

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gondolier Restaurant, Ltd. : AFFIDAVIT OF MAILING
and Dominick Galvano, as Officer :

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 12/1/80-2/29/84.

State of New York :

ss.:

County of Albany :

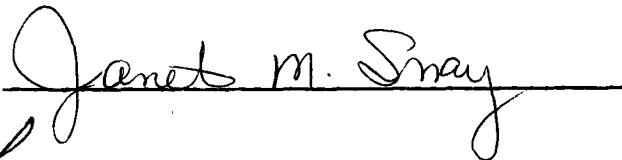
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 6th day of April, 1987, he/she served the within notice of decision by certified mail upon Gondolier Restaurant, Ltd., and Dominick Galvano, as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

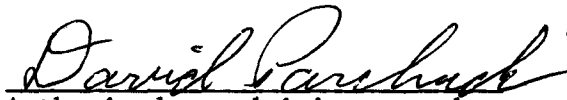
Gondolier Restaurant, Ltd.
and Dominick Galvano, as Officer
39 DaVinci Drive
Rochester, NY 14624

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
6th day of April, 1987.




Authorized to administer oaths
pursuant to Tax Law section 174

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

April 6, 1987

Gondolier Restaurant, Ltd.
and Dominick Galvano, as Officer
39 DaVinci Drive
Rochester, NY 14624

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
GONDOLIER RESTAURANT, LTD.	:	DECISION
AND DOMINICK GALVANO AS OFFICER	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1980	:	
through February 29, 1984.	:	

Petitioners, Gondolier Restaurant, Ltd. and Dominick Galvano as Officer, 39 DaVinci Drive, Rochester, New York 14624, filed petitions for revision of determinations or for refunds of sales and use taxes under Article 28 and 29 of the Tax Law for the period December 1, 1980 through February 29, 1984 (File Nos. 52891 and 54546).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York on September 17, 1986 at 9:15 A.M. Petitioner, Dominick Galvano, appeared pro se and for Gondolier Restaurant, Ltd. 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 April 9, 1984, the Audit Division issued to petitioners, Gondolier Restaurant, Ltd., and Dominick Galvano as Officer of Gondolier Restaurant, Ltd., notices of determination and demands for payment of sales and use taxes

due for the period December 1, 1980 through February 29, 1984, asserting additional tax due of \$56,172.14, plus penalty and interest.

2. On March 9, 1984, the Gondolier Restaurant, Ltd., by its president, Dominick Galvano, executed a consent extending the period of limitation for assessment of sales and use taxes due for the period December 1, 1980 through February 28, 1981 until June 20, 1984.

3. At all times relevant herein petitioner Gondolier Restaurant, Ltd. operated a restaurant at 250 Pixley Road, Rochester, New York. Petitioner Dominick Galvano was president of Gondolier Restaurant, Ltd., running its operations throughout the period at issue. During 1981 and 1982 the restaurant operated a bakery next door to the restaurant. The bakery was sold in 1982.

4. On audit, the Audit Division requested that petitioner Gondolier Restaurant, Ltd. make its books and records available for review and inspection by the Audit Division. Petitioner failed to do so. The Audit Division therefore calculated the deficiency set forth in the April 9, 1984 notices of determination by calculating the ratio between petitioner's gross sales as set forth on its Federal corporate income tax returns and gross sales as set forth on its sales tax returns, and applying this error ratio to petitioner's reported gross sales for sales tax purposes. The Audit Division utilized petitioners' 1981 and 1982 Federal returns in calculating this error ratio, and estimated an error ratio for 1983 using the 1982 return. Subsequent to the application of the error rates, the Audit Division increased the resulting deficiencies by fifty percent to arrive at the deficiency asserted in the March 9, 1984 notices.

5. On March 5, 1985 the Audit Division issued to both petitioners revised notices of determination and demands for payment of sales and use taxes due for the period December 1, 1980 through February 29, 1984, asserting additional tax

due of \$37,404.29 plus penalty and interest. The tax asserted due in these revised notices was premised upon an application of the error ratios described in Finding of Fact "4". The Audit Division removed the fifty percent increase in the deficiencies premised upon the error ratios after a review of petitioners' books. Such books were, in the Audit Division's opinion, sufficiently consistent with petitioners' Federal returns to warrant the use of the Federal returns as the basis for the asserted deficiency without such a fifty percent increase. No guest checks or cash register tapes were ever produced by petitioner at any time during the course of the audit.

6. Subsequent to the issuance of the revised notices of determination, petitioner Gondolier Restaurant, Ltd. provided its 1983 Federal corporate return to the Audit Division. The actual margin of error between gross sales per the sales tax returns and gross sales per the Federal returns was then used in determining the error ratio for the final year of the audit. Additionally, petitioners substantiated certain exempt sales during the audit period, notably bakery sales and sales in connection with parties and banquets held by exempt organizations. The result of this documentation was an adjustment of the tax asserted due herein to \$15,997.03, plus penalty and interest.

7. Petitioner contended that the restaurant had additional exempt sales during the audit period. Specifically, petitioner contended that the restaurant had additional exempt sales in connection with parties and banquets for exempt organizations. Additionally, petitioner contended that the restaurant had continued to sell baked goods out of the restaurant after the sale of the bakery. Petitioner failed to submit any documentation with respect to these contentions and its testimonial evidence lacked any degree of specificity as to the amount charged, the dates of the banquets and parties, the names of the

purported exempt organization, and the amount of gross sales of the purported bakery operations subsequent to 1982.

CONCLUSIONS OF LAW

A. That in view of Finding of Fact "3", petitioner Dominick Galvano was a "person 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 said petitioner as an officer of Gondolier Restaurant, Ltd.

B. That since petitioners failed to provide the Audit Division with complete and adequate records of Gondolier Restaurant, Ltd., 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 petitioners have failed to establish that the failure to pay over the taxes found due and owing herein was due to reasonable cause within the meaning of section 1145(a) of the Tax Law and 20 NYCRR 536.5. Accordingly, the penalty asserted herein is sustained.

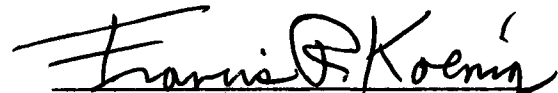
D. That the petitions of Gondolier Restaurant, Ltd. and Dominick Galvano, as Officer are in all respects denied and the revised notices of determination, as adjusted (Finding of Fact "6"), are sustained.

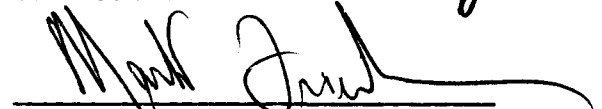
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER