

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

May 6, 1983

The Southland Corporation  
c/o Thomas P. Dougherty  
The Colonial Office Building  
Port Washington, NY 11050

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  
Thomas P. Dougherty  
St. John & Dougherty  
The Colonial Office Bldg., 14 Vanderventer Ave.  
Port Washington, NY 11050

AND

Michael & Mina DeLuca  
16-10 Pond Way  
Manorville, NY 11949  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
The Southland Corporation :  
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 8/31/71 - 11/13/74. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

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 The Southland Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Southland Corporation  
c/o Thomas P. Dougherty  
The Colonial Office Building  
Port Washington, NY 11050

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

Annice A. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
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under Article 28 & 29 of the Tax Law for the :  
Period 8/31/71 - 11/13/74. :  
:

AFFIDAVIT OF MAILING

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 Michael & Mina DeLuca, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael & Mina DeLuca  
16-10 Pond Way  
Manorville, NY 11949

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. 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 :  
The Southland Corporation :  
for Redetermination of a Deficiency or a Revision :  
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under Article 28 & 29 of the Tax Law for the :  
Period 8/31/71 - 11/13/74. :  
:

AFFIDAVIT OF MAILING

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 Thomas P. Dougherty the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas P. Dougherty  
St. John & Dougherty  
The Colonial Office Bldg., 14 Vanderventer Ave.  
Port Washington, NY 11050

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 A. Heglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
THE SOUTHLAND CORPORATION	:	DECISION
	:	
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 Ended August	:	
31, 1971 through March 31, 1974.	:	

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Petitioner, The Southland Corporation, 4 Park Street, Blue Point, New York (hereinafter referred to as "Southland"), 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 ended August 31, 1971 through March 31, 1974 relating to Southland's alleged liability for such taxes as purchaser, under section 1141(c) of the Tax Law, of the business of Michael and Mina DeLuca d/b/a 7-11 Food Store No. 11206, 4506 Sunrise Highway, Oakdale, New York (hereinafter referred to collectively as the "DeLucas"). At the hearing on the petition, as hereinafter described, the Audit Division amended its answer to allege that, with respect to 7-11 Food Store 11206, Southland was a person required to collect sales and use taxes within the meaning of section 1131(1) of the Tax Law and thus was liable for failure to collect sales and use taxes assessed and unpaid for the periods in question (File No. 14425).

A formal hearing was commenced before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 18, 1977 at 9:15 A.M. and was continued to conclusion before John Davidian, Hearing Officer, at the same location on March 10, 1981 at 10:30 A.M. and at the offices of the State Tax Commission, State Office

Building, Hauppauge, New York, on April 21, 1981, June 26, 1981 and July 29, 1981 at 10:30 A.M. Southland appeared by St. John & Dougherty, Esqs. (Thomas P. Dougherty, Esq., of counsel). The Audit Division appeared on the first hearing day by Peter Crotty, Esq. (James Scott, Esq., of counsel) and thereafter by Ralph J. Vecchio, Esq. (Laurence Stevens and Jamie Woodward, Esqs., of counsel).

### ISSUES

I. Whether Michael and Mina DeLuca are liable for additional sales taxes assessed for the periods ended August 31, 1971 through March 31, 1974.

II. Whether, with respect to 7-11 Food Store 11206, petitioner, Southland, is a person required to collect sales and use taxes within the meaning of section 1131(1) of the Tax Law and, if so, whether said petitioner is liable, within the meaning of section 1133(a) of the Tax Law, for failing to collect sales and use taxes assessed and unpaid for the periods in question.

III. Whether, with respect to 7-11 Food Store 11206 operated by Michael and Mina DeLuca, petitioner, Southland, is a purchaser, transferee or assignee in bulk of the business assets of such store within the meaning of section 1141(c) of the Tax Law and, if so, whether said petitioner is liable for sales and use taxes assessed and unpaid for the periods in question.

### FINDINGS OF FACT

1. New York State and local sales and use tax returns for the periods ended August 31, 1971 through March 31, 1974 were prepared and filed by Southland, as franchisor, on behalf of its franchisee, Michael and Mina DeLuca d/b/a 7-11 Store No. 11206, and sales taxes were remitted in the amounts reflected thereon. Copies of such returns for the periods ended November 30, 1973 through March 31, 1974 were not introduced at the hearing.

2. On April 3, 1974, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk, dated April 1, 1974, indicating that Southland had purchased certain furniture and fixtures at a price of \$96.97 from the DeLucas in connection with the surrender of the DeLucas' 7-11 franchise "pursuant to franchise and security agreements".

3. On May 6, 1974, the Audit Division sent a notice to the DeLucas indicating the possibility of claims for sales and use taxes due and requesting that the DeLucas complete and return the enclosed Bulk Sale Questionnaire which requested, inter alia, certain financial data with respect to the business for certain of the periods in question.

4. The notice and Bulk Sale Questionnaire referred to above were addressed to the DeLucas at their former business address and were returned to the Audit Division with the notation "Moved, left no address". No further effort to locate the DeLucas with regard to the notice and questionnaire was made by the Audit Division and the questionnaire remained unanswered.

5. On May 6, 1974, the Audit Division sent a Notice of Claim to Purchaser to Southland indicating the possibility of claims for sales and use taxes relating to the bulk sale of the business assets of the DeLucas.

6. On August 21, 1974, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to the DeLucas in the amount of \$8,456.12 for sales taxes, \$2,158.44 in penalties and interest and \$6.79 in bulk sales tax, making a total of \$10,621.35 due and owing for the periods ended August 31, 1971 through March 31, 1974. The sales tax due was arrived at by multiplying the gross sales previously reported on tax returns submitted for the periods by a 45 percent estimated taxable ratio to arrive at estimated taxable sales. This

taxable sales figure was thereafter multiplied by the applicable sales tax rate to arrive at the tax due. No audit, be it of a test period or otherwise, of business books and records, copies of which were available at the time through Southland and/or the DeLucas, was requested, demanded or performed by the Audit Division prior to issue of the aforesaid notice.

7. On August 21, 1974, a Notice and Demand for Payment of Sales and Use Taxes Due was issued to Southland with the notation that a total of \$10,621.35 was due from the DeLucas and that such amount represented the liability of Southland, as purchaser, in accordance with section 1141(c) of the Tax Law.

8. A timely petition in the form of an Application for Hearing to Review Determination (with power of attorney) was filed on behalf of Southland on the ground that Southland had not purchased the business of the DeLucas. On or about February 22, 1978, Southland filed a perfected petition with regard to this proceeding and, on or about March 6, 1978, an amended perfected petition was filed. On or about July 14, 1978, the Audit Division served its answer.

9. In or about October 1975, Southland, pursuant to a Tax Collectors Levy and Warrant, and in partial satisfaction of sales tax allegedly due from the DeLucas, paid over \$1,061.73 to the State Tax Commission, said sum representing the property of the DeLucas then in Southland's possession. Thereafter, an additional payment of \$125.00 was made by Southland on account of the amounts assessed as due and owing by the DeLucas.

10. For the periods in question, the DeLucas operated a retail food store, located at 4506 Sunrise Highway, Oakdale, New York, pursuant to a Store Agreement, dated April 6, 1970, and an undated Revised Store Agreement between the DeLucas and Southland.



11. The store in which the DeLucas' business was located was owned by Southland and the leasing of said premises, and of the equipment installed thereon, was covered by the Store Agreement and Revised Store Agreement. The agreements further provided for the DeLucas to acquire a license to use the 7-11 system and trademarks and to use Southland's services in connection with the operation of the store.

12. The business of the DeLucas was operated as follows: (i) the DeLucas purchased their franchise from Southland for a total purchase price of \$16,000, \$4,000 of which was paid initially and \$12,000 of which was owed and payable to Southland; (ii) the portion of the purchase price owed to Southland was debited on Southland's books to an account referred to as the "Open Account"; (iii) thereafter, all purchases and operating expenses paid for by Southland on behalf of the DeLucas, as set forth below, would serve to increase the Open Account, whereas the receipts of the business deposited with Southland, as set forth below, would serve to decrease the Open Account; (iv) if the business realized a "Gross Profit", i.e., total sales less refunds, taxes collected, money orders sold and the cost of goods sold, the DeLucas' Open Account would be debited by an amount equal to 56 percent of the Gross Profit, such percentage representing the consideration due Southland for the lease, trademark license and other services provided by Southland; (v) to the extent receipts collected and remitted to Southland were less than total expenses relating to the business for the applicable period, the resulting deficit would be borne totally by the DeLucas in the form of a net increase to their Open Account; (vi) expenses borne solely by the DeLucas, i.e., expenses having no effect on the amount of Southland's rent, license and service charge, included, without limitation,

