

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Dining & Kitchen Administration, Inc. : 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 12/1/78-11/30/81.

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State of New York :

ss.:

County of Albany :

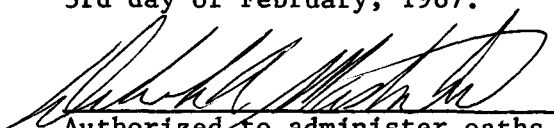
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of February, 1987, he/she served the within notice of Decision by certified mail upon Dining & Kitchen Administration, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

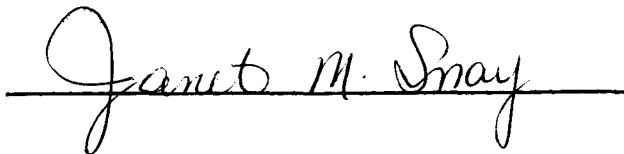
Dining & Kitchen Administration, Inc.  
5 Lakeside Office Park  
Wakefield, MA 01880

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  
3rd day of February, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

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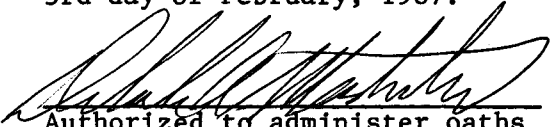
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of February, 1987, he served the within notice of Decision by certified mail upon W. Arthur Garrity, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

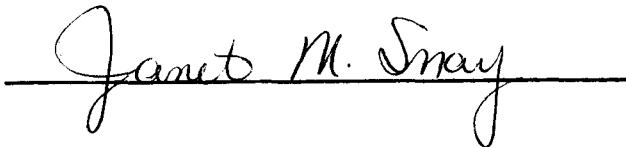
W. Arthur Garrity  
Coyne & Gottlieb  
50 Congress St.  
Boston, MA

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  
3rd day of February, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

February 3, 1987

Dining & Kitchen Administration, Inc.  
5 Lakeside Office Park  
Wakefield, MA 01880

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  
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:  
W. Arthur Garrity  
Coyne & Gottlieb  
50 Congress St.  
Boston, MA

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
DINING AND KITCHEN ADMINISTRATION, 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 December 1, 1978  
through November 30, 1981.

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DECISION

Petitioner, Dining and Kitchen Administration, Inc., 5 Lakeside Office Park, Wakefield, Massachusetts 01880, 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, 1978 through November 30, 1981 (File No. 45333).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Campus, Albany, New York, on January 29, 1986 at 9:15 A.M., with all briefs to be submitted by May 9, 1986. Petitioner appeared by Coyne & Gottlieb (W. Arthur Garrity, III, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

#### ISSUES

I. Whether the arrangements under which meals were served to students at the training academy operated by the Department of Correctional Services constituted "contractual arrangement[s]" within the meaning of Tax Law §1105(d)(ii)(B) and whether the training academy is a "school" within the meaning of Tax Law §1105(d)(ii)(B) thereby exempting petitioner from the requirement of collecting sales tax on its sales to individual students.

II. Whether petitioner's purchases were exempt from tax because petitioner was an agent for tax-exempt entities.

III. Whether petitioner is entitled to a refund for erroneous payment of sales tax.

FINDINGS OF FACT

1. Petitioner, Dining and Kitchen Administration, Inc. ("DAKA"), is a company which operates cafeterias at various locations.

2. On April 20, 1983, the Audit Division, on the basis of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner assessing a deficiency of sales and use taxes for the period December 1, 1978 through November 30, 1981 in the amount of \$49,154.55, plus interest of \$13,347.09, for a total amount due of \$62,501.64.

3. The amount of tax assessed was premised upon the following items:

a) The Audit Division concluded that, as a result of sales through vending machines, sales tax was due in the amount of \$5,373.27. Petitioner has not raised an objection to this portion of the assessment.

b) Petitioner operates a facility in a division of the Young Men's Christian Association known as Holiday Hills in Dutchess County. It was determined that petitioner's activities resulted in a tax liability in the amount of \$2,079.13. Petitioner has also not raised an objection to this portion of the assessment.

c) Petitioner managed a cafeteria in a training academy ("training academy") which, in turn, was operated by the New York State Department of Correctional Services. Petitioner did not collect sales tax on any cash sales or in those instances where the Department of Correctional Services was not reflected as the purchaser in petitioner's records. The foregoing

items resulted in additional tax due of \$9,822.33. Petitioner has agreed that tax in the amount of \$914.69 is due on these items and has objected to the balance of the assessment on the ground that the students purchased under a "contractual arrangement" and that the training academy is a "school" within the meaning of Tax Law §1105(d)(11)(B).

d) Petitioner made sales at various locations throughout New York on which sales tax was not collected. The Audit Division assessed \$13,200.76 on this portion of the audit. After the notice was issued, the Audit Division reduced the amount of tax assessed on this phase of the audit to \$8,237.67. As adjusted, petitioner has not objected to this portion of the audit.

e) The Audit Division examined petitioner's recurring expense purchases in detail for the months of May, June and July 1981. The Audit Division found that tax had not been paid on recurring purchases of items such as chemicals, various paper supplies, utensils, office supplies and cleaning supplies. With petitioner's consent, an error rate for the test period was determined and applied to gross sales. This resulted in tax due of \$18,135.29. Petitioner has objected to this portion of the audit on the asserted ground that petitioner was making its purchases as an agent for tax exempt entities. In determining the amount of tax due on this item, petitioner was given credit for erroneous overpayments of tax of \$6,917.75. Since petitioner maintains that no tax is due on the purchases of recurring items, petitioner asserts that it is entitled to a refund of the erroneous overpayment of \$6,917.75.

f) The Audit Division concluded, upon a review of petitioner's acquisition of fixed assets, that tax was due in the amount of \$543.77. This portion of the assessment is not in dispute.

The Training Academy

4. During the years in issue, petitioner supplied prepared food, labor and supplies to the training academy. One week in advance of the time petitioner was expected to supply the food, the training academy would notify petitioner of the number of students that petitioner would be supplying meals to for the following week. The meal plan was in operation from Monday through Friday and consisted of fourteen meals a week. Depending on the particular course, the number of students participating in the plan ranged from fifty to three hundred.

5. At the conclusion of each week, petitioner would send a bill to the training academy for the meals which had been delivered. The bill from petitioner would not segregate those students who paid directly for their meals from the students whose meals were paid for by a county.

6. The training academy would collect money for the meal plan prior to the students' arrival. Most of the counties that sent students to the training academy would pay for the students with county funds. This would be accomplished by the respective county drafting a check payable to the Department of Corrections. Some counties, however, required students to pay their travel, room and board expenses from their own sources and then seek reimbursement from the county. In these instances, the students would make the checks payable to petitioner and then deliver the check to the business manager of the Department of Correctional Services. Subsequently, when petitioner delivered an invoice for a particular period, the checks from individuals would be delivered to petitioner.

7. Petitioner would place an employee with a cash register at the end of the food service line. It was this employee's function to collect cash from any of the staff that regularly worked in the building. The instructors and staff were readily distinguishable from the students since the students would wear a uniform. It was also petitioner's practice to count the number of students who went through the serving line in order to verify the accuracy of the number of students which the training academy said to expect. Petitioner would be paid for the expected number of students regardless of whether fewer students appeared for a meal.

8. Petitioner did not have a direct contractual arrangement with any of the students.

#### Recurring Expenses

9. It is not disputed that the customers to which petitioner provided food management services were exempt from sales and use taxation pursuant to Tax Law §1116.

10. The various institutions to which petitioner supplied meals exercised control over the food service operation. Petitioner's clients set minimum standards as to food quality. In many instances, the client would control the selling price and the hours of operation. With respect to the training academy and "Holiday Hills", which is a conference center for the YMCA, the clients had input as to who was hired.

11. In all instances, the location managers and cooks were employees of petitioner and, in most instances, the food servers and cashiers were also employees of petitioner.

12. The broad operational policy would be set by the client institution in either the bid specifications or the contract.



13. At each location, the institution would have a specific individual to whom the location manager would report and who would monitor petitioner's daily activities. An individual from a client institution would have frequent meetings with petitioner's location manager.

14. In all instances, the menus were initially developed by the location manager. Generally, the menus would then be reviewed by the client institution. The location manager was also responsible for the daily operations and directed the employees as to what services to perform.

15. The buildings, equipment, dishes, pots, pans and glassware were all the property of the institution. Generally, petitioner was obligated to replace lost or broken china, glasses or other similar items. Approximately one percent of the annual sales revenue was spent on the replacement of these items.

16. The location manager would decide the amount of the purchase of regular items such as napkins, disposable utensils, cleaning supplies and office supplies. The location managers were expected to make their purchases from petitioner's preferred list of suppliers.

17. Usually, purchase requests were made orally by the location manager. However, a purchase order approved by the district manager was necessary when the purchase was in excess of a certain amount or the purchase involved a capital expenditure.

18. Purchases of items made out of the ordinary course of business were reviewed by the client.

19. When a purchase order was necessary, it would be prepared by the location manager and approved by the district manager. The purchase order would have the name "daka" printed on it and list petitioner's address in

Wakefield, Massachusetts. One portion of the purchase invoice contained the words "ship to". Thereafter, petitioner would show "daka", a hyphen and the institution's name.

20. The food, supplies and other items would always be received by petitioner at the loading dock area of the kitchen in the specific institution. Generally, the location managers ordered the food and supplies based on available information.

21. Initially, all purchases by petitioner were paid for by petitioner. Thereafter, the disposition of the expense would depend on the type of contract petitioner had with its client.

22. Petitioner had one of two types of arrangements with its clients: a management fee contract or a profit and loss contract.

23. In a profit and loss contract, petitioner collected all of the revenue and paid all of the expenses. In some contractual arrangements, the profit was shared with the client. Petitioner was not reimbursed for replacement costs with this type of contract.

24. In a management fee contract, petitioner was either paid a fixed fee per year or a percentage of gross sales. In these circumstances, the purchases were paid for by petitioner or billed to the client for the same price petitioner paid. In this manner, petitioner was reimbursed for replacement costs.

25. When the term of the contract with a particular institution was concluded, the disposition of remaining disposable inventory would depend on the type of contract petitioner had with that client. In a profit and loss contract, the remaining inventory would become the property of petitioner. In a management fee contract, the disposable inventory became the property of the institution.

26. (a) Petitioner's agreements with the various institutions varied with respect to petitioner's purchases of recurring items. For example, petitioner's agreement with the Interchurch Center provided in paragraph 9 that:

"The parties hereby agree that in all matters relating to this agreement, DAKA shall be acting as an agent of Interchurch and shall perform the services hereunder for the account of Interchurch."

However, paragraph 14A of the contract provided:

"DAKA shall collect, report and pay to the proper authorities any and all sales or other transaction taxes imposed with respect to the services provided hereunder."

(b) Petitioner's contracts with three branches of the YMCA ("West Side", "Sloane" and "Vanderbilt" provided that "DAKA will maintain an initially agreed upon inventory of china, glassware, and silverware."

(c) Petitioner's contract with the Teachers College provided that "DAKA shall make all contracts in its own name and shall be fully responsible for all purchases made by it."

(d) Petitioner's contract with New York University School of Law provided that petitioner was to operate as an independent contractor. Similar provisions were contained in petitioner's agreement with the YMCA's Holiday Hills Conference Center.

(e) Petitioner's two contracts with Rensselaer Polytechnic Institute provided that petitioner maintain the inventory of glassware, chinaware, silverware, pots and pans at its own expense. Petitioner also agreed to collect and pay all sales tax.

(f) Petitioner's contract with Russell Sage College provided that petitioner would purchase all expendable supplies and that delivery of all supplies would be accepted in the name of DAKA.

27. In 1983, individuals associated with some of the exempt institutions for which petitioner operates food service facilities signed a statement which authorized petitioner to act as an agent with respect to purchases for the operation of the respective food service facilities.

CONCLUSIONS OF LAW

A. That Tax Law §1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property with certain exceptions.

B. That by Chapter 425 of the Laws of 1968, the tax imposed by Tax Law §1105(a) does not apply to:

"food or drink sold to a student of a nursery school, kindergarten, elementary or secondary school at a restaurant or cafeteria located on the premises of such a school, or food or drink, other than beer, wine, or other alcoholic beverages, sold at a restaurant, tavern or other establishment located on the premises of a college, university or a school (other than a nursery school, kindergarten, elementary or secondary school) to a student enrolled therein who purchases such food or drink under a contractual arrangement whereby the student does not pay cash at the time he is served, provided the school, college or university described in this subparagraph is operated by an exempt organization described in subdivision (a) of section eleven hundred sixteen, or is created, incorporated, registered, or licensed by the state legislature or pursuant to the education law or the regulations of the commissioner of education, or is incorporated by the regents of the university of the State of New York or with their consent or the consent of the commissioner of education as provided in section two hundred sixteen of the education law" (Tax Law § 1105 [d][ii][B]).

C. That the foregoing amendment to the Tax Law was enacted to clarify the sales tax exemption for meals served to students at educational institutions (N.Y. Legis. Ann., 1968, p. 392). The amendment was intended to provide an exemption for meals served on school premises to students of nursery, kindergarten, elementary or secondary schools as well as meals served on school premises to students of a school, college or university provided the meals are served on a contract basis and do not involve a cash transaction at the time the food is served. (Id.)

D. That petitioner has failed to sustain its burden of proof of establishing that the training academy constitutes a school within the meaning of Tax Law §1105(d)(11)(B). Rather, it is entirely possible that the students enrolled at the training academy were engaged in on-the-job training. If this was the situation, then the training academy would not be a school within the meaning Tax Law §1105(d)(11)(B). In view of the foregoing, it is unnecessary to determine whether the arrangements under which the meals were served to students at the training academy constituted "contractual arrangement[s]" within the meaning of Tax Law §1105(d)(11)(B).

E. That in order for an exemption to apply to recurring purchases, it must be clearly established that such items were directly purchased by the exempt organizations through employees or agents of such exempt organizations properly authorized to make such purchases (cf. Matter of The Seiler Corporation, State Tax Commission, September 13, 1985).

F. That the evidence establishes that petitioner and not the exempt organizations was the direct purchaser of the items at issue. The purchases were initiated by petitioner's personnel. Although the invoices included the particular exempt organization's name and address, as well as petitioner's name, such information would, of necessity, be included for purposes of delivery of the supplies ordered. It is also noted that some of petitioner's contracts expressly contemplated that petitioner would pay sales tax on its purchases. In sum, petitioner was the purchaser of the items in issue and used by it in providing food management operations at the various institutions. Therefore, the Audit Division's assessment of tax on recurring purchases was proper.


G. That in view of Conclusion of Law "F", petitioner is not entitled to a refund of the tax which was erroneously paid.

H. That the petition of Dining and Kitchen Administration, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as modified in Finding of Fact "3(d)", is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

**FEB 03 1987**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER