

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
P.M.G. Diner, Inc.	:	
d/b/a Brooklyn Townhouse Restaurant	:	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 6/1/81-8/31/81.	:	

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 April, 1985, he served the within notice of Decision by certified mail upon P.M.G. Diner, Inc. d/b/a Brooklyn Townhouse Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

P.M.G. Diner, Inc.
d/b/a Brooklyn Townhouse Restaurant
717 Kings Hwy.
Brooklyn, NY 11223

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
22nd day of April, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

April 22, 1985

P.M.G. Diner, Inc.
d/b/a Brooklyn Townhouse Restaurant
717 Kings Hwy.
Brooklyn, NY 11223

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
Jack M. Portney
207 Main St., Box 346
Fort Lee, NJ 07024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
P.M.G. DINER, INC.	:	DECISION
d/b/a BROOKLYN TOWNHOUSE RESTAURANT	:	
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, 1981	:	
through August 31, 1981.	:	

Petitioner, P.M.G. Diner, Inc., d/b/a Brooklyn Townhouse Restaurant, 717 Kings Highway, Brooklyn, New York 11223, 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, 1981 through August 31, 1981 (File No. 43354).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 2, 1984 at 1:15 P.M., with all additional documentary evidence and briefs to be submitted by November 21, 1984. Petitioner appeared by Jack M. Portney, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether the Audit Division properly assessed use tax upon petitioner's purchase of component parts of a diner from an out-of-state manufacturer.

FINDINGS OF FACT

1. On March 1, 1983, the Audit Division issued to petitioner, P.M.G. Diner, Inc. doing business as Brooklyn Townhouse Restaurant, a Notice of Determination and Demand 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 June 1, 1981 through August 31, 1981 in the amount of \$40,061.32, plus interest and penalty. The document states that the tax was assessed upon petitioner's purchase of a diner from an out-of-state manufacturer for \$500,766.52.

2. Petitioner is a corporation organized under the laws of this state with its principal place of business at 717 Kings Highway, Brooklyn, New York. On August 18, 1980, petitioner entered into a contract with Aacco Construction Co., Inc. ("Aacco") for Aacco's preparation of the site at 717 Kings Highway (at that time occupied by a service station) and the construction thereon of a diner for the total consideration of \$226,853.60. Petitioner later purchased certain component parts of a diner from Swingle Diners, Inc. ("Swingle"), a manufacturer with its principal place of business at 300 Lincoln Boulevard, Middlesex, New Jersey, for a price of \$500,766.52, exclusive of transportation costs. Swingle manufactured the component parts in accordance with petitioner's specifications.

3. Aacco furnished materials and performed work in conformity with plans and specifications prepared by the firm of Storch, Pesa and Associates. Petitioner did not offer in evidence such plans and specifications, but the agreement between petitioner and Aacco generally described the obligations of Aacco to include the following: demolition of the service station; installation of footing, a foundation, concrete piers and a concrete floor; erection of rear concrete block walls; installation of 600 ampere electrical service; erection of a bake shop consisting of metal stud walls and sheetrock; installation of a boiler room, a wood-paneled office and a bathroom; connection of the water supply to the diner; and construction of a wall of four-inch solid block veneer on the north side of the diner. Petitioner's representative stated that

Swingle also performed certain installation services; however, he supplied no detail regarding the services and did not present any contract entered into by petitioner and Swingle.

4. In petitioner's federal corporation income tax return for the fiscal year ended November 30, 1981, buildings and other depreciable assets were valued at \$866,821.00 on Schedule L, Balance Sheets (\$939,724.00 less accumulated depreciation of \$72,903.00); on Form 4562 appended to the return, petitioner claimed a deduction for depreciation of \$54,444.30 on buildings with a basis of \$816,664.50.

5. The Audit Division concedes that the charges for site preparation and construction paid by petitioner to Aacco were excepted from sales and use taxes by virtue of Tax Law section 1105(c)(3)(iii).

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property. Where a contractor or subcontractor sells tangible personal property to a person (other than an exempt organization) for whom he is adding to or improving real property, property or land by a capital improvement and such tangible personal property is to become an integral component part of the structure, building or real property, the receipts from the sale are exempted from sales and use taxes by virtue of section 1115(a)(17); under such circumstances, it is the obligation of the contractor or subcontractor, as the consumer of the tangible personal property, to pay the tax upon the cost of the materials to him (20 NYCRR 527.7[b][5]). Section 1105(c)(3) imposes sales tax on the receipts from every sale (except for resale) of the service of installing tangible personal property; excepted from taxation is the service of "installing property which, when

installed, will constitute an addition or capital improvement to real property, property or land..." (section 1105[c][3][iii]).

B. That petitioner failed to establish that any portion of its remittance to Swingle was other than for component parts of the diner. The transaction between petitioner and Swingle thus constituted a sale of tangible personal property, the use of which within this state by petitioner was subject to the compensating use tax imposed by section 1110.

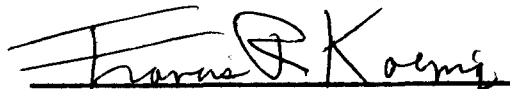
C. That the petition of P.M.G. Diner, Inc., doing business as Brooklyn Townhouse Restaurant is hereby denied, and the assessment issued on March 1, 1983 is sustained in all respects.


DATED: Albany, New York

STATE TAX COMMISSION

APR 22 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

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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>Jack M. Partney</i>	
Street and No. <i>107 Main St Rt 348</i>	
P.O., State and ZIP Code <i>East Hill N. 07024</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 693 169 759

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>Mr. Brockman</i>	
Street and No. <i>117 Kings Hwy</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11229</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	