

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
European American Bank and Trust Company : 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 3/1/75-11/30/78. :

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon European American Bank and Trust Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

European American Bank and Trust Company
Att: Lionel S. Jassy, Esq.
10 Hanover Square
New York, NY 10015

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
23rd day of May, 1985.

David Parchuck

Ann P. Hegland
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
European American Bank and Trust Company :

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 3/1/75-11/30/78.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon John McKay, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John McKay
10 Hanover Square
New York, NY 10005

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
23rd day of May, 1985.

David Parchuck

James J. O'Day, Jr.
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 23, 1985

European American Bank and Trust Company
Att: Lionel S. Jassy, Esq.
10 Hanover Square
New York, NY 10015

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 McKay
10 Hanover Square
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EUROPEAN AMERICAN BANK & TRUST COMPANY	:	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 March 1, 1975	:	
through November 30, 1978.	:	

Petitioner, European American Bank & Trust Company, 10 Hanover Square, New York, New York 10015, 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 March 1, 1975 through November 30, 1978 (File No. 27268).

A formal hearing was commenced before Stanley Buchsbaum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 27, 1980 at 9:30 A.M., continued on January 5, 1981 at 10:00 A.M., continued again before Doris E. Steinhardt, Hearing Officer, on May 3, 1984 at 1:30 P.M. and continued to conclusion on September 12, 1984 at 9:15 A.M., with all briefs to be submitted by November 14, 1984. Petitioner appeared by John F. MacKay, Vice President and Counsel. The Audit Division appeared at the hearings on May 27, 1980 and January 5, 1981 by Ralph J. Vecchio, Esq. and at the hearings on May 3, 1984 and September 12, 1984 by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly assessed petitioner for the under-collection of sales tax on equipment leases assigned to petitioner by the lessors.

II. Whether the Audit Division properly assessed sales tax against petitioner upon food subsidies paid to The Drinx Plus Company, Inc.

FINDINGS OF FACT

1. On June 27, 1979, the Audit Division issued to petitioner, European American Bank & Trust Company ("EAB"), two notices of determination and demands for payment of sales and use taxes due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1975 through November 30, 1978 in the amount of \$250,199.11, plus penalties and interest. The assessments were premised on four different grounds. By a Stipulation executed by John MacKay, Esq. on behalf of petitioner and by William Fox, Esq. on behalf of the Audit Division, two issues were agreed upon and disposed of¹; the issues remaining in dispute concern sales tax assessed upon food subsidies (\$72,093.95 plus penalty and interest) and sales tax which arose by reason of petitioner's alleged undercollection of tax upon certain equipment leases (\$40,389.21 plus penalty and interest).

On March 1, 1979, EAB's senior vice president and comptroller had executed on its behalf a consent extending the period of limitations for assessment of sales and use taxes for the quarterly period ended May 31, 1975 through the quarterly period ended February 28, 1978 to December 20, 1979.

1 According to the terms of the Stipulation, petitioner withdrew its protest with respect to \$135.00 due on its rental of a quotation interrogation device. As to the portion of the assessment based on petitioner's failure to collect sales tax on 51 equipment leases, petitioner withdrew certain leases (Exhibits 1, 11, 13, 20, 23, 27, 31 and 45); the parties agreed that other leases (Exhibits 15, 17, 48 and 49) should be assessed at the rate of four percent; and the Audit Division conceded that no tax was properly due on the remaining leases offered in evidence.

2. The Audit Division maintains that EAB undercollected sales tax on approximately 240 leases assigned to it by 53 leasing companies, which leases were for the rental of equipment situated in New York and Nassau Counties. In the typical leasing transaction, a person who wished to lease certain equipment (e.g., dental equipment) contacted the leasing company, requesting the company to purchase the equipment (with funds advanced by EAB) and to arrange for its delivery to the lessee. The lessor and the lessee executed a full pay-out lease wherein the total rental payments were equivalent to the purchase price of the equipment, plus carrying or interest charges. Further, the lessee was granted a purchase option which entitled him to purchase the equipment at the end of the lease term for a nominal sum, ranging from \$1.00 to approximately \$100.00. By an assignment of lease, the lessor then transferred, assigned and sold to EAB at a discount all its right, title and interest in the lease, referred to as a "security agreement"; the assignment recited that title to the equipment "was at the time of lease vested exclusively in the Lessor named in said [Security] Agreement, and said title as hereby conveyed is free of all liens and encumbrances and is subject to no defenses or counter-claims on the part of the Lessee...". Uniform Commercial Code financing statements were prepared and filed, indicating the lessee as the debtor, the lessor as the secured party and EAB as the assignee of the secured party.

3. Subsequent to the assignment, the lessee made payments of rent, interest and sales tax in one of three manners.

- (a) The lessee utilized a coupon book furnished by EAB and remitted one monthly aggregate amount to the bank. EAB then forwarded the sales tax to the lessor for payment to the Audit Division.
- (b) The lessee paid an aggregate amount to EAB upon monthly billing by the lessor. EAB again forwarded the sales tax to the lessor for payment to the Audit Division.

- (c) The lessee paid the rental and interest to EAB and the sales tax to the lessor upon monthly billing by the lessor.

In all instances, the sales tax collected on the rentals was paid over to the Audit Division by the lessors. When the New York City sales and use tax rate was increased from seven to eight percent on July 1, 1974, and for the period September 1, 1976 through August 31, 1977 when the Nassau County rate rose from seven percent to eight percent, EAB did not issue new coupon books to lessees but informed the lessors in writing that it was their obligation to collect and remit the one percent difference in tax. The Audit Division asserts that under the first type of payment arrangement above-described, it was EAB's obligation to collect and remit the difference.

4. Petitioner carried the leases on its books as receivables and did not claim depreciation on the leased equipment. At the end of each lease term, EAB reassigned its interest in the transaction back to the lessor.

5. During the period under consideration and pursuant to a written Agreement for Services, The Drinx Plus Company, Inc. provided food services for EAB's personnel at EAB's premises located at 865 Merrick Avenue, Westbury, New York and 600 Old Country Road, Garden City, New York. (The Drinx Plus Company, Inc. ["Drinx Plus"] was a wholly-owned subsidiary of Food Concepts, Inc. and merged into the parent corporation subsequent to the period at issue). Drinx Plus provided the foodstuffs and beverages, equipment for preparation and serving, and trained personnel. By the terms of the contract, Drinx Plus acted as an independent contractor and Drinx Plus employees were not considered employees of EAB "under the meaning or application of any Federal or State Unemployment Insurance Laws, or other Social Security Law or any Workmen's Compensation Law, Industrial Law, or otherwise." Among other things, Drinx Plus and EAB agreed that Drinx Plus would: adequately staff and operate

cafeterias and service the vending equipment; assume responsibility for the cleanliness of the serving lines and food preparation areas; have exclusive rights to all food and beverage production, preparation, distribution and sale and all vending machine sales on EAB's premises; and allow authorized EAB personnel access to all food service areas at all times and allow such personnel the right to inspect the premises at all reasonable times. Food and beverage prices were established by a general price list appended to the Agreement for Services. Similar price lists were posted in the cafeterias, and EAB employees were charged the posted prices plus the applicable sales tax.

6. Petitioner subsidized the food services provided to its employees by making certain weekly payments to Drinx Plus, such payments generally equal to one-third of total sales for the week, inclusive of sales tax. Petitioner subsidized coffee furnished to its employees at the rate of fifty percent. Thus, in billing EAB, Drinx Plus computed the subsidy in the following manner:

- (a) Coffee sales were calculated (number of cups sold times price per cup including sales tax) and extracted from total weekly sales. Drinx Plus then billed EAB at fifty percent of such weekly coffee sales.
- (b) Drinx Plus billed EAB at $33\frac{1}{3}$ percent of the remaining food and beverage sales, including sales tax.
- (c) Drinx Plus charged EAB at an agreed upon rate for each cup of coffee and soda sold through vending machines.

The above three amounts were cumulated, and the total entered on the billing invoice at both the "subtotal" and "total amount due" lines. No entry was made at the "sales tax" line of the invoice since the subsidies were computed upon total receipts including sales tax.

7. Petitioner's role vis-a-vis Drinx Plus' food services consisted of reviewing the weekly sales figures, approving or disapproving proposed price increases, and inspecting the cafeterias to ensure that the Drinx Plus employees

were courteous, that food was properly displayed and available and that a balanced diet was served.

8. Drinx Plus submitted sales and use tax returns, reporting taxable sales (food and beverage sales to employees and subsidies charged to employers) to EAB as well as to its other customers. Drinx Plus maintains that it properly reported sales and accepts full responsibility for and totally indemnifies EAB from any liability for sales tax obligations arising from the contractual relationship with EAB. By the time of the hearings held herein, Drinx Plus was unable to locate the customer-by-customer source documentation underlying its returns for the period March 1, 1975 through November 30, 1978; Food Concepts, Inc. relocated its corporate offices on several occasions, the business has grown dramatically to one now international in scope, and with the passage of time, detailed records were discarded and only general information (such as total taxable sales to all customers) retained. An audit was conducted of Drinx Plus' books and records for a later period, March 1, 1980 through May 31, 1983, resulting in a use tax liability of approximately \$12,600.00 upon the acquisition of capital assets. It is the position of Drinx Plus that its record keeping procedures were identical during the periods March 1, 1975 through November 30, 1978 and March 1, 1980 through May 31, 1983, and that the results of the later audit are indicative of the correctness of its returns for the earlier period.

CONCLUSIONS OF LAW

A. That for purposes of Articles 28 and 29, the term "taxable sale" includes a lease agreement. However, "[a] lease which has been entered into merely as a security agreement, but which does not in fact represent a transaction in which there has been a transfer of possession from the lessor to the lessee,

is not a 'sale' within the meaning of the Tax Law." (20 NYCRR 526.7[c][3].) In defining the term "security interest", the Uniform Commercial Code draws a distinction between a lease and a security interest, as follows:

"Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security." UCC §1-201(37).

B. That an examination of the leasing and assignment documents and of the underlying substance of the transactions between the leasing companies and the equipment lessees reveals that the leases were security agreements and therefore not subject to sales and use taxes. The lessee was entitled to purchase the equipment at the end of the lease term for the payment of a nominal sum; a financing statement was filed characterizing the lessee as the debtor and the leasing company as the secured party; the agreement was discounted to EAB; and the leasing company never obtained possession of the equipment. (Matter of The Bank of California, N.A., State Tax Comm., April 27, 1983.) Consequently, EAB was not under an obligation to collect and remit any additional sales tax when the rates were increased in certain jurisdictions.

C. That it is now well-settled that subsidy payments by an employer to a food service corporation operating in-house restaurant facilities for employees are receipts from sales of food and drink subject to sales tax. (Stouffer Management Food Service, Inc. v. Tully, 98 Misc.2d 1128, affd. mem., 69 A.D.2d 1023.) Notwithstanding that the subsidies at issue were calculated as a percentage of weekly food and beverage sales inclusive of sales tax, the billing invoices presented to EAB by Drinx Plus failed to separately state and


charge the sales tax due on the subsidies, as mandated by Tax Law section 1132(a). The Audit Division therefore correctly assessed sales tax upon the subsidies and properly looked to EAB, as customer, for payment of the tax. Where any customer has failed to pay sales or use tax to a person required to collect the tax, in addition to all other rights, obligations and remedies provided by the Tax Law, the tax is deemed payable by the customer directly to the Tax Commission (section 1133[b]); thus the presence of any third party indemnification agreement does not preclude the Commission from proceeding against the customer for the tax due.

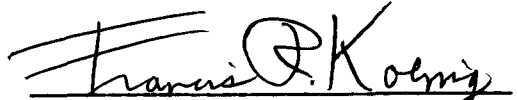
D. That the petition of European American Bank & Trust Company is granted to the extent indicated in Conclusion of Law "B"; the assessment issued on June 27, 1979 is to be modified in accordance therewith and also to take account of the concessions made by the Audit Division in the Stipulation; and except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

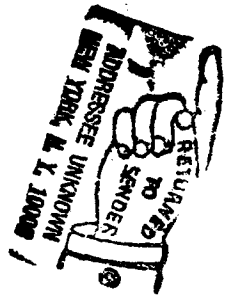
MAY 23 1985


PRESIDENT

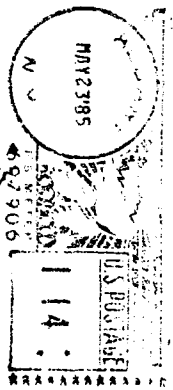
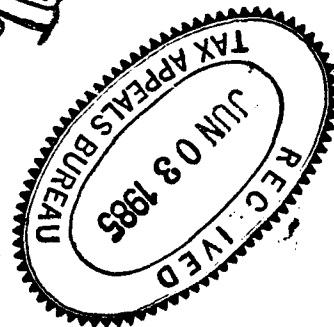
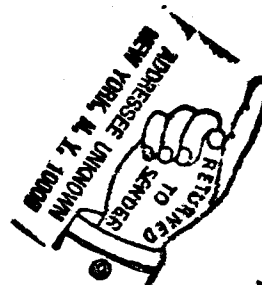

COMMISSIONER


COMMISSIONER

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



John McKay
10 Hanover Square
New York, NY 10005



P 693 169 840

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to *Joseph J. Lombardi*
Street and No. *100 West 114th St*
P.O., State and ZIP Code *New York NY 10027*

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	

S Form 3800, Feb. 1982

P 693 169 839

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

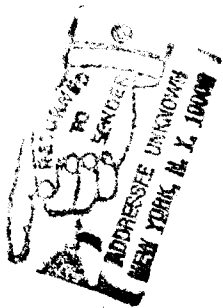
Sent to *European Office Bank New York*
Street and No. *100 West 114th St*
P.O., State and ZIP Code *New York NY 10027*

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	

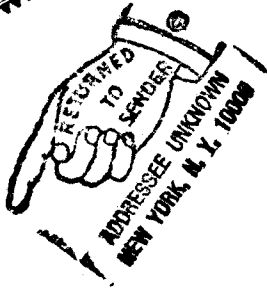
Form 3800, Feb. 1982

TA 26 (9-79)

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



John McKay
10 Hanover Square
New York, NY 10005



CERTIFIED

P 693 169 840

MAIL



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

May 23, 1985

European American Bank and Trust Company
Att: Lionel S. Jassy, Esq.
10 Hanover Square
New York, NY 10015

Gentlemen:

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Law Bureau - Litigation Unit
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STATE TAX COMMISSION

cc: Petitioner's Representative
John McKay
10 Hanover Square
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STATE OF NEW YORK

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for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
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In all instances, the sales tax collected on the rentals was paid over to the Audit Division by the lessors. When the New York City sales and use tax rate was increased from seven to eight percent on July 1, 1974, and for the period September 1, 1976 through August 31, 1977 when the Nassau County rate rose from seven percent to eight percent, EAB did not issue new coupon books to lessees but informed the lessors in writing that it was their obligation to collect and remit the one percent difference in tax. The Audit Division asserts that under the first type of payment arrangement above-described, it was EAB's obligation to collect and remit the difference.

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cafeterias and service the vending equipment; assume responsibility for the cleanliness of the serving lines and food preparation areas; have exclusive rights to all food and beverage production, preparation, distribution and sale and all vending machine sales on EAB's premises; and allow authorized EAB personnel access to all food service areas at all times and allow such personnel the right to inspect the premises at all reasonable times. Food and beverage prices were established by a general price list appended to the Agreement for Services. Similar price lists were posted in the cafeterias, and EAB employees were charged the posted prices plus the applicable sales tax.

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CONCLUSIONS OF LAW

A. That for purposes of Articles 28 and 29, the term "taxable sale" includes a lease agreement. However, "[a] lease which has been entered into merely as a security agreement, but which does not in fact represent a transaction in which there has been a transfer of possession from the lessor to the lessee,

is not a 'sale' within the meaning of the Tax Law." (20 NYCRR 526.7[c][3].) In defining the term "security interest", the Uniform Commercial Code draws a distinction between a lease and a security interest, as follows:

"Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security." UCC §1-201(37).

B. That an examination of the leasing and assignment documents and of the underlying substance of the transactions between the leasing companies and the equipment lessees reveals that the leases were security agreements and therefore not subject to sales and use taxes. The lessee was entitled to purchase the equipment at the end of the lease term for the payment of a nominal sum; a financing statement was filed characterizing the lessee as the debtor and the leasing company as the secured party; the agreement was discounted to EAB; and the leasing company never obtained possession of the equipment. (Matter of The Bank of California, N.A., State Tax Comm., April 27, 1983.) Consequently, EAB was not under an obligation to collect and remit any additional sales tax when the rates were increased in certain jurisdictions.

C. That it is now well-settled that subsidy payments by an employer to a food service corporation operating in-house restaurant facilities for employees are receipts from sales of food and drink subject to sales tax. (Stouffer Management Food Service, Inc. v. Tully, 98 Misc.2d 1128, affd. mem., 69 A.D.2d 1023.) Notwithstanding that the subsidies at issue were calculated as a percentage of weekly food and beverage sales inclusive of sales tax, the billing invoices presented to EAB by Drinx Plus failed to separately state and


charge the sales tax due on the subsidies, as mandated by Tax Law section 1132(a). The Audit Division therefore correctly assessed sales tax upon the subsidies and properly looked to EAB, as customer, for payment of the tax. Where any customer has failed to pay sales or use tax to a person required to collect the tax, in addition to all other rights, obligations and remedies provided by the Tax Law, the tax is deemed payable by the customer directly to the Tax Commission (section 1133[b]); thus the presence of any third party indemnification agreement does not preclude the Commission from proceeding against the customer for the tax due.

D. That the petition of European American Bank & Trust Company is granted to the extent indicated in Conclusion of Law "B"; the assessment issued on June 27, 1979 is to be modified in accordance therewith and also to take account of the concessions made by the Audit Division in the Stipulation; and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985


PRESIDENT


COMMISSIONER


COMMISSIONER