

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mario & Lamberto DiRienzo, as Partners :
d/b/a Famous Rays Pizza : AFFIDAVIT OF MAILING
:
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 :
12/1/78-8/14/80. :

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 6th day of July, 1984, he served the within notice of Decision by certified mail upon Mario & Lamberto DiRienzo, as Partners, d/b/a Famous Rays Pizza, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mario & Lamberto DiRienzo, as Partners
d/b/a Famous Rays Pizza
465 Sixth Ave.
New York, NY 10011

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
6th day of July, 1984.

David Parchuck

Anne P. Harnish
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Mario & Lamberto DiRienzo, as Partners	:	
d/b/a Famous Rays Pizza	:	AFFIDAVIT OF MAILING
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 12/1/78-8/14/80.	:	

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 6th day of July, 1984, he served the within notice of Decision by certified mail upon John R. Serpico, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Serpico
186 Joralemon St.
Brooklyn, NY 11201

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
6th day of July, 1984.

David Parluck

James A. H. H. H.
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 6, 1984

Mario & Lamberto DiRienzo, as Partners
d/b/a Famous Rays Pizza
465 Sixth Ave.
New York, NY 10011

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
John R. Serpico
186 Joralemon St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
MARIO DIRIENZO AND LAMBERTO DIRIENZO, : DECISION
AS PARTNERS OF THE FAMOUS RAY'S PIZZA :
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, 1978 :
through August 14, 1980. :

Petitioners, Mario Dirienzo and Lamberto Dirienzo, as partners of The Famous Ray's Pizza, 465 Sixth Avenue, New York, New York 10011, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through August 14, 1980 (File No. 33596 and 33872).

A formal hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1983 at 9:15 A.M., with all briefs due no later than October 20, 1983. Petitioners appeared by John R. Serpico, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether, petitioner, as the result of a field audit, incurred additional taxable sales in excess of those reported on sales and use tax returns filed.
- II. Whether certain purchases made by petitioner were subject to tax.

FINDINGS OF FACT

1. On November 20, 1980, as the result of a field audit, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due. One notice was issued to Mario Dirienzo, as partner of The

Famous Ray's Pizza and the other notice was issued to Lamberto Dirienzo, as partner of The Famous Ray's Pizza. Both notices covered the period December 1, 1978 through August 14, 1980 and were issued for tax in the amount of \$87,106.00, penalty in the amount of \$14,341.00 and interest in the amount of \$10,856.76, for a total of \$112,303.76.

2. Petitioners, Mario and Lamberto Dirienzo, were the only partners in The Famous Ray's Pizza (hereinafter referred to as "partnership") which was a very well-known, high-volume pizza shop located in a primarily residential area of Manhattan (Greenwich Village). The area was also somewhat commercial and, in addition, hosted tourists. Both regular and Sicilian pizzas were sold whole, but primarily by the slice; whole pizzas and slices were sold both with and without toppings. The only other item sold by the partnership was soft drinks by the cup. There were three stand-up tables and five or six tables with seats available on the business premises where customers could consume pizza and soft drinks.

3. Both partners worked at the business behind the counter. In addition, there were four employees, of which two made pizzas. The business was open six days per week and was closed Sundays, holidays and normally three weeks in the summer, with the exception of 1979 when it was closed for four weeks due to sewer pipe repairs in the street.

4. The business was sold on August 14, 1980.

5. The partnership maintained some sales and disbursements records; however, such records were not adequate in order for the Audit Division to determine the partnership's exact tax liability.

6. In order to determine the partnership's tax liability, sales were reconstructed from flour purchases used by the partnership to make its own

pizza dough. This method was basically used on a prior audit of the partnership which covered the period December 1, 1975 through November 30, 1978. Flour purchases were obtained for the period under audit from the partnership's only known supplier, Farro Foods Corp. The auditor, however, felt that the partnership had other supplier(s) due to inconsistent flour purchase intervals and the fact that the business premises had, what he determined, limited storage space for flour. Therefore, two quarterly periods were chosen by the auditor which he determined reflected the most complete purchases due to the consistent purchase intervals, those being the quarters ended May 31, 1979 and May 31, 1980. He then converted the flour purchased during the two quarters into pizzas by using the following criteria:

a) It would take $1\frac{1}{2}$ pounds of flour to make a regular pizza and $2\frac{1}{4}$ pounds of flour to make a Sicilian pizza.

b) Out of 54,540 pizzas made during the two quarters, 12,120 were Sicilian pies and 42,420 were regular pies.

c) 25 percent of all pies were sold as whole pies and 75 percent were sold by the slice.

d) 25 percent of all pies were sold with toppings at \$7.60 for a regular whole pie, \$1.30 for a regular slice, \$10.75 for a Sicilian whole pie and \$1.35 for a Sicilian slice; that 75 percent of all pies were sold without additional toppings at \$6.60 for a regular whole pie, \$.90 for a regular slice, \$9.75 for a Sicilian whole pie and \$.95 for a Sicilian slice; all of the above prices were obtained from the partnership's successor. The partnership's successor operated the business in the same manner as the partnership.

Application of the above resulted in total audited pizza sales of \$471,995.90 for the quarters ended May 31, 1979 and May 31, 1980. The partnership purchased 230,200 soft drink cups during the same two quarters. Based on this, soft drink sales were determined to be \$103,590.00 for the two quarters (230,200 x 45¢ per soft drink); the 45¢ soft drink price was also obtained from the partnership's successor. Total sales of pizza and soft drinks for the two quarters totalled \$575,585.90; this was divided by two to determine taxable sales of \$287,792.95, and this was determined to be audited taxable sales for each and every quarterly period in the audit period (the last quarter was prorated based on weeks as it was a partial period). Sales reported on sales and use tax returns filed were deducted from the sales determined by the auditor for each quarter which, when the 8 percent tax rate was applied, resulted in additional sales tax due for the entire audit period of \$81,802.94.

Purchases made by the partnership were reviewed for the quarterly period ended May 31, 1980. Purchases which the Audit Division determined taxable at the time of the audit upon which no tax was paid totalled \$9,737.25, of which \$8,156.85 were purchases of paper products such as pizza boxes, soft drink cups, etc. These purchases were considered to be additional taxable purchases for each quarter of the audit period; again, the final quarterly period was prorated based on weeks. Total additional taxable purchases determined for the audit period were \$66,288.20, reflecting tax assessed at the 8 percent rate of \$5,303.06. Total tax assessed against each partner for sales and purchases totalled \$87,106.00, as reflected in Finding of Fact "1" supra.

7. Petitioner Mario Dirienzo testified that the partnership had only one supplier of flour during the audit period, that being Farro Foods Corp.; thus petitioners contended that the assessments should be based on the purchases of

flour made from Farro Foods Corp. during the entire audit period rather than only the quarters ended May 31, 1979 and May 31, 1980 (this would result in a tax liability lower than that computed by the auditor). This testimony was credible and it is hereby found that Farro Foods Corp. was the only supplier of flour.

8. The auditor contended that the previous audit used the figures of $1\frac{1}{2}$ pounds of flour to make a regular pizza and $2\frac{1}{4}$ pounds of flour to make a Sicilian pizza; however, petitioner Mario Dirienzo testified that it takes 2 pounds of flour to make a regular pizza and 3 pounds of flour to make a Sicilian pizza. He also testified that the prior audit used the 2 pound and 3 pound quantities. Petitioners offered no documentary evidence reflecting the quantity of flour needed to make pizza of any type.

9. Petitioners contended that soft drink sales should be computed at 16 percent of pizza sales, as this was done on the prior audit.

10. Petitioners contended that at the beginning of the audit period, prices were lower than those used by the auditor. In February, 1979, a whole regular pizza without toppings sold for \$5.25, a regular slice sold for \$.70, a whole Sicilian pizza sold for \$8.00 and a Sicilian slice sold for \$.75. The prices were raised twice thereafter.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that when a return filed is incorrect or insufficient, that the tax may be estimated on the basis of external indices, such as purchases.

That the reconstruction of pizza sales based upon purchases was a proper audit method.

B. That the partnership had no supplier of flour other than Farro Foods Corp. and, therefore, the sales of pizza must be recomputed based on flour purchases from Farro Foods Corp. for the entire audit period rather than the quarterly periods ended May 31, 1979 and May 31, 1980 only.

That the prices used to compute the audited sales are to be reduced 65¢ per whole pie and 10¢ per slice to allow for rising prices during the audit period (see Findings of Fact "6" and "10", supra).

That soft drink sales are to be reduced in the same proportion as the pizza sales upon recomputation of same.

That insufficient evidence was presented to warrant an adjustment to the amount of flour used to produce regular and Sicilian pizza pies.

C. That additional taxable purchases are to be reduced to eliminate the purchases of paper products in the amount of \$8,156.85 per quarter (see Finding of Fact "6", supra) determined not to be taxable by the decision of the New York State Court of Appeals in the Matter of Burger King, Inc. v. State Tax Commission, 435 N.Y.S.2d 689.

D. That the petitions of Mario Dirienzo and Lamberto Dirienzo as partners of The Famous Ray's Pizza are granted to the extent indicated in Conclusions of Law "B" and "C" above; and that except as so granted, the petitions are denied and the notices of determination and demand for payment of sales and use taxes due issued on November 20, 1980 are sustained, together with such penalty and interest as may be lawfully due and owing.

DATED: Albany, New York

JUL 06 1984

STATE TAX COMMISSION

Raduick W. Dun
PRESIDENT

Francis R. Koony
COMMISSIONER

[Signature]
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>John R. Servico</i>	
Street and No. <i>186 Joralemon St.</i>	
P.O., State and ZIP Code <i>Brooklyn, NY 11201</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

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

See Reverse

Sent to <i>Christina L. Servico</i>	
Street and No. <i>465 Smith Ave.</i>	
P.O., State and ZIP Code <i>NY, NY 10011</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