payroll, maintenance and bad merchandise; (vii) Southland would recommend that the DeLucas purchase inventory from vendors designated by Southland (hereinafter referred to as "program vendors"); (viii) deliveries from a program vendor would be invoiced and such invoices would be turned over by Michael DeLuca every two to three days to Southland's agent so that Southland could make direct payment to the program vendors; (ix) delivery of beer from a program vendor was an exception and treated separately in that Michael DeLuca was given special drafts by Southland to be issued by Michael DeLuca directly to the beer vendors who insisted on COD payment; (x) Michael DeLuca could and did place orders with non-program vendors, in which case Michael DeLuca would pay cash directly to the non-program vendor for each delivery and submit the invoice, together with the daily report, to Southland; (xi) Southland furnished Michael DeLuca with suggested retail prices as to products of program vendors which Michael DeLuca felt compelled to follow; (xii) as to non-program vendors, Michael DeLuca determined retail prices based upon a profit margin deemed satisfactory to both Michael DeLuca and Southland; (xiii) the cash register was furnished by Southland and contained taxable and non-taxable keys; (xiv) Michael DeLuca prepared daily reports (submitted to Southland every two to three days) which contained, among other things, the day's total receipts, expenses paid out, beginning and ending readings for the cash register, and a breakdown of receipts into taxable and non-taxable sales; (xv) the daily receipts, including sales taxes collected, were deposited in the Franklin National Bank in an account under the exclusive control of Southland; (xvi) the DeLucas did not have authority to issue and/or sign checks against the aforesaid bank account, did not, in fact, sign checks for purposes of payroll or otherwise,

and did not maintain a checking account in the business name; (xvii) the DeLucas received a total weekly draw of \$200.00, which, like other payroll, constituted an increase to the DeLucas' Open Account liability; (xviii) Michael DeLuca hired all other employees and fixed wages, but gross payroll, including the DeLucas' draw, could not exceed eight (8%) percent of net sales or the DeLucas would not receive their weekly draw; (xix) Southland also deducted and paid over to the proper taxing authorities all FICA and withholding taxes; (xx) all employees were paid directly by Southland; (xxi) Southland would prepare and furnish to the DeLucas a quarterly statement which would set forth, among other things, income for the period covered, assets, liabilities, including the Open Account balance, and the DeLucas' net worth in the business; and (xxii) pursuant to a power of attorney given to Southland, Southland maintained books and records with respect to the business and prepared and filed all tax returns, paying the taxes due and owing directly to the proper taxing authorities.

13. During the period in question, Michael DeLuca worked full-time in the store but Mina DeLuca neither worked in the store nor had responsibilities with respect to the store management. Michael DeLuca hired and supervised store employees and ordered food and other supplies. While not previously in the retail business, Michael DeLuca was aware of the necessity of collecting and remitting sales taxes and had been advised by a representative of Southland that 33-1/3 percent was an approximate ratio of taxable to total sales.

14. Pursuant to the original Store Agreement, the DeLucas entered into a Security Agreement with Southland dated April 9, 1970, whereby the DeLucas granted to Southland a security interest in all the present and thereafter

acquired inventory of the business. The security interest was stated to secure advances made by Southland pursuant to the Store Agreement and any other indebtedness, charges or expenses owed by the DeLucas to Southland. In connection with this security interest, a financing statement (UCC-1) was filed with the Suffolk County Clerk on April 16, 1970.

15. Pursuant to the Revised Store Agreement, the DeLucas were to execute a Security Agreement and financing statement covering inventory, merchandise sales, money order receipts and miscellaneous income. No such security agreement or financing statement was in fact executed. In addition, the Revised Store Agreement provided that it superseded all prior agreements of the parties relating to their relationship.

16. The DeLucas ceased doing business on or about April 1, 1974, and surrendered the store and its contents to Southland in alleged satisfaction of Southland's security interest.

17. On November 25, 1974, Southland, by its counsel, met with the Audit Division's sales tax examiners to present Southland's position regarding all bulk sale cases wherein the Audit Division alleged liability under section 1141(c) of the Tax Law. Neither at that time nor at any prior time was any request made by the Audit Division to examine or audit all or any portion of the records of 7-11 Store No. 11206, which records were then in the possession of Southland.

18. On or about April 19, 1976, Michael DeLuca met with Audit Division's sales tax examiners and requested explanation of the method used in determining his liability. The examiners advised that the 45 percent taxable ratio applied in computing his liability was based upon the general results of other cases

involving 7-11 stores. He was advised that an actual audit of his books and records could be performed and that such an audit might reveal an actual taxable ratio less than or greater than the estimated percentage used. Based upon the explanation given, Michael DeLuca indicated that an audit would be unnecessary. At no time did the Audit Division request or demand that an audit of the DeLucas' books and records be conducted for the full period in question or for any test period.

19. The Audit Division's use of a 45 percent estimated taxable ratio in its computation of sales tax due for the DeLucas was based upon actual field audits of other 7-11 businesses located in Nassau and Suffolk Counties, New York. These field audits related to test periods selected or consented to by the Audit Division, and to documents provided by the appropriate taxpayer or Southland, as franchisor. Since the 45 percent ratio was being used in 1974 at the time the DeLucas liability was computed, the same ratio was applied for all years included in the determination, i.e., 1971, 1972, 1973 and 1974.

20. At all times prior to 1976, the DeLucas retained copies of daily reports showing, among other things, daily sales of the business including taxable sales, and purchase documents relating to approximately 80 percent of the inventory acquired by the business. After the DeLucas surrendered the business to Southland, these documents were kept at the DeLucas' home. In 1976 or 1977, the documents were destroyed as a result of a snow storm which damaged the shed in which the documents were stored.

21. Prior to February 21, 1980, Southland retained copies of various documents relating to sales and purchases by the DeLucas' business. These documents, including daily sales reports and purchase documents, were forwarded

by Michael DeLuca to Southland in accordance with Southland's obligation to render bookkeeping services pursuant to the Store Agreement. On February 21, 1980, a fire in a building owned by Southland caused these and other records to be destroyed.

22. Prior to the destruction of the records as discussed above, the books and records maintained by the DeLucas and Southland were adequate for the Audit Division to determine the exact tax liability relating to the business of the DeLucas.

23. As a result of evidence of control of the DeLucas' business by Southland, the Audit Division, at the hearing on this matter, was granted leave to amend its answer to allege that Southland was, with respect to such business, a person required to collect tax within the meaning of section 1131(1) of the Tax Law. Southland thereafter filed a Reply to the Amended Answer dated July 14, 1981.

24. Southland contested the claimed deficiency on the grounds that (a) it acquired the business assets of the DeLucas pursuant to a valid security interest in such assets and not as a purchaser in a bulk sale; (b) in view of the absence of an actual audit, the method used to determine the amount of tax due was arbitrary and capricious and lacked a rational basis; (c) amendment to the answer was an improper means for asserting liability against Southland as a person required to collect tax in the absence of a notice of such determination by the Audit Division; (d) the amended answer was in the nature of a request for declaratory judgment for which there are no administrative procedures under the Tax Law or Commission rules; (e) the DeLucas were independent contractors and not agents of Southland; (f) leave to amend the Answer was otherwise

improperly granted; (g) the attempt to hold Southland liable as a person required to collect taxes was barred by the statute of limitations; and (h) the Audit Division was guilty of laches in making the application to amend its answer.

25. In support of the claimed deficiency, the Audit Division argued that (a) Southland's control of the inventory, purchasing, bookkeeping and sales tax reporting for the DeLucas' business caused Southland to be a person required to collect sales tax; (b) Southland did not have a valid security interest in the business assets of the store, did not give timely or accurate notice of its reacquisition of such assets and, thus, is liable for any shortfall in sales tax payments by the DeLucas; (c) any invalidity in the desk audit performed by the Audit Division was never properly alleged by the petitioner; and (d) the desk audit was performed in accordance with the requirements of the Tax Law.

#### CONCLUSIONS OF LAW

A. That although there is statutory authority for the use of estimates to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

B. That until 1980, the DeLucas and/or Southland maintained adequate books and records from which the actual tax could have been determined and that no request for information or documents pertaining to an audit were refused or rejected by petitioners.

C. That, therefore, the estimate procedures adopted by the Audit Division were arbitrary and capricious and lacked a rational basis.

D. That the petition of The Southland Corporation is granted and the Notice and Demand for Payment of Sales and Use Taxes Due issued August 21, 1974 to petitioner Southland is cancelled.

E. The Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 21, 1974 to the DeLucas by cancelling such notice of determination except for \$6.79 plus interest, said amount having been included in such notice of determination with respect to certain furniture and fixtures sold to petitioner Southland and which amount was not challenged in this proceeding.


F. That, in light of the conclusions herein with respect to the computation of tax liability due, the issues as to Southland's status as a person required to collect sales and use taxes and as a purchaser, transferee or assignee in a bulk sale are rendered moot.

G. That all amounts obtained from Michael and Mina DeLuca stemming from the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 21, 1974, issued to them be refunded to the DeLucas, together with appropriate interest thereon, less the amount due from the DeLucas pursuant to Conclusion of Law "E" of this decision.

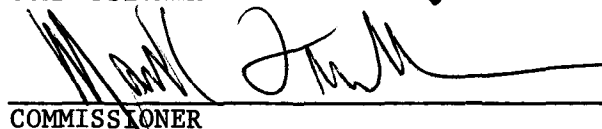
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 389 758 907  
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>The Southland Corporation</i> <i>c/o Thomas P. Dougherty</i>	
Street and No. <i>The Colonial Office Building</i>	
P.O., State and ZIP Code <i>Port Washington, NY 11050</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 389 758 908  
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Thomas P. Dougherty</i> <i>St. John &amp; Dougherty</i>	
Street and No. <i>The Colonial Office Bldg.</i> <i>14 Vanderventer Ave.</i>	
P.O., State and ZIP Code <i>Port Washington, NY 11050</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 389 758 957  
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Adrienne Maria DeGuz</i>	
Street and No. <i>16-10 Pond Way</i>	
P.O., State and ZIP Code <i>Marquette NY 11949</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