

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Java Caterers, Inc.

:

:

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:  
3/1/78-5/31/81.

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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 February, 1985, he served the within notice of Decision by certified mail upon Java Caterers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Java Caterers, Inc.  
473 Bayview Ave.  
Inwood, NY 11696

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 February, 1985.

David Parchuck

Bennie R. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Java Caterers, Inc. : AFFIDAVIT OF MAILING  
  
for Redetermination of a Deficiency or Revision :  
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under Article 28 & 29 of the Tax Law for the :  
Period 3/1/78-5/31/81. :

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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 February, 1985, he served the within notice of Decision by certified mail upon Melvyn J. Raphael, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvyn J. Raphael  
450 7th Ave.  
New York, NY 10001

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 February, 1985.

David Parchuck

Annue R. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

February 6, 1985

Java Caterers, Inc.  
473 Bayview Ave.  
Inwood, NY 11696

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  
Melvyn J. Raphael  
450 7th Ave.  
New York, NY 10001  
Taxing Bureau's Representative

## STATE TAX COMMISSION

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, 1978  
through May 31, 1981. :

Petitioner, Java Caterers, Inc., 473 Bayview Avenue, Inwood, New York 11696, 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, 1978 through May 31, 1981 (File No. 38136).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1984 at 1:15 P.M. Petitioner appeared by Melvyn J. Raphael, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

Whether tables, chairs and linens were rented by petitioner for resale to its customers within the meaning and intent of section 1101(b)(4) of the Tax Law.

1. Petitioner, Java Caterers, Inc., operates a catering business preparing food and drink and furnishing waitress or waiter service. Petitioner caters affairs at personal residences, churches and temples.

2. On May 12, 1982, 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 petitioner covering the period March 1, 1978 through August 31, 1981 for taxes due of \$6,872.44, plus interest of \$1,983.40, for a total of \$8,855.84.

On May 3, 1983, petitioner paid the above tax due to avoid any further interest charges.

3. Petitioner executed a consent extending the period of limitation for the assessment of sales and use taxes for the period March 1, 1978 through February 28, 1981 to June 20, 1982.

4. An audit of petitioner's acquisition of fixed assets and expense purchases disclosed additional taxes due of \$641.83. Petitioner agreed to this phase of the audit and executed a consent to fixing of tax and remitted a check in payment of the tax due. The unresolved portion of the audit represented the tax assessed on the rental of tables, chairs, bars and linens. Petitioner issued a resale certificate to Famous Party Suppliers, Inc. and therefore, paid no sales tax on the rentals. The rentals amounted to \$98,177.85 for the audit period and the sales tax computed thereon was \$6,872.44.

5. Petitioner rented tables, chairs, bars and linens from Famous Party Suppliers, Inc. The equipment was delivered by the vendor directly to the location where the catered affair was to be held. Petitioner used the equipment in performing its catering services and such equipment was picked up by the vendor the following day. Petitioner argued that it did not take possession of the equipment nor did it have control over its use. Petitioner concluded that its customers were the consumers of the equipment and that it merely rented the equipment for re-rental to the customers.

6. Petitioner's expense for renting the equipment was included in the charge to each customer for catering services. Petitioner collected sales tax from each customer on the total charge.

7. Petitioner maintained that the rental items are critical elements of performing catering services and on that basis were resold to its customers. Petitioner relies on Celestial Food of Massapequa Corp. v. New York State Tax Commission, 98 A.D.2d 157 to support this conclusion.

8. Notwithstanding the position taken by petitioner with respect to resale, petitioner argued that if it is required to pay the sales tax on the rentals, the tax paid should be allowed as a credit against the sales tax collected from the customer, as is the case with certain uses of tangible personal property in the contracting industry.

9. In approximately April, 1980, petitioner changed its rental procedures to avoid any further sales tax liability with respect thereto. Famous Party Suppliers, Inc. now bills the customer directly for the rental of the equipment and petitioner receives a commission.

#### CONCLUSIONS OF LAW

A. That section 1101(b)(4) of the Tax Law defines "retail sale" as:

"(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

B. That section 1105(d)(i) of the Tax Law imposes a tax on receipts from the sale of food and drink of any nature or of food alone, when sold by caterers.

C. That the rental by petitioner of tables, chairs, bars and linens for use in performing catering services pursuant to section 1105(d) of the Tax Law was not for resale as such or as a physical component part of tangible personal property or for use in performing services subject to tax under section 1105(c)(1), (2), (3), and (5) of the Tax Law.

Petitioner's reliance on Celestial is misplaced for two reasons. First, the types of items rented by petitioner herein were not disposable and clearly distinguishable from the products in Celestial. Moreover, the Court of Appeals reversed the Appellate Division and held that the disposable plastic and paper products, straws, stirrers and napkins are not critical elements of the product sold (Celestial Food of Massapequa Corp. v. New York State Tax Commission, \_\_ N.Y.2d \_\_).

Accordingly, the items rented by petitioner are subject to the tax imposed under section 1105(a) of the Tax Law. Additionally, petitioner is required to collect tax on the total selling price to its customers, including the cost for the rentals, in accordance with section 1105(d) of the Tax Law and 20 NYCRR 527.8(f).


D. That the credit provisions of section 1139(a) of the Tax Law regarding the use of tangible personal property by contractors are not applicable to petitioner's catering operations.

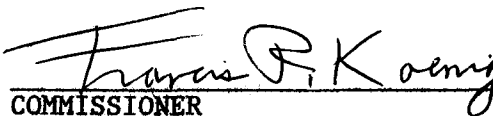
E. That the petition of Java Caterers, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 693 169 534

**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>Jana Caterers Inc.</i>	
Street and No. <i>478 Bayview Ave</i>	
P.O. State and ZIP Code <i>Chardon NY 11696</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 693 169 535

**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>Melvin J. Raphael</i>	
Street and No. <i>450 7th Ave</i>	
P.O. State and ZIP Code <i>New York NY 10001</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	