

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

November 10, 1983

Maureen Vachss
80-16 85th Drive
Woodhaven, NY 11421

Dear Ms. Vachss:

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
Melvin N. Borowka
150 Old Country Rd.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Maureen Vachss :
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 6/1/76-5/31/79. :
_____ :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Maureen Vachss, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Maureen Vachss
80-16 85th Drive
Woodhaven, NY 11421

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
10th day of November, 1983.

Maucha L. Grunelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Maureen Vachss :
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 6/1/76-5/31/79. :
_____ :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Melvin N. Borowka the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin N. Borowka
150 Old Country Rd.
Mineola, NY 11501

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
10th day of November, 1983.

Maureen L. Dannelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MAUREEN VACHSS	:	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 Period June 1, 1976	:	
through May 31, 1979.	:	

Petitioner, Maureen Vachss, 80-16 85th Drive, Woodhaven, New York 11421, 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, 1976 through May 31, 1979 (File No. 31526).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the Offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 10, 1983, at 9:30 A.M. with all briefs to be submitted by April 7, 1983. Petitioner appeared by Melvin N. Borowka, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. On March 20, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$43,656.07 plus penalty of \$9,434.19 and interest of \$9,424.61 for a total due of \$62,514.87 for the period June 1, 1976 through May 31, 1979. Petitioner's liability was

based on her position as an officer of Aleph Restaurant, Inc. d/b/a Tin Palace ("Aleph").

2. In or about May, 1976 petitioner invested \$5,000.00 in Aleph. Between September, 1976 and February, 1977 she invested another \$5,000.00. In return for her investment she was advised that she would be a director and also the secretary of the corporation. One Jack Sherlock was president of Aleph and one Melissa Murdock was the treasurer. No stock certificates were ever issued to the three shareholders and the corporation never held any board meetings or shareholder meetings.

3. The restaurant opened daily at 5:00 or 6:00 P.M. Sherlock had another full-time job and stopped by Friday and Saturday evenings at 9:00. Sherlock only worked at the restaurant when he had free time. Melissa Murdock worked full-time as the manager of the restaurant and had no other employment during the period in issue. Petitioner worked at the restaurant as a hostess on Friday and Saturday evenings for which she was paid \$50.00 to \$100.00 per week. Her duties involved greeting patrons at the door and seating them at tables. At the end of the evening she turned over any money collected to Murdock who acted as petitioner's supervisor. During the period in issue, petitioner was employed full-time as a program manager for the Office for the Handicapped of Catholic Charities in Brooklyn, New York.

4. Sherlock and Murdock signed all checks for Aleph. They participated in the actual running of the restaurant and had authority to hire and fire employees. Tax returns were prepared by Sherlock and Murdock together with Aleph's accountant and signed by Sherlock. Both Sherlock and Murdock viewed petitioner more as an investor and part-time employee than as a person actively involved in running corporate affairs. Petitioner had no authority to sign

checks, tax returns, or other corporate documents. She could not hire or fire employees and had virtually no say in the operation of the corporation. Her only connection with the restaurant, aside from her investment, was her weekend hostess activities.

5. Petitioner had no responsibility for payment of sales taxes other than turning over receipts collected on the weekends to Melissa Murdock. Petitioner was not aware of any outstanding tax liabilities until June of 1979 when Murdock so advised her. A meeting was held in August, 1979 with petitioner, Sherlock, Murdock and Aleph's attorney to discuss possible actions. In August, 1979 petitioner resigned her position with Aleph.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "persons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of the Sales Tax Law.

B. That 20 NYCRR 526.11(b)(2) describes an officer or employee who is under a duty to act for the corporation, as a person who is authorized to sign a corporation's tax returns or is responsible for maintaining the corporate books, or is responsible for the corporation's management. Other "[i]ndicia of this duty...include factors...such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation"

and "the officer's duties and functions..." (Vogel v. New York State Department of Taxation and Finance, 98 Misc. 2d 222, 225).

C. That inasmuch as petitioner did not participate in the day-to-day running of Aleph other than weekend hostess work, did not sign corporation checks or tax returns, was not responsible for maintaining the corporate books, and was not responsible for the corporation's management, she was not a person required to collect tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

D. That the petition of Maureen Vachss is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1980 is cancelled.

DATED: Albany, New York

NOV 10 1983

STATE TAX COMMISSION

Rodriguez
PRESIDENT

Francis Q. Koeng
COMMISSIONER

[Signature]
COMMISSIONER

P 470 315 139
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Maureen Vachss</i>	
Street and No. <i>80-16 85th Drive</i>	
P.O., State and ZIP Code <i>Woodhaven, NY 11421</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 470 315 140
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Melvin N. Borowka</i>	
Street and No. <i>150 Old Country Rd.</i>	
P.O., State and ZIP Code <i>Mineola, NY 11501</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