

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Van C. Stathe :  
Officer of 1174 Restaurant Inc. :  
d/b/a Tip Top Restaurant :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 12/1/80-8/31/82. :  
\_\_\_\_\_:

State of New York :

ss.:

County of Albany :


David Parchuck/Janet M. Snay, 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 14th day of November, 1986, he/she served the within notice of Decision by certified mail upon Van C. Stathe, Officer of 1174 Restaurant Inc. d/b/a Tip Top Restaurant the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

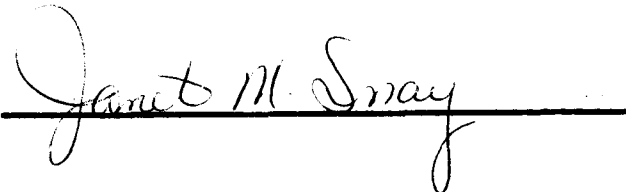
Van C. Stathe  
Officer of 1174 Restaurant Inc.  
d/b/a Tip Top Restaurant  
1174 Brooks Avenue  
Rochester, New York 14624

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  
14th day of November, 1986.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
William Panos : AFFIDAVIT OF MAILING  
President of 1174 Restaurant, Inc. :  
d/b/a Tip Top Restaurant :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 12/1/80-8/31/82. :  
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State of New York :

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William Panos  
President of 1174 Restaurant, Inc.  
d/b/a Tip Top Restaurant  
1174 Brooks Avenue  
Rochester, NY 14624

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14th day of November, 1986.

David Parchuck  
Authorized to administer oaths  
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Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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Van C. Stathe : AFFIDAVIT OF MAILING  
Officer of 1174 Restaurant Inc. :  
d/b/a Tip Top Restaurant :

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 12/1/80-8/31/82. :  
\_\_\_\_\_:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, 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 14th day of November, 1986, he served the within notice of Decision by certified mail upon Carl A. Nanni, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl A. Nanni  
271 Lake Avenue  
Rochester, NY 14608

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  
14th day of November, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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Rochester, NY 14608

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  
14th day of November, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

November 14, 1986

Van C. Stathe  
Officer of 1174 Restaurant Inc.  
d/b/a Tip Top Restaurant  
1174 Brooks Avenue  
Rochester, New York 14624

Dear Mr. Stathe:

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Carl A. Nanni  
271 Lake Avenue  
Rochester, NY 14608

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

November 14, 1986

William Panos  
President of 1174 Restaurant, Inc.  
d/b/a Tip Top Restaurant  
1174 Brooks Avenue  
Rochester, NY 14624

Dear Mr. Panos:

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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Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Carl A. Nanni  
271 Lake Ave.  
Rochester, NY 14608

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition of  
of  
VAN C. STATHE,  
OFFICER OF 1174 RESTAURANT, INC.,  
D/B/A TIP TOP 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 December 1, 1980  
through August 31, 1982.

DECISION

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In the Matter of the Petition  
of  
WILLIAM PANOS,  
PRESIDENT OF 1174 RESTAURANT, INC.,  
D/B/A TIP TOP 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 December 1, 1980  
through August 31, 1982.

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Petitioner, Van C. Stathe, 1174 Brooks Avenue, Rochester, New York 14624,  
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 December 1, 1980  
through August 31, 1982 (File No. 50474).

Petitioner, William Panos, 1174 Brooks Avenue, Rochester, New York 14624,  
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 December 1, 1980  
through August 31, 1982 (File No. 50648).

A consolidated hearing was held before Timothy J. Alston, Hearing Officer,  
at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New

York, on June 3, 1986 at 9:15 A.M., with additional evidence to be submitted by June 17, 1986. Petitioner appeared by Carl A. Nanni, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly asserted additional sales tax due from petitioners and whether such tax was properly determined.

#### FINDINGS OF FACT

1. On February 24, 1984, following an audit of 1174 Restaurant, Inc. d/b/a Tip Top Restaurant, the Audit Division issued to each of the respective petitioners, Van C. Stathe and William Panos, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1980 through August 31, 1982. The notices each asserted \$8,196.90 in additional sales tax due together with interest thereon and also asserted penalty against each petitioner pursuant to section 1145(a) of the Tax Law. Petitioners' liability was premised upon the Audit Division's assertion that each was a responsible officer of 1174 Restaurant, Inc. during the audit period and therefore liable for additional sales tax found on audit pursuant to sections 1131(a) and 1133 of the Tax Law.
2. During the audit period, petitioner Panos was president and petitioner Stathe was vice-president and secretary of 1174 Restaurant, Inc. d/b/a Tip Top Restaurant ("the corporation").
3. During the corporation's fiscal year ended July 31, 1982 each petitioner owned 50% of the corporation's stock. During the corporation's fiscal year ended July 31, 1983 petitioner Stathe owned 51% of the corporation's stock and petitioner Panos owned the remaining 49%. Neither petitioner took issue with



the Audit Division's assertion that he was a responsible officer of the corporation during the relevant period.

4. On audit, the Audit Division requested access to the corporation's books and records, monthly statements, guest checks, cash register tapes, bank records, and any other records to substantiate the corporation's reported taxable sales. The Audit Division made such requests of petitioners' representative on four occasions. In response to such requests, petitioners' representative provided the Audit Division with the corporation's Federal Income Tax Returns for fiscal years ended July 31, 1981, July 31, 1982 and July 31, 1983, and some monthly statements. No other records were provided prior to the issuance of the notices of determination.

5. To determine the corporation's taxable sales, the Audit Division compared the corporation's gross sales as set forth on its Federal corporate income tax returns for its fiscal years ended July 31, 1981 and July 31, 1982 with the corporation's gross sales per its quarterly sales tax returns for the period September 1, 1980 through August 31, 1981 and September 1, 1981 through August 31, 1982. An exact comparison between sales tax figures and income tax figures was not possible given the corporation's failure to provide adequate documentation as to monthly sales. The difference between gross sales per the income tax returns and gross sales per the closest corresponding sales tax returns was determined by the Audit Division to be additional taxable sales attributed to the corporation. Specifically, the Audit Division reached the following results:

Gross Sales per Income Tax Returns

8/1/80 - 7/31/81

\$410,386

Gross Sales per Sales Tax Returns

9/1/80 - 8/31/81

351,336

\$ 59,050

x 7%

\$ 4,133.50

x  $\frac{1}{4}$

\$ 1,033.38

Additional Sales

Tax Due

Tax Due/Quarter

Gross Sales per Income Tax Returns

8/1/81 - 7/31/82

\$457,048

Gross Sales per Sales Tax Returns

9/1/81 - 8/31/82

384,237

\$ 72,811

x 7%

\$ 5,096.77

x  $\frac{1}{4}$

\$ 1,274.19

Additional Sales

Tax Due

Tax Due/Quarter

Based upon these calculations, the notices of determination herein were issued to each of the respective petitioners.

6. Petitioners produced certain records subsequent to a pre-hearing conference in this matter. Said records were deemed inadequate and incomplete by the Audit Division and no adjustments in the tax asserted due herein were made as a result of the production of such records.

7. Petitioners contended that the gross sales figures reported on the corporation's Federal income tax returns included certain amounts not subject to sales tax and that therefore the Audit Division's determination should be adjusted to reflect such amounts. Specifically, petitioners contended that they had each purchased for their personal use approximately \$15,000 worth of food for each of the fiscal years at issue from the restaurant. Petitioners also contended that the corporation had received rebates and/or commissions from Wonder Bread, Rochester Telephone Company, Maxwell Vending Company, and its grease suppliers during the audit period and that such amounts were included

in the corporation's gross sales on its Federal income tax returns. Since these rebates and/or commissions would not be subject to sales tax, petitioners contended that the amount of additional gross sales asserted by the Audit Division should be adjusted accordingly. In addition, petitioners contended that the corporation's gross sales as set forth on its Federal income tax returns included Blue Cross and Blue Shield health insurance premium payments made by the corporation's employees to the corporation which had purchased the insurance on behalf of said employees. Also, petitioners contended that the corporation's gross sales for income tax purposes included \$15,000.00 in insurance payments received for water damages incurred by the corporation during the audit period. Finally, petitioners contended that the corporation had improperly paid sales tax on certain purchases of paper products during the audit period and that such overpayments should be adjusted from the amount of sales tax asserted due herein.

8. Petitioners introduced no evidence to prove that the amounts discussed in Finding of Fact "7" were included in the gross receipts reported on the corporation's Federal income tax return for the fiscal years at issue.

9. At hearing, petitioners contended that the Audit Division's answer in this matter did not address certain allegations made in petitioners' perfected petition and that therefore the answer was defective. Petitioners moved for the dismissal of the notices of determination based upon this alleged defect.

#### CONCLUSIONS OF LAW

A. That in view of Findings of Fact "2" and "3", petitioners were "persons required to collect tax" under Article 28 of the Tax Law within the meaning of section 1131(1) of the Tax Law. The Audit Division therefore properly asserted

the tax at issue herein against petitioners as officers of 1174 Restaurant, Inc.

B. That since petitioners failed to provide the Audit Division with complete and adequate records of 1174 Restaurant, Inc., the Audit Division properly and reasonably determined additional taxes due from petitioners from such information as was available in accordance with section 1138(a)(1) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 AD2d 655). Petitioners have failed to demonstrate that the audit method or the amount of tax asserted due was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). Under the circumstances herein, petitioners have failed to meet their burden of proof with respect to their contentions as discussed in Finding of Fact "7".

C. That the Audit Division's answer in this matter was in all respects proper. Petitioners' contention that the answer did not address certain allegations set forth in their respective perfected petitions is simply unsupported by the record.

D. That the petitions of Van C. Stathe and William Panos as officers of 1174 Restaurant, Inc. d/b/a Tip Top Restaurant are in all respects denied and the notices of determination and demands for payment of sales and use taxes due dated February 24, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1986

Rodriguez  
PRESIDENT

Francis Q. Koenig  
COMMISSIONER

Mark J. Miller  
COMMISSIONER