

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nicholas Pittas :
Vice President of Melon's Disco & Records, Inc. :
:
for Revision of a Determination or for Refund of :
Sales & Use Tax under Articles 28 & 29 of the Tax :
Law for the Period 3/1/79-8/31/81. :

In the Matter of the Petition :
of :
Fred Davis :
Secretary/Treasurer of Melon's Disco & Records, Inc. :
:
for Revision of a Determination or for Refund of :
Sales & Use Tax under Articles 28 & 29 of the Tax :
Law for the Period 3/1/79-8/31/81. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Andrew Tellarico :
Officer of Melon's Disco & Records, Inc. :
:
for Revision of a Determination or for Refund of :
Sales & Use Tax under Articles 28 & 29 of the Tax :
Law for the Period 3/1/79-8/31/81. :

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 22nd day of March, 1985, he served the within notice of Decision by certified mail upon Nicholas Pittas, Vice President of Melon's Disco & Records, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas Pittas
Vice President of Melon's Disco & Records, Inc.
5 Birch Court
Oyster Bay, NY 11771

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.

Page 2

Affidavit of Mailing

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
22nd day of March, 1985.

David Parachuck

George R. Lagler

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nicholas Pittas :
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Sales & Use Tax under Articles 28 & 29 of the Tax :
Law for the Period 3/1/79-8/31/81. :
:

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 22nd day of March, 1985, he served the within notice of Decision by certified mail upon Myron Gould, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Myron Gould
1501 Broadway
New York, NY 10036

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.

Page 2

Affidavit of Mailing

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
22nd day of March, 1985.

David Baruchuk

William J. O'Connell
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 22, 1985

Nicholas Pittas
Vice President of Melon's Disco & Records, Inc.
5 Birch Court
Oyster Bay, NY 11771

Dear Mr. Pittas:

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
Myron Gould
1501 Broadway
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nicholas Pittas :
Vice President of Melon's Disco & Records, Inc. :
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Sales & Use Tax under Articles 28 & 29 of the Tax :
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In the Matter of the Petition :
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Fred Davis :
Secretary/Treasurer of Melon's Disco & Records, Inc. : AFFIDAVIT OF MAILING
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Sales & Use Tax under Articles 28 & 29 of the Tax :
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In the Matter of the Petition :
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State of New York :

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Fred Davis
Secretary/Treasurer of Melon's Disco & Records, Inc.
370 Ocean Pkwy.
Brooklyn, NY 11218

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.

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Sworn to before me this
22nd day of March, 1985.

David Barchuck

Emmie R. Sheppard
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 22, 1985

Fred Davis
Secretary/Treasurer of Melon's Disco & Records, Inc.
370 Ocean Pkwy.
Brooklyn, NY 11218

Dear Mr. Davis:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

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Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Myron Gould
1501 Broadway
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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Nicholas Pittas :
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Sales & Use Tax under Articles 28 & 29 of the Tax :
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AFFIDAVIT OF MAILING

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Andrew Tellarico :
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State of New York :

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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 22nd day of March, 1985, he served the within notice of Decision by certified mail upon Andrew Tellarico, Officer of Melon's Disco & Records, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Andrew Tellarico
Officer of Melon's Disco & Records, Inc.
1333 66th St.
Brooklyn, NY 11219

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.

Page 2

Affidavit of Mailing

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
22nd day of March, 1985.

David Parshack

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

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

March 22, 1985

Andrew Tellarico
Officer of Melon's Disco & Records, Inc.
1333 66th St.
Brooklyn, NY 11219

Dear Mr. Tellarico:

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:

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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
Myron Gould
1501 Broadway
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
NICHOLAS PITTAS :
VICE PRESIDENT OF MELON'S DISCO & RECORDS, INC. :
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, 1979 through :
August 31, 1981. :
:

In the Matter of the Petition :
of :
FRED DAVIS :
SECRETARY/TREASURER OF MELON'S DISCO & RECORDS, INC. :
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, 1979 through :
August 31, 1981. :
:

DECISION

In the Matter of the Petition :
of :
ANDREW TELLARICO :
OFFICER OF MELON'S DISCO & RECORDS, INC. :
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, 1979 through :
August 31, 1981. :
:

Petitioners, Nicholas Pittas, 5 Birch Court, Oyster Bay, New York 11771,
Fred Davis, 370 Ocean Parkway, Brooklyn, New York 11218, and Andrew Tellarico,
1333 66th Street, Brooklyn, New York 11219, each 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, 1979 through August 31, 1981 (File Nos. 42241, 42242 and 42243).

A formal hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 28, 1984 at 9:15 A.M., with all briefs to be submitted by August 20, 1984. Petitioners appeared by Myron Gould, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioners were persons required to collect and pay over sales tax on behalf of Melon's Disco & Records, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

II. If so, whether the Audit Division properly determined the sales taxes due from petitioners.

FINDINGS OF FACT

1. Melon's Disco & Records, Inc. ("Melon's") operated a discotheque at 120 East 16th Street, New York, New York. On July 24, 1981, the business was closed by the New York City Police Department for selling liquor without a license and for operating an unlicensed premises. All the assets of Melon's were transferred to Golden Gate Carting, 69 Ingraham Street, Brooklyn, New York.

2. Since Melon's was no longer in business, no records were available for audit. The Audit Division estimated the tax due based upon a New York City Fire Department certificate of occupancy which indicated the maximum number of persons to be accommodated at the premises as 600. Admission revenue to the establishment was determined by the number of days the establishment was

purportedly opened during the audit period (252) times the average number of admissions per day (600) times an average admission price of \$11.00. Total admission revenue was determined to be \$1,663,200.00. Wine and beer sales for the audit period were determined by multiplying the total number of customers admitted ($252 \times 600 = 151,200$) times two drinks per customer at \$2.00 per drink for total wine and beer sales of \$604,800.00. Membership fees were calculated based on 3,684 members at \$10.00 each for a total of \$36,840.00. The above audit method resulted in a total tax due of \$184,387.20.

3. On November 19, 1982, the Audit Division issued to petitioner Nicholas Pittas a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for a tax due of \$184,387.20, plus penalty of \$43,884.14 and interest of \$54,671.12, for a total due of \$282,942.46. On the same date, the Audit Division issued to petitioner Fred Davis and petitioner Andrew Tellarico similar notices for the same amount of tax, penalty and interest due.

4. During the audit period, Melon's filed only one sales tax return which was for the period March 1, 1980 through May 31, 1980. A check for \$1,875.78 was remitted with the return. However, the check did not clear the bank and it was returned. The check was never made good by Melon's.

5. Petitioner Fred Davis was an independent salesman during the audit period. He alleged that he was not an officer of Melon's and that, at the urging of Robert Woltin, he invested \$8,000.00 or \$9,000.00 in Melon's at the end of 1979 or the beginning of 1980. He claimed that Melon's was Mr. Woltin's idea and that Mr. Woltin ran the day-to-day affairs of Melon's. A signature card for Manufacturers Hanover Trust Co. dated November 8, 1978 indicated that Mr. Davis was secretary and Mr. Woltin was president of Melon's. The card also indicated that checks were to be signed by the president and secretary.

Mr. Davis, with Mr. Woltin, signed a few checks for a matter of weeks during the Melon's construction period. A signature card for Citibank also indicated that Mr. Davis was secretary and Mr. Woltin was president of the corporation. On May 1, 1981, Mr. Davis signed a violation order issued against Melon's by the New York City Fire Department. Mr. Davis was at Melon's when the New York City Police Department closed the premises.

6. Petitioner Andrew Tellarico was employed by Golden Gate Carting Co., Inc. as a salesman during the audit period. Mr. Tellarico became involved with Melon's through an associate of Mr. Davis. He invested \$40,000.00 in Melon's. Mr. Tellarico's name does not appear on any of the bank signature cards. He did sign a Financing Statement (Standard Form UCC-1) as a debtor which listed Melon's as a debtor. The secured party was Moka D'Oro Coffee. The statement covered a coffee machine and coffee grinder. Mr. Tellarico signed the statement because the owner of Moka D'Oro Coffee knew him. Mr. Tellarico was at Melon's when the New York City Police Department closed the premises.

7. Petitioner Nicholas Pittas was vice president and half owner of Golden Gate Carting Co., Inc. during the audit period. Mr. Pittas became involved with Melon's through an associate of Mr. Davis. Mr. Pittas invested \$25,000.00 in Melon's. He alleged that he was not an officer of Melon's, only an investor. He claimed that Melon's opened for business in December, 1980 or January, 1981. During its existence, Melon's had opened and closed checking accounts at Manufacturers Hanover Trust Co., Citibank, Chemical Bank and Republic National Bank of New York. Each bank requested Melon's to close the account for writing checks with insufficient funds in the account. The signature cards for Citibank, Chemical Bank and Republic National Bank of New York each listed Mr. Pittas as vice president and Mr. Woltin as president. Mr. Pittas signed a few checks on

the Citibank checking account. Mr. Pittas also had a key to Melon's which he used to gain access to the premises prior to the closing. He purportedly was looking for Melon's books and records, since Mr. Woltin had disappeared. He discovered thirty-seven checks drawn on the Republic National Bank of New York. The checks had his signature and Robert Woltin's signature on them. Mr. Pittas claimed that it was not his signature and that his name was forged on the checks.

8. The Application for Permit for a Place of Assembly was received by the Department of Buildings, City of New York, on August 1, 1979. Type of occupancy was listed as dance hall and the maximum number of persons to be accommodated was patrons 590, employees 10, total number 600. The application was approved on December 21, 1979.

9. No issue was raised with reference to penalty and interest.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected." Section 1131(1) defines "persons required to collect tax" as including any officer or employee who is under a duty to act for a corporation in complying with the Sales and Use Tax Law.

B. That within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law, petitioners, Nicholas Pittas and Fred Davis, were persons required to collect tax on behalf of Melon's.

C. That within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law, petitioner Andrew Tellarico was not a person required to collect tax on behalf of Melon's.

D. That section 1138(a)(1) provides that if a return required by this article is not filed, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as type of accommodations and services, number of employees or other factors.

E. That while the Audit Division's method of estimating the tax due is within the meaning and intent of section 1138(a)(1) of the Tax Law, the audit period should begin on December 21, 1979, since the permit application was not approved until December 21, 1979 and Melon's was not open prior to that date, and end on July 24, 1981, the date the premise was closed. Further, the number of patrons used in computing the admission revenue should be reduced to 590 (Finding of Fact "8", supra).

F. That the petition of Andrew Tellarico is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated November 19, 1982 is cancelled.

G. That the petitions of Nicholas Pittas and Fred Davis are granted to the extent indicated in Conclusion of Law "E", supra; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due dated November 19, 1982; and that, except as so granted, the petitions are denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 22 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 688

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

| | | |
|---|--------------------------|--|
| Sent to | <i>Michael Pettes VP</i> | |
| Street and No. | <i>1501 Broadway</i> | |
| P.O., State and ZIP Code | <i>New York NY 10036</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 693 169 687

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

| | | |
|---|--------------------------|--|
| Sent to | <i>Michael Pettes VP</i> | |
| Street and No. | <i>1501 Broadway</i> | |
| P.O., State and ZIP Code | <i>New York NY 10036</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 693 169 689

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>Andrew Tellerico Office</i> |
| Street and No. | <i>1000 1st Ave & 1st St</i> |
| P.O., State and ZIP Code | <i>1333 66 St</i> |
| Postage | <i>Brooklyn NY 11219</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 | |

P 693 169 686

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>Fred Davis</i> |
| Street and No. | <i>1000 1st Ave & 1st St</i> |
| P.O., State and ZIP Code | <i>370 1st Ave PR 11218</i> |
| Postage | <i>Brooklyn NY 11218</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 | |

Detached from
PS Form 3849-A
Oct. 1980

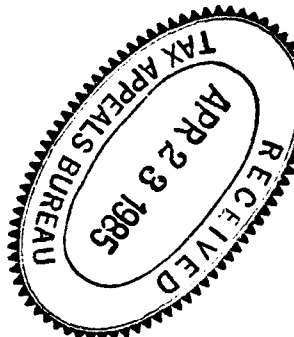
RETURN

MAIL

P 693 169 688

CERTIFIED

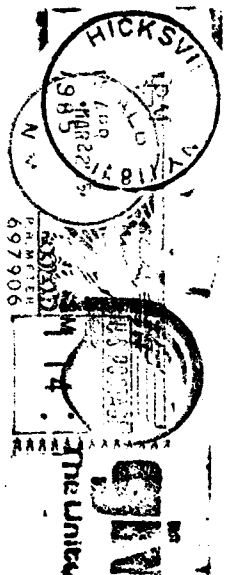
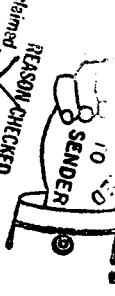
Nicholas Pittas
Vice President of Melon's Disco & Records, Inc.
5 Birch Court
Oyster Bay, NY 11771



CLERK'S ROOM
NO. 2
2987 21 NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CLERK
12227

3/25/85
1ST NOTICE
4/12/85
2ND NOTICE

REASON CHECKED
Unclaimed ☒ Refused ☐
Addressee unknown ☐
Insufficient address ☐
No such street ☐
No such office in state ☐
Do not remove to this building ☐

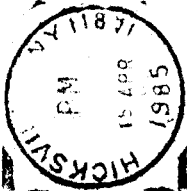


NEW YORK
Commission
BUREAU
CAMPUS
12227

REASON CHECKED
1. ☒ Directed to office
2. ☐ Insufficient funds
3. ☐ No such street
4. ☐ No such office in state
5. ☐ Other (specify) _____

SENDER

Nicholas Pittas
Vice President of Melon's Disco & Records, Inc.
5 Birch Court
Oyster Bay, NY 11771



The United States



CERTIFIED

P 693 169 688

MAIL

REQUEST FOR BETTER ADDRESS

| | | |
|---|---|--------------------------------|
| Requested Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227 | Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227 | Date of Request 4/25/85 |
|---|---|--------------------------------|

Please find most recent address of taxpayer described below; return to person named above.

| | |
|---|---|
| Social Security Number | Date of Petition Jan. - Dec. - 3/22/85 |
| Name Nicholas Pittas | |
| Address Vice President of Melon's Disco & Records, Inc. 5 Birch Court Oyster Bay, N.Y. 11771 | |

Results of search by Files

| | |
|---|-----------|
| <input type="checkbox"/> New address: | |
| <input type="checkbox"/> Same as above, no better address | |
| <input checked="" type="checkbox"/> Other: | Unclaimed |

| | | |
|-----------------------|---------|-------------------------------|
| Searched by DP | Section | Date of Search 4/25/85 |
|-----------------------|---------|-------------------------------|

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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

March 22, 1985

Nicholas Pittas
Vice President of Melon's Disco & Records, Inc.
5 Birch Court
Oyster Bay, NY 11771

Dear Mr. Pittas:

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.

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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
Myron Gould
1501 Broadway
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NICHOLAS PITTAS

VICE PRESIDENT OF MELON'S DISCO & RECORDS, INC.

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, 1979 through
August 31, 1981.

In the Matter of the Petition

of

FRED DAVIS

SECRETARY/TREASURER OF MELON'S DISCO & RECORDS, INC.

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, 1979 through
August 31, 1981.

DECISION

In the Matter of the Petition

of

ANDREW TELLARICO

OFFICER OF MELON'S DISCO & RECORDS, INC.

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, 1979 through
August 31, 1981.

Petitioners, Nicholas Pittas, 5 Birch Court, Oyster Bay, New York 11771,
Fred Davis, 370 Ocean Parkway, Brooklyn, New York 11218, and Andrew Tellarico,
1333 66th Street, Brooklyn, New York 11219, each 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, 1979 through August 31, 1981 (File Nos. 42241, 42242 and 42243).

A formal hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 28, 1984 at 9:15 A.M., with all briefs to be submitted by August 20, 1984. Petitioners appeared by Myron Gould, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioners were persons required to collect and pay over sales tax on behalf of Melon's Disco & Records, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

II. If so, whether the Audit Division properly determined the sales taxes due from petitioners.

FINDINGS OF FACT

1. Melon's Disco & Records, Inc. ("Melon's") operated a discotheque at 120 East 16th Street, New York, New York. On July 24, 1981, the business was closed by the New York City Police Department for selling liquor without a license and for operating an unlicensed premises. All the assets of Melon's were transferred to Golden Gate Carting, 69 Ingraham Street, Brooklyn, New York.

2. Since Melon's was no longer in business, no records were available for audit. The Audit Division estimated the tax due based upon a New York City Fire Department certificate of occupancy which indicated the maximum number of persons to be accommodated at the premises as 600. Admission revenue to the establishment was determined by the number of days the establishment was

purportedly opened during the audit period (252) times the average number of admissions per day (600) times an average admission price of \$11.00. Total admission revenue was determined to be \$1,663,200.00. Wine and beer sales for the audit period were determined by multiplying the total number of customers admitted ($252 \times 600 = 151,200$) times two drinks per customer at \$2.00 per drink for total wine and beer sales of \$604,800.00. Membership fees were calculated based on 3,684 members at \$10.00 each for a total of \$36,840.00. The above audit method resulted in a total tax due of \$184,387.20.

3. On November 19, 1982, the Audit Division issued to petitioner Nicholas Pittas a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for a tax due of \$184,387.20, plus penalty of \$43,884.14 and interest of \$54,671.12, for a total due of \$282,942.46. On the same date, the Audit Division issued to petitioner Fred Davis and petitioner Andrew Tellarico similar notices for the same amount of tax, penalty and interest due.

4. During the audit period, Melon's filed only one sales tax return which was for the period March 1, 1980 through May 31, 1980. A check for \$1,875.78 was remitted with the return. However, the check did not clear the bank and it was returned. The check was never made good by Melon's.

5. Petitioner Fred Davis was an independent salesman during the audit period. He alleged that he was not an officer of Melon's and that, at the urging of Robert Woltin, he invested \$8,000.00 or \$9,000.00 in Melon's at the end of 1979 or the beginning of 1980. He claimed that Melon's was Mr. Woltin's idea and that Mr. Woltin ran the day-to-day affairs of Melon's. A signature card for Manufacturers Hanover Trust Co. dated November 8, 1978 indicated that Mr. Davis was secretary and Mr. Woltin was president of Melon's. The card also indicated that checks were to be signed by the president and secretary.

Mr. Davis, with Mr. Woltin, signed a few checks for a matter of weeks during the Melon's construction period. A signature card for Citibank also indicated that Mr. Davis was secretary and Mr. Woltin was president of the corporation. On May 1, 1981, Mr. Davis signed a violation order issued against Melon's by the New York City Fire Department. Mr. Davis was at Melon's when the New York City Police Department closed the premises.

6. Petitioner Andrew Tellarico was employed by Golden Gate Carting Co., Inc. as a salesman during the audit period. Mr. Tellarico became involved with Melon's through an associate of Mr. Davis. He invested \$40,000.00 in Melon's. Mr. Tellarico's name does not appear on any of the bank signature cards. He did sign a Financing Statement (Standard Form UCC-1) as a debtor which listed Melon's as a debtor. The secured party was Moka D'Oro Coffee. The statement covered a coffee machine and coffee grinder. Mr. Tellarico signed the statement because the owner of Moka D'Oro Coffee knew him. Mr. Tellarico was at Melon's when the New York City Police Department closed the premises.

7. Petitioner Nicholas Pittas was vice president and half owner of Golden Gate Carting Co., Inc. during the audit period. Mr. Pittas became involved with Melon's through an associate of Mr. Davis. Mr. Pittas invested \$25,000.00 in Melon's. He alleged that he was not an officer of Melon's, only an investor. He claimed that Melon's opened for business in December, 1980 or January, 1981. During its existence, Melon's had opened and closed checking accounts at Manufacturers Hanover Trust Co., Citibank, Chemical Bank and Republic National Bank of New York. Each bank requested Melon's to close the account for writing checks with insufficient funds in the account. The signature cards for Citibank, Chemical Bank and Republic National Bank of New York each listed Mr. Pittas as vice president and Mr. Woltin as president. Mr. Pittas signed a few checks on

the Citibank checking account. Mr. Pittas also had a key to Melon's which he used to gain access to the premises prior to the closing. He purportedly was looking for Melon's books and records, since Mr. Woltin had disappeared. He discovered thirty-seven checks drawn on the Republic National Bank of New York. The checks had his signature and Robert Woltin's signature on them. Mr. Pittas claimed that it was not his signature and that his name was forged on the checks.

8. The Application for Permit for a Place of Assembly was received by the Department of Buildings, City of New York, on August 1, 1979. Type of occupancy was listed as dance hall and the maximum number of persons to be accommodated was patrons 590, employees 10, total number 600. The application was approved on December 21, 1979.

9. No issue was raised with reference to penalty and interest.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected." Section 1131(1) defines "persons required to collect tax" as including any officer or employee who is under a duty to act for a corporation in complying with the Sales and Use Tax Law.

B. That within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law, petitioners, Nicholas Pittas and Fred Davis, were persons required to collect tax on behalf of Melon's.

C. That within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law, petitioner Andrew Tellarico was not a person required to collect tax on behalf of Melon's.

D. That section 1138(a)(1) provides that if a return required by this article is not filed, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as type of accommodations and services, number of employees or other factors.

E. That while the Audit Division's method of estimating the tax due is within the meaning and intent of section 1138(a)(1) of the Tax Law, the audit period should begin on December 21, 1979, since the permit application was not approved until December 21, 1979 and Melon's was not open prior to that date, and end on July 24, 1981, the date the premise was closed. Further, the number of patrons used in computing the admission revenue should be reduced to 590 (Finding of Fact "8", supra).

F. That the petition of Andrew Tellarico is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated November 19, 1982 is cancelled.

G. That the petitions of Nicholas Pittas and Fred Davis are granted to the extent indicated in Conclusion of Law "E", supra; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due dated November 19, 1982; and that, except as so granted, the petitions are denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 22 1985


PRESIDENT


COMMISSIONER


COMMISSIONER