

STATE TAX COMMISSION

of

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
Periods Ending 11/30/80-1/11/82.

SS.:

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Lapineta, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lapineta, Inc.
c/o Joseph Geraci
735 Ocean Pkwy.
Brooklyn, NY 11230

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
18th day of February, 1986.

David E. Steinhart

Stan Coughlin
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lapineta, Inc. :
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 :
Periods Ending 11/30/80-1/11/82. :
:

AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he served the within notice of Decision by certified mail upon Alfred F. Morace, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alfred F. Morace
232-B Medford Court
Englishtown, NJ 07726

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
18th day of February, 1986.

Doris E. Steinhardt

John Coughlin
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Lapineta, Inc.
c/o Joseph Geraci
735 Ocean Pkwy.
Brooklyn, NY 11230

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
Alfred F. Morace
232-B Medford Court
Englishtown, NJ 07726
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LA PINETA, INC.	:	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 Periods Ended	:	
November 30, 1980 through January 11, 1982.	:	

Petitioner, La Pineta, Inc., c/o Joseph Geraci, 735 Ocean Parkway, Brooklyn, New York 11230, 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 periods ended November 30, 1980 through January 11, 1982 (File No. 39674).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 14, 1985 at 1:15 P.M., with all briefs to be submitted by May 30, 1985. Petitioner appeared by Alfred F. Morace, P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from La Pineta, Inc. for the periods ended November 30, 1980 through January 11, 1982.

FINDINGS OF FACT

1. On June 22, 1982, the Audit Division 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, La Pineta, Inc., for taxes due of \$3,945.52, plus penalty of \$491.58 and interest of \$333.14, for a total amount due of

\$4,770.24 for the periods ended November 30, 1980 through January 11, 1982.

The notice contained the following explanation:

"As a result of a review of returns filed and you (sic) not sending information requested, your reported taxable sales have been increased by 35%. The following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law."

2. On September 15, 1982, the petitioner timely filed a petition for a hearing to review the above notice of determination. The petitioner claims that the notice is not consistent with the books and records which were made available to the Audit Division. The Audit Division claims that its audit method was proper and correct.

3. La Pineta, Inc. owned and operated a restaurant which was located at 306 West 48th Street in New York City. The restaurant sold food, beer, liquor and soft drinks. During the period at issue, the restaurant experienced declining sales and petitioner's president, Joseph Geraci, had to loan money to petitioner to pay its bills. As a result of the drop in sales, the restaurant was sold on January 11, 1982 to Mount Blanc Restaurant Corp. for \$3,000.00, which was the fair market value of the fixtures and equipment.

4. On April 9, 1982, the Audit Division sent petitioner a Bulk Sale Questionnaire requesting information about the sale of the restaurant and data regarding petitioner's purchases for the quarters ended February 29, 1980 through November 30, 1980. Since the questionnaire was not completed and returned to the Audit Division within the required ten days, the aforementioned notice was issued against the petitioner (see Finding of Fact "1"). The questionnaire was subsequently completed and returned to the Audit Division on May 4, 1983.

5. As the result of a pre-hearing conference, the Audit Division sent an auditor to Mr. Geraci's residence to review the petitioner's books and records

and determine if the assessment should be reduced or eliminated. The auditor found that the petitioner's books and records were inadequate. The petitioner maintained no cash register tapes, guest checks, sales or purchases journal or purchase invoices. Pursuant to the records which were maintained, the petitioner's purchases of food, liquor, beer and soda were lumped together in a single amount. Additionally, according to petitioner's U.S. Corporation Income Tax Returns for the years 1981 and 1982, petitioner's markup was only 31 percent, which was considered excessively low for a restaurant. The auditor concluded that there were, in fact, grounds for increasing the assessment; however, no actual audit of petitioner's books and records was performed.

6. At the hearing held herein, petitioner's representative introduced into evidence (Petitioner's Exhibit "1") worksheets which purported to be a summary of petitioner's sales by category, i.e. food, beverages, taxes and tips, taken from food tickets for the entire audit period. The worksheets, however, do not support petitioner's claim that the assessment is erroneous.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in part, that if a return required to be filed is not filed, or if a return when filed is incorrect or insufficient, 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 stock on hand, purchases, rental paid, number of employees or other factors.

B. That in determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206). When the Audit Division employs such a method, it becomes incumbent upon the

petitioner to establish error (Matter of Meyer v. State Tax Commssion, 61 A.D. 2d 223 lv. to app. den. 44 N.Y.2d 645).

C. That, notwithstanding the inadequacy of petitioner's books and records, the Audit Division's increasing of petitioner's taxable sales by 35 percent was not proper auditing methodology and the assessment must be cancelled. The auditor visited Mr. Geraci's residence and was afforded the opportunity to conduct an audit of petitioner's books and records, but neglected to do so (see Finding of Fact "5") (see Matter of Chartair, Inc. v. State Tax Comm. 65 A.D.2d 44). The assessment at issue herein was therefore not based on any "external indices" as provided by section 1138(a)(1) of the Tax Law.

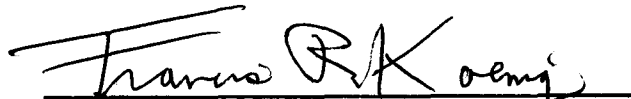
D. That the petition of La Pineta, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 22, 1982 is hereby cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


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. 1985-480-794

PS Form 3800, June 1985

Sent to LAPINETA INC	
Street and No. 735 OCEAN PKWY.	
P.O. State and ZIP Code BROOKLYN, NY 11230	
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 319 373 533

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to ALFRED F. MORACE	
Street and No. 232-B MEDFORD COURT	
P.O. State and ZIP Code ENGLISHTOWN, NJ 07726	
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	