

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DFK 11 Trinity Place Corp. :
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 6/1/77-2/28/81. :
:

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon DFK 11 Trinity Place Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

DFK 11 Trinity Place Corp.
11 Trinity Place
New York, NY 10006

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 April, 1985.

David Parchuck

Ann R. 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 :
DFK 11 Trinity Place Corp. :
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 6/1/77-2/28/81. :

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon James H. Tully, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James H. Tully
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State Street
Albany, NY 12207

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 April, 1985.

David Parchuck

Annice G. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 15, 1985

DFK 11 Trinity Place Corp.
11 Trinity Place
New York, NY 10006

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
James H. Tully
DeGraff, Foy, Conway, Holt-Harris & Mealey
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE TAX COMMISSION

for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods June 1, 1977
through May 31, 1980 and June 1, 1980 through :
February 28, 1981.

DECISION

1. On March 19, 1982, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law against the petitioner, DFK 11 Trinity Place Corp., for taxes due of \$23,567.25, plus penalty of \$5,891.81 and

interest of \$8,979.21, for a total amount due of \$38,438.27 for the period June 1, 1977 through May 31, 1980.

Also, on March 19, 1982, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for taxes due of \$7,798.94, plus penalty of \$1,487.68 and interest of \$1,262.31, for a total amount due of \$10,548.93 for the period June 1, 1980 through February 28, 1981.

2. The petitioner, by signature of its secretary-treasurer, Michael Keane, executed consents extending the statute of limitations for issuing an assessment for sales and use taxes for the period June 1, 1977 through February 28, 1981 to June 20, 1982.

3. On June 15, 1982, the petitioner timely filed petitions for a hearing on the aforementioned notices and on December 6, 1983 submitted a perfected petition. The petitioner contends, in regard to the additional taxable food sales, that it sold cold, unprepared food in bulk to local residents; that people knew about it and would stop in for a pound of roast beef, ham, etc. Additionally, the petitioner claims that it acted in good faith and in accordance with previous instructions; therefore, penalty should not be imposed.

4. The petitioner is a "Blarney Stone" bar/restaurant located in the financial district in Manhattan. Blarney Stone bars are known for their relatively low markups on food and liquor and for catering to a working class clientele. As the auditor observed, the petitioner "serves his customers very thick sandwiches and meat platters."

5. On audit, the auditor determined that the petitioner had gross sales, as well as taxable sales, for the period at issue of \$2,217,306.00 as compared

to reported taxable sales of \$1,827,878.00. Additional taxable sales were therefore determined to be \$389,428.00 with a tax due thereon of \$31,154.40.

6. As the result of evidence presented by the petitioner at a pre-hearing conference, the Audit Division made a substantial reduction in petitioner's liquor and beer sales which reduced petitioner's overall additional taxable sales to \$258,665.00 with a tax due thereon of \$20,691.52. Of the \$258,665.00 additional taxable sales, \$225,140.00 represent additional food sales. The Audit Division also determined additional tax due on purchases of furniture and fixtures of \$211.79 and additional tax due on employee drinks of \$702.00 for a total amount now due of \$21,605.31. Petitioner concedes that the revised amount is due. Petitioner is now protesting the imposition of penalty and interest in excess of the minimum statutory rate.

7. For the period June 1, 1977 through May 31, 1980, the petitioner did not include on sales tax returns 25 percent of food sales that the petitioner claimed to be non-taxable sales. When questioned by the auditor, the petitioner's accountant stated that the 25 percent reduction represented take-out sales of bulk meat. After the audit had been initiated and the accountant questioned about the reduction, the petitioner discontinued the reduction. Therefore, for the final three quarters of the audit period (June 1, 1980 through February 28, 1981), all of petitioner's food sales were reported as taxable.

8. The auditor, on several visits to petitioner's premises, saw no evidence that the petitioner made take-out sales of bulk meat (e.g. there was no scale present for weighing food for bulk sales).

CONCLUSIONS OF LAW

A. That Tax Law section 1145(a)(1)(i) imposes penalty and interest for failure to file a return or to pay tax within the time limitations prescribed by Articles 28 and 29 equal to:

"...five percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due."

Where this Commission determines that such failure or delay is due to reasonable cause and not due to willful neglect, it is authorized to cancel the penalty and that portion of interest in excess of the interest computed at the rate established pursuant to section 1142. Section 1145(a)(1)(ii).

B. That petitioner, DFK 11 Trinity Place Corp., has failed to demonstrate a cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay in paying sales and use taxes and which clearly indicates an absence of gross negligence or willful intent to disobey the tax statutes, so as to warrant the cancellation of penalty and interest in excess of the minimum statutory rate. 20 NYCRR 536.1(b)(6).

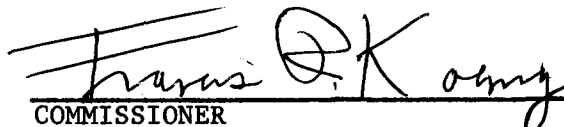
C. That the petitions of DFK 11 Trinity Place Corp. are denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 717

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>OKF Trinity Place</i>	
Street and No. <i>11 Trinity Place</i>	
P.O., State and ZIP Code <i>New York NY 10006</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	

P 693 169 718

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>James B. Tully</i>	
Street and No. <i>11 Trinity Place</i>	
P.O., State and ZIP Code <i>New York NY 10006</i>	
Postage	\$ <i>2.07</i>
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	