

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

July 18, 1984

S & Y Garden Cafeteria, Inc.
165 E. Broadway
New York, NY 10002

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
Stewart Buxbaum
S. Buxbaum & Co.
55 Virginia Ave.
W. Nyack, NY 10994
AND
Ira S. Bezozza
Damashek & Bezozza
342 Madison Ave.
New York, NY 10173
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
S & Y Garden Cafeteria, Inc. :
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 6/1/75 - 2/28/81. :
_____ :

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 18th day of July, 1984, he served the within notice of Decision by certified mail upon S & Y Garden Cafeteria, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

S & Y Garden Cafeteria, Inc.
165 E. Broadway
New York, NY 10002

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
18th day of July, 1984.

David Parchuck

Conrad C. H. H. H.
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

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

Stewart Buxbaum
S. Buxbaum & Co.
55 Virginia Ave.
W. Nyack, NY 10994

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.

David Parluck

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

STATE TAX COMMISSION

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

Ira S. Bezozza
Damashek & Bezozza
342 Madison Ave.
New York, NY 10173

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Daniel Parhuch

David R. Hays
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
S & Y GARDEN CAFETERIA, INC.	:	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, 1975	:	
through February 28, 1981.	:	

Petitioner, S & Y Garden Cafeteria, Inc., 165 East Broadway, New York, New York 10002, 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, 1975 through February 28, 1981 (File Nos. 28205 and 36731).

A small claims hearing was held before Judy Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 20, 1983 at 1:15 P.M., with all briefs to be submitted by January 12, 1984. Petitioner appeared by Ira S. Bezoza, Esq. and Stewart Buxbaum, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the audit technique used in the determination of additional taxable sales and sales tax due from the petitioner was correct.

II. Whether the paper products purchased and used in the restaurant business of the petitioner were properly included in the computation of use tax due.

III. Whether the value recorded on the books of the petitioner for the equipment acquired with the purchase of the business was the correct valuation for the computation of use tax.

FINDINGS OF FACT

1. Petitioner, S & Y Garden Cafeteria, Inc., acquired the Garden Cafeteria at 165 East Broadway, New York, New York in August, 1975 and operated same as a dairy-vegetarian restaurant until February, 1981 at which time the Garden Cafeteria was sold to BRW Garden Cafeteria.

2. On September 20, 1979, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner assessing taxes due of \$38,503.20 plus minimum statutory interest for the period June 1, 1975 through August 31, 1978. On October 29, 1979, a Notice of Assessment Review was issued to revise the taxes due for the period June, 1975 through August, 1978 to \$26,122.32.

3. On September 25, 1981, as the result of the sale of the Garden Cafeteria, the Audit Division issued a supplemental Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner assessing taxes due of \$17,003.39 plus penalty and interest for the period September 1, 1978 through February 28, 1981.

4. On audit, the Audit Division's auditor reviewed petitioner's capital asset accounts and found that the furniture and fixtures acquired in the August, 1975 purchase of the Garden Cafeteria were recorded at a \$65,000.00 value and that no tax had been paid thereon. He computed a use tax due on the furniture and fixtures of \$5,200.00. The auditor tested petitioner's expense purchases for the period June, 1977 through May, 1978 and determined that no tax had been paid on 1.24 percent of the total expense purchases. He applied

the 1.24 percentage to the expense purchases within the audit period and arrived at a use tax due on expense purchases of \$1,734.08. Lastly, the auditor observed petitioner's operations on Friday, September 8, 1978 and Tuesday, September 19, 1978 and found that, of the sales made, 41.59 percent and 3.87 percent were the nontaxable sales for the respective days. On the basis that petitioner's nontaxable sales for one day of the week were 41.59 percent and 3.87 percent for the other five days (petitioner was closed on Saturdays), he projected the test results and arrived at taxable sales for the audit period. Credit was given for the taxable sales which petitioner reported and a sales tax computed on the additional taxable sales of \$31,569.12. The total sales and use tax determined on audit amounted to \$38,503.20.

5. As the result of a post-assessment conference, petitioner's nontaxable sales for the five days Sunday through Thursday were revised to 13.17 percent. The revision was predicated on a survey conducted by petitioner's then representative on a Monday between the hours of 3:00 p.m. and 9:00 p.m., which time period was not observed by the auditor in his Tuesday, September 19 observation test. The result was an adjustment in the sales tax due on the additional taxable sales to \$19,188.24.

6. The sales and use taxes in dispute are \$42,725.71 which consists of \$6,934.08 use tax on expense purchases and furniture and fixtures and sales tax of \$19,188.24 on additional taxable sales as assessed by the revised September 20, 1979 Notice, plus sales tax of \$16,603.39 as assessed by the September 25, 1981 Notice. Petitioner is not contesting the sales tax assessed on the September 25, 1981 Notice in the amount of \$400.00 which relates to the sale of furniture and fixtures to BRW Garden Cafeteria.

7. a) During the period August, 1975 through February, 1978, the Garden Cafeteria was operated on a six-day week schedule with hours of 6:00 a.m. to 9:00 p.m. on Sunday through Thursday and 6:00 a.m. to 3:00 p.m. on Friday. Additionally, the Garden Cafeteria closed at noon the days before Jewish holidays and remained closed in observance of the holiday.

b) The Garden Cafeteria, which was known for its fish, dairy products and bakery goods, was a landmark in the lower east side of Manhattan. Its sales of foods were both for on and off-premises consumption. The sales of food, and in particular bakery products, for off-premises consumption were the greatest on Fridays, Sundays and before Jewish holidays. On these days, a separate cash register was operated to accommodate the heavy traffic.

c) Each sale of the Garden Cafeteria was written up on a guest check which served as the source document for the journal entry on sales. These guest checks were retained and available for the period of the audit, but have since been destroyed.

d) The guest checks noted above were not among the documents reviewed in the audit of the Garden Cafeteria. The projection of the test results gave no consideration to the large percentage of bakery sales on Sundays and before holidays, as well as the days the Garden Cafeteria closed early and remained closed in observance of holidays. Moreover, sales to exempt organizations and the sales of salads sold by the pound and food of the type commonly sold by a food store for off premises consumption which petitioner made on Friday, September 8¹ were not taken into account.

¹ The test results took into account only those sales recorded at the register in the bakery section of the Garden Cafeteria, whereas exempt sales were also made at a second register located in the restaurant section.

8. The expense purchases on which petitioner paid no tax at the time of purchase involved paper products consisting of wrapping paper used in the packaging of take-out sales.

9. a) Petitioner, on its U.S. Corporation Income Tax Return for fiscal years ending June 30, 1978, 1979 and 1980, took a deduction of \$650.00 each year for the depreciation of furniture and fixtures. The depreciation was computed on the straight line method with a useful life of ten years.

b) The Notification of Sale, Transfer or Assignment in Bulk filed by BRW Garden Cafeteria on its purchase of the Garden Cafeteria from petitioner lists a selling price for furniture, fixtures, equipment and supplies of \$5,000.00.

c) Petitioner erred in recording the furniture and fixtures on its books at \$65,000.00.

CONCLUSIONS OF LAW

A. That the Audit Division lacked the authority to use external indices in the determination of additional taxable sales since petitioner maintained adequate sales records from which its exact amount of sales tax could have been determined (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That the paper food wrappings purchased by petitioner were purchased "for resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law. Accordingly, the purchases thereof by petitioner were exempt from use tax (Matter of Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614).

C. That in accordance with Finding of Fact "9c", petitioner erred in recording the value of the assets acquired in its purchase of the Garden Cafeteria. The value on which use tax is to be computed is \$6,500.00.

D. That the petition of S & Y Garden Cafeteria, Inc. is granted in accordance with Conclusions of Law "A" "B" and "C". The Audit Division is directed to modify the Notice of Assessment Review issued October 29, 1979 to reflect the tax due on the purchase of furniture and fixtures in accordance with Conclusion of Law "C" and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 25, 1981 to reflect the tax due on the sale of the furniture and fixtures in accordance with Finding of Fact "6".

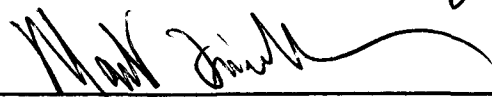
DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

3800, Feb. 1982

PS Form 3800, Feb. 1982

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

S & Y Garden Cafeteria, Inc.
165 E. Broadway
New York, NY 10002



P 440 977 315

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Charles L. Brown	
Street and No.	
Chancellor Brown	
P.O., State, and Zip Code	
342 Madison Ave	
New York, NY 10017	
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

TA 26 (6-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK
NO.

817180

☐ HOLD

DATE

7/20
1ST NOTICE

2ND NOTICE

RETURN

Detected from

CERT

P 440 977 313

MAIL

S & Y Garden Cafeteria, Inc.
165 E. Broadway
New York, NY 10002

NEW YORK, NY 10002
JUL 27 1984
7/20
7/20
7/20



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ALBANY, NEW YORK 12227

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7. a) During the period August, 1975 through February, 1978, the Garden Cafeteria was operated on a six-day week schedule with hours of 6:00 a.m. to 9:00 p.m. on Sunday through Thursday and 6:00 a.m. to 3:00 p.m. on Friday. Additionally, the Garden Cafeteria closed at noon the days before Jewish holidays and remained closed in observance of the holiday.

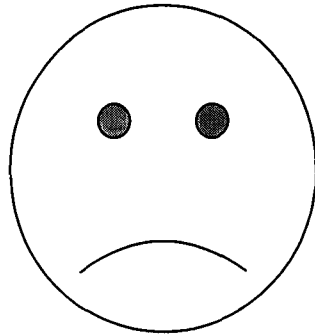
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CORRECTION FOLLOWS



STATE OF NEW YORK

STATE TAX COMMISSION

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9. a) Petitioner, on its U.S. Corporation Income Tax Return for fiscal years ending June 30, 1978, 1979 and 1980, took a deduction of \$650.00 each year for the depreciation of furniture and fixtures. The depreciation was computed on the straight line method with a useful life of ten years.

b) The Notification of Sale, Transfer or Assignment in Bulk filed by BRW Garden Cafeteria on its purchase of the Garden Cafeteria from petitioner lists a selling price for furniture, fixtures, equipment and supplies of \$5,000.00.

c) Petitioner erred in recording the furniture and fixtures on its books at \$65,000.00.

CONCLUSIONS OF LAW

A. That the Audit Division lacked the authority to use external indices in the determination of additional taxable sales since petitioner maintained adequate sales records from which its exact amount of sales tax could have been determined (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That the paper food wrappings purchased by petitioner were purchased "for resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law. Accordingly, the purchases thereof by petitioner were exempt from use tax (Matter of Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614).

C. That in accordance with Finding of Fact "9c", petitioner erred in recording the value of the assets acquired in its purchase of the Garden Cafeteria. The value on which use tax is to be computed is \$6,500.00.

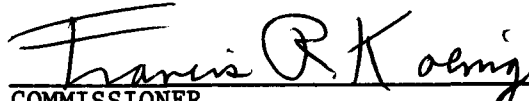
D. That the petition of S & Y Garden Cafeteria, Inc. is granted in accordance with Conclusions of Law "A" "B" and "C". The Audit Division is directed to modify the Notice of Assessment Review issued October 29, 1979 to reflect the tax due on the purchase of furniture and fixtures in accordance with Conclusion of Law "C" and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 25, 1981 to reflect the tax due on the sale of the furniture and fixtures in accordance with Finding of Fact "6".


DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER