

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
George Spanos : 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 8/31/74 - 8/31/76. :

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 15th day of June, 1984, he served the within notice of Decision by certified mail upon George Spanos, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

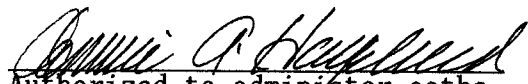
George Spanos
86 Hampton Rd.
Garden City, NY 11530

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
15th day of June, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
George Spanos : AFFIDAVIT OF MAILING
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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 15th day of June, 1984, he served the within notice of Decision by certified mail upon Robert M. Donahue, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert M. Donahue
Holzka, Donahue, Kuhn & Howard
358 St. Marks Pl.
Staten Island, NY 10301

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
15th day of June, 1984.

David Parchuck

James G. Howard
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 15, 1984

George Spanos
86 Hampton Rd.
Garden City, NY 11530

Dear Mr. Spanos:

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
Robert M. Donahue
Holzka, Donahue, Kuhn & Howard
358 St. Marks Pl.
Staten Island, NY 10301
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GEORGE SPANOS	:	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, 1974	:	
through August 31, 1976.	:	

Petitioner, George Spanos, 86 Hampton Road, Garden City, New York 11530, 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, 1974 through August 31, 1976 (File No. 17733).

A formal hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 21, 1981 at 1:25 P.M. and concluded at a hearing held at the same offices on April 25, 1983 at 1:45 P.M., with all briefs to be submitted by July 25, 1983. Petitioner appeared by Holzka, Donahue, Kuhn & Howard (Robert M. Donahue, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel) at the hearing held on July 21, 1983 and by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel) at the hearing held on April 25, 1983.

ISSUES

I. Whether petitioner was a person required to collect and pay over sales taxes on behalf of Ambrose Coppotelli, Inc. d/b/a Tavern on the Green within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

II. Whether petitioner was denied due process of law on the ground that he did not receive adequate notice of his liability and thereafter denied timely access to the records of Ambrose Coppotelli, Inc.

III. Whether the field audit conducted by the Audit Division resulted in a proper determination of sales and use taxes due.

IV. Whether petitioner was entitled to access to the Audit Division files on another individual whom the Audit Division maintained was also a person required to collect and pay over sales taxes on behalf of Ambrose Coppotelli, Inc.

V. Whether the Audit Division's failure to serve a timely answer to petitioner's perfected petition bars continuation of the proceeding.

IV. Whether the Audit Division erred in not reducing the amount assessed in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due by the value of the property allegedly seized by the Warrant and Collection Bureau.

FINDINGS OF FACT

1. On September 16, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the quarterly periods June 1, 1974 through August 31, 1976. The Notice assessed a tax due of \$78,905.51, plus penalty and interest of \$37,763.61, for a total amount due of \$116,669.12. The Notice was issued to petitioner as the president of Ambrose Coppotelli, Inc. and explained that as an officer he was personally liable for the assessed tax, penalty and interest.

2. Ambrose Coppotelli, Inc. was a corporation which operated a restaurant known as Tavern on the Green (hereafter "the Restaurant"). The Restaurant was

located at 2566 Hylan Boulevard, Staten Island, New York. In addition to dining facilities, the Restaurant contained banquet facilities.

3. On August 23, 1976, the Restaurant and its contents were seized and padlocked by employees of the New York State Department of Taxation and Finance Warrant and Collection Bureau for delinquent taxes. The books and records were delivered to the Audit Division to conduct an audit for the period June 1, 1974 through August 23, 1976.

4. Upon review of the records, it was discovered that sales reported on the Restaurant's sales tax returns, when compared to its sales journal, were underreported in the amount of \$182,495.00 for the audit period. The Restaurant's books reflected a markup on food of 72 percent and a markup on liquor and beer of 107 percent. The Audit Division concluded that the markups reflected on the books were too low and that insufficient information was available to perform a markup test. Accordingly, the Audit Division utilized markup percentages of 125 percent for food, 300 percent for beer and 325 percent for liquor based upon prior office experience.

5. The Audit Division found that the purchases reflected on the Restaurant's United States Corporation Tax Return for the period of June, 1974 through May, 1975 exceeded the purchases reflected on petitioner's records by 5.35 percent. This percentage was multiplied by the purchases reflected on petitioner's records, resulting in adjusted purchases of \$884,508.14. The adjusted purchases of food, beer and liquor were then multiplied by the Restaurant's estimated markup percentages resulting in adjusted gross sales of \$2,582,454.00 during the audit period. The Restaurant's adjusted gross sales were then reduced by its non-taxable sales of \$69,335.00, resulting in adjusted taxable sales of \$2,513,120.00¹ and tax due thereon of \$199,981.69.

¹ It is assumed that the difference is due to rounding.

6. The Audit Division also examined from available records the rate at which the Restaurant overcollected sales tax on May 9, 1976. This examination revealed that the Restaurant overcollected sales tax at a ratio of 1.12 percent of its sales. This percentage was then multiplied by petitioner's adjusted taxable sales, resulting in additional tax due of \$2,239.80 on the overcollection of sales tax during the audit period.

7. The Audit Division examined the Restaurant's acquisition of furniture and fixtures, as reflected in the Restaurant's cash disbursements book, during the audit period. This study revealed that there were purchases in the amount of \$15,615.00 upon which tax was not paid and, therefore, the Audit Division concluded that additional use tax in the amount of \$1,221.09 was due.

8. The Audit Division also examined the Restaurant's purchases for the month of March, 1976. The audit revealed that there were purchases of \$7,422.00 upon which tax was not paid. This amount was divided by the Restaurant's adjusted gross sales during March, 1976 of \$88,212.00, resulting in a percentage of purchases upon which tax was unpaid of 8.4 percent. This percentage was then multiplied by the Restaurant's adjusted gross sales during the audit period, resulting in purchases of \$216,925.00 upon which no tax was paid and use tax due of \$17,262.77.

9. As a result of the foregoing computations, sales and use tax due during the audit period was determined to be \$220,705.35. This amount was reduced by the sales tax previously paid of \$123,315.98, resulting in sales tax due of \$78,905.51 and use tax due of \$18,483.86. Petitioner, as an officer of the Restaurant, was assessed the sales tax alleged to be due plus penalty and interest.

10. Petitioner has been in the restaurant business since 1960 and, since 1961, has owned a diner in Queens, New York.

11. In April, 1974, petitioner and two other individuals, Mr. Arthur Keriopoulos and Mr. Peter Markos a/k/a Mr. Peter Hagiamarkos, purchased from a Mr. Coppotelli the outstanding stock of the Restaurant. Petitioner contributed \$60,000.00 and the other individuals each contributed \$25,000.00 to the purchase. Following the purchase, petitioner became a fifty percent shareholder of the Restaurant.

12. It was agreed among petitioner and his associates that Mr. Keriopoulos and Mr. Markos would operate the Restaurant on a daily basis. However, when petitioner and his associates first began operating the Restaurant, petitioner went to the Restaurant frequently to assist in making renovations.

13. After petitioner and his associates began operating the Restaurant, it began having financial difficulties arising from an insufficient number of customers. As a result, petitioner looked for an individual to assist in augmenting the Restaurant's sales. Subsequently, petitioner met a Mr. Carmine Lombardi. It was petitioner's impression that Mr. Lombardi would be of assistance in promoting the Restaurant.

14. In May or June, 1975, petitioner entered into an agreement wherein Mr. Lombardi would purchase a fifty percent interest in the Restaurant. This agreement was subject to Mr. Coppotelli's approval. At the time this agreement was entered into, it was contemplated that petitioner's associates would continue to be active in the Restaurant.

15. At or about the beginning of June, 1975, Mr. Lombardi assumed actual control of the Restaurant. Mr. Lombardi invested \$60,000.00 in the Restaurant concomitant with the assumption of actual control. Thereafter, for a period of

approximately two weeks, petitioner utilized the funds invested by Mr. Lombardi to pay the creditors of the Restaurant. At the conclusion of this two-week period, petitioner withdrew his name as a signatory of the Restaurant's checking account and ceased drafting checks on the Restaurant's checking account. In addition, petitioner completely disassociated himself from the Restaurant.

16. On September 8, 1982, the New York State Tax Commission issued a determination in the Matter of the Petition of Carmine Lombardi. In this determination, Mr. Lombardi was found to be an officer responsible for the collection of sales tax from the Restaurant for the period September 1, 1975 through August 31, 1976. In reaching this conclusion, it was stated in Finding of Fact "14" that:

"An interoffice memorandum from the Audit Division's New York District Office Warrant and Collection Section dated September 15, 1976, contains information, in contrast to petitioner's affidavit, that Mr. Lombardi was the manager and was operating the Restaurant, was authorized to enter into agreements for the restaurant, and was observed making a cash distribution of payroll subsequent to seizure and closing of the premises by agents of the State Department of Taxation and Finance."

17. At the commencement of the hearing, petitioner's representative produced a subpoena duces tecum for the production of all of the Restaurant's books and records. In the interim period between hearings, petitioner was afforded the opportunity to review all of the Restaurant's books and records which were in the possession of the Audit Division. Petitioner was not given access to the Audit Division file pertaining to Mr. Lombardi.

18. Petitioner did not submit any evidence disputing the assertion that he was a responsible officer prior to the time Mr. Lombardi took control of the Restaurant.

19. In his petition, Mr. Spanos argued, among other things, that by the time the Notice of Determination and Demand was sent to petitioner, it was too

late for petitioner to take corrective measures to protect himself; that the assets of the Restaurant were liquidated and the asserted deficiency was not reduced by the proceeds of the liquidation; and that the Warrant and Collection Bureau's mismanagement of the property and conduct of the sale resulted in a failure to realize a proper value of the assets and the destruction of the building by fire. Petitioner also argued at the hearing that the delay in serving the answer, which was close to three years after the perfected petition was filed but before the hearing, prejudiced petitioner's position.

CONCLUSIONS OF LAW

A. That, in general, section 1133(a) of the Tax Law imposes upon any person required to collect tax imposed by Article 28 of the Tax Law, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

B. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222). The relevant factors include, but are not limited to: the individual's daily involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; the individual who prepared and signed the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and, in the case of a closely-held corporation, the individual's knowledge of the affairs of the firm and benefits from the firm's profits (Matter of Robert Gattie, State Tax Commission, September 5, 1980).

C. That inasmuch as petitioner had no involvement in or control over the financial affairs of the corporation after June, 1975, he was not under a duty to act for the Restaurant with respect to the requirements of Article 28 of the Tax Law after this month. It is noted that petitioner did not submit any evidence disputing his liability either during or prior to this month.

D. That when the records provided are incomplete or insufficient, it is the duty of the Audit Division to select a method reasonably calculated to reflect the taxes due (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, et al., 85 A.D.2d 858). Petitioner did maintain some records which were examined by the Audit Division. These records, however, were insufficient for the verification of taxable sales as evidenced by the difference between the purchases shown on the Restaurant's United States Corporation Tax Return and the purchases reflected on petitioner's records. The inadequacy of records is also evidenced by the discrepancy between the sales reported on the sales tax returns and that reflected on the Restaurant's sales journal. Therefore, the Audit Division properly utilized external indices to determine the amount of sales taxes due.

E. That, assuming arguendo petitioner was entitled to examine the Audit Division's file pertaining to Mr. Lombardi, it is clear, in view of Conclusion of Law "C", that petitioner was not prejudiced by the denial of this information. It is noted, in this regard, that the quarterly periods upon which petitioner and Mr. Lombardi are found liable do not correspond.

F. That the time periods prescribed by section 1147 of the Tax Law for the issuing of an assessment are in the nature of a Statute of Limitations (Matter of Convissar v. State Tax Comm., 69 A.D.2d 929, 930). In view of the fact that the three-year period for issuing assessments was complied with,

petitioner's argument pertaining to the timeliness of the assessment or prejudice from the delay in its issuance is rejected.


G. That the hearing for which a petition was filed is a proper forum to determine the amount of tax due, but not the manner of collecting taxes (Matter of T.J.K. Food Corp., State Tax Commission, November 10, 1983; Tax Law §1138(a)(1)). Accordingly, no determination is made herein regarding a reduction in the assessment for the value, if any, of the property seized or for an adjustment attributable to the asserted negligence of the Warrant and Collection Bureau.

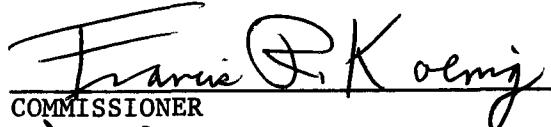
H. That when the Law Bureau fails to serve an answer within the prescribed time, the petitioner is permitted to make a motion before the State Tax Commission for a default (20 NYCRR 601.6(4)). The State Tax Commission may either grant the motion or determine such other relief as is considered appropriate (20 NYCRR 601.6(4)). In this instance, petitioner chose not to follow the remedy provided and waited until the hearing to object to the untimeliness of the answer. In view of the foregoing, as well as the fact that the answer was served prior to the hearing thereby placing petitioner on notice of the issues, and the fact that there has been no demonstration of actual prejudice from the delay in serving the answer, the failure to serve the answer within the sixty day period mandated by 20 NYCRR 601.6(a)(1), is viewed as a harmless error (see generally, Matter of John A. Snyder d/b/a Snyder's Grocery, State Tax Commission, January 20, 1984).

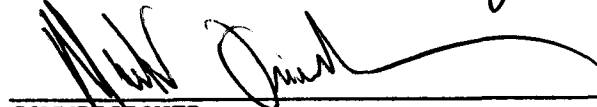
I. That the petition of George Spanos is granted to the extent of Conclusion of Law "C" and is, in all other respects, denied.

DATED: Albany, New York
JUN 15 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 977 277

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Robert M. Donahue</i>	
Street and No. <i>14th Avenue</i>	
P.O. State and ZIP Code <i>358 St. Marks Pl.</i>	
Postage <i>Staten Island NY</i>	
Certified Fee <i>1.03</i>	
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 440 977 276

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>George Spanos</i>	
Street and No. <i>86 Hampton Rd.</i>	
P.O. State and ZIP Code <i>Queens City NY 11530</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