

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rotiso Service, Inc. d/b/a G.I. Joe :
and Hiram & MaryAnn Isola : 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 :
3/1/79-2/28/82. :

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 March, 1985, he served the within notice of Decision by certified mail upon Rotiso Service, Inc. d/b/a G.I. Joe, and Hiram & MaryAnn Isola, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rotiso Service, Inc. d/b/a G.I. Joe
and Hiram & MaryAnn Isola
37 Carmine St.
New York, NY 10014

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 March, 1985.

David Parchuck

Conna A. DeGasperis

Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Rotiso Service, Inc. d/b/a G.I. Joe	:	
and Hiram & MaryAnn Isola	:	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 3/1/79-2/28/82.	:	

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

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

Michael Amarosa
136 Waverly Place
New York, NY 10014

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 March, 1985.

Garriol Parsbuck

James R. Hagelwood

Authorized to administer oaths
pursuant to Tax Law section 174

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

March 6, 1985

Rotiso Service, Inc. d/b/a G.I. Joe
and Hiram & MaryAnn Isola
37 Carmine St.
New York, NY 10014

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
Michael Amarosa
136 Waverly Place
New York, NY 10014
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
:
of :
:
ROTISO SERVICES, INC. :
D/B/A G.I. JOE :
:
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 February 28, 1982. :
:

In the Matter of the Petition :
:
of :
:
MARY ANN ISOLA : 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, 1979 :
through February 28, 1982. :
:

In the Matter of the Petition :
:
of :
:
HIRAM ISOLA :
:
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 February 28, 1982. :
:

Petitioners, Rotiso Services, Inc. d/b/a G.I. Joe, Mary Ann Isola and
Hiram Isola, 37 Carmine Street, New York, New York 10014, 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 February 28, 1982
(File No. 38579).

A combined small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1984 at 1:15 P.M. Petitioners appeared by Michael Amarosa, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the additional tax due assessed against petitioners was properly and correctly determined.

FINDINGS OF FACT

1. On June 20, 1982, the Audit Division issued notices of determination and demand for payment of sales and use taxes due to "G.I. Joe d/b/a Rotiso Service, Inc." (sic), Mary Ann Isola and Hiram Isola. Each notice assessed additional tax due of \$25,878.48 plus penalty and interest in accordance with the following schedule:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
5/31/79	\$1,853.52		\$721.07
8/31/79	1,194.08		420.38
11/30/79	1,951.76		628.72
2/28/80	2,088.40		610.94
5/31/80	2,046.16		536.69
8/31/80	2,220.40		500.28
11/30/80	2,374.16		463.88
2/28/81	2,400.00	\$456.00	397.92
5/31/81	2,400.00	384.00	325.32
8/31/81	2,400.00	312.00	259.68
11/30/81	2,475.00	247.50	181.42
2/28/82	2,475.00	173.25	96.67

2. The assessment against the corporate petitioner was based on a sales tax audit. Although requested, the corporation's books and records were not produced for audit. Lacking the records, the auditor reviewed the information available to him. An examination of the New York City corporation tax returns of Rotiso Services, Inc. filed for the years 1977 and 1978 revealed that the

business was a one man operation selling prepared foods, e.g. hot dogs, with an address of 370 West 11th Street. Based on the auditor's experience of auditing similar businesses operating in mid-town and lower Manhattan, it was estimated that corporate sales subject to sales tax were \$120,000.00 per year. The projection of the audit finding over the audit period, after an allowance for the taxable sales reported, resulted in a determination of additional tax due in the amount of \$25,878.48.

3. Petitioners maintain that the auditor's estimate of sales is excessive, but are unable to produce books and records, same having allegedly been destroyed by petitioners' landlord after evicting petitioners from the business premises or by the accounting firm in possession of corporate books. At the hearing, petitioners introduced their file copy of the U.S. Corporation Income Tax Return for the fiscal year November 1, 1979 through October 31, 1980, which shows that corporate sales for the fiscal year were \$18,497.00. Petitioners also introduced photocopies of checks, presumably written in payment of the sales tax reported on returns filed for the quarterly periods ended February 28, 1976; May 31, 1976; August 31, 1976 and November 30, 1976, which indicate sales for the yearly period December, 1975 through November, 1976 of \$21,290.75.¹

4. Petitioners further maintain that Rotiso Services, Inc. ceased operations sometime in March, 1980. It is noted that the assessments issued to petitioners reflect the filing of sales and use tax returns for quarterly periods through

1 The checks of Rotiso Services, Inc. total \$1,703.26 which when divided by the 8 percent combined State and local rate results in taxable sales of \$21,290.75.

November 30, 1980. In fact, taxable sales reported for the time period after March, 1980 were \$6,991.00.²

CONCLUSIONS OF LAW

A. That petitioner failed to maintain books and records as required under section 1135 of the Tax Law. Without books and records, the Audit Division was unable to verify the taxable sales reported or to determine such sales accurately. It was, therefore, proper and correct for the Audit Division to determine the taxable sales of Rotiso Services, Inc. d/b/a G.I. Joe from available information as provided in section 1138(a) of the Tax Law. (See Matter of Chartair, Inc. v. State Tax Commission, 64 A.D.2d 44.)

B. That once established that the Audit Division selected a method of calculation reasonably designed to reflect the tax due, it was incumbent upon petitioners to show by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. It cannot be said from the testimony or evidence presented at the hearing that petitioners have sustained their burden. (See Matter of Carmine Rest. v. State Tax Commission, 99 A.D.2d 581.)

C. That the petitions of Rotiso Services, Inc. d/b/a G.I. Joe, Mary Ann Isola and Hiram Isola are denied and the notices of determination and demand

2 The auditor estimated quarterly taxable sales of \$30,000.00 and tax due of \$2,400.00 based on a combined 8 percent State and local rate. Therefore, the estimated tax due for the three quarterly periods within the time span of April, 1980 through November, 1980 would be \$7,200.00. Only \$6,640.72 tax due was assessed. Subtraction of the \$6,640.72 from the \$7,200.00 results in a tax reported of \$559.28. The division thereof by the applicable 8 percent rate indicates taxable sales of \$6,991.00 were reported.

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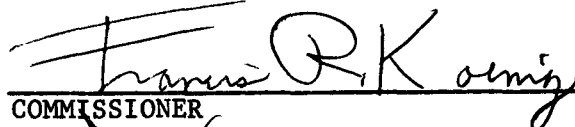
for payment of sales and use taxes due, numbered S820620030M, S820620031M and S820620032M, respectively, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER