fact "6") were uncollectible and, therefore, petitioner Pine Ridge Associates, Inc. is liable for tax only on that portion of the receipts actually received (Matter of Abraham & Strauss v. Tully, 47 N.Y.2d 207). Accordingly, the tax asserted on Notice #90,203,470 is adjusted to \$3,390.00 and on Notice #90,203,535 to \$2,083.14.

C. That petitioner Showboat Restaurant, Inc. is liable for the sales taxes of \$4,600.00 it failed to pay to Pine Ridge Associates, Inc. pursuant to section 1133(b) of the Tax Law.

D. That section 1131(1) of the Tax Law provides:

"'Persons required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;... Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

E. That petitioner John J. Piazza, although not actively involved in the day-to-day management of Pine Ridge Associates, Inc. and Showboat Restaurant, Inc. (December, 1970 through June, 1972), was the President and sole stockholder of both corporations; he negotiated the purchase and sale of the showboat and the berth and land use agreement; he was authorized and on occasion signed checks. As President, Mr. Piazza had authority to sign tax returns, decide what bills would be paid, and hire and fire employees. The delegation of these duties by a corporate officer does not relieve him of his own responsibility.

That petitioner John J. Piazza was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and, therefore, has personal liability for the taxes due from Pine Ridge Associates, Inc. and Showboat Restaurant, Inc. (December, 1970 through June, 1972) in accordance with section 1133(a) of the Tax Law.

F. That the penalty is cancelled and interest is reduced to the minimum statutory rate.

G. That the petition of Pine Ridge Associates, Inc. is granted to the extent indicated in Conclusions of Law "B" and "F"; that the petitions of Showboat Restaurant, Inc. and John J. Piazza are granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued February 4, 1974, March 12, 1974 and May 30, 1974; and that, except as so granted, the petitions are in all other respects denied.

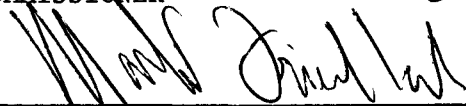
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 389 758 945
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Pine Ridge Assoc, Inc</i>	
+ <i>John Piazza</i>	
Street and No. <i>clo George Zimmerman</i>	
<i>200 Main Place Tower</i>	
P.O., State and ZIP Code	
<i>Buffalo, NY 14202</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 389 758 947
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Showboat Rest, Inc</i>	
+ <i>John J. Piazza</i>	
Street and No. <i>clo George Zimmerman</i>	
<i>2100 Main Place Tower</i>	
P.O., State and ZIP Code	
<i>Buffalo, NY 14202</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	\$

1982

P 389 758 946
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>George Zimmerman</i>	
<i>Abrecht, Maguire, Heffern & Dragg</i>	
Street and No. <i>clo George Zimmerman</i>	
<i>2100 Main Place Tower</i>	
P.O., State and ZIP Code	
<i>Buffalo, NY 14202</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