

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Natalie : AFFIDAVIT OF MAILING
d/b/a Natalie's Famous Pizza :
:
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 6/1/81-5/31/84. :

State of New York :

ss.:

County of Albany :

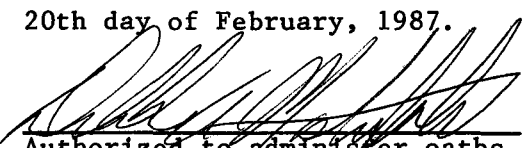
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of February, 1987, he/she served the within notice of Decision by certified mail upon John Natalie, d/b/a Natalie's Famous Pizza the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

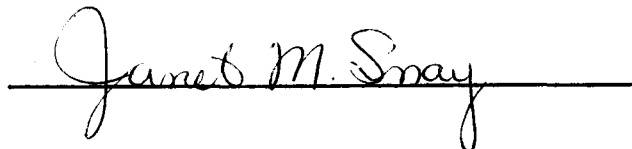
John Natalie
d/b/a Natalie's Famous Pizza
4364 Culver Road
Rochester, NY 14622

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
20th day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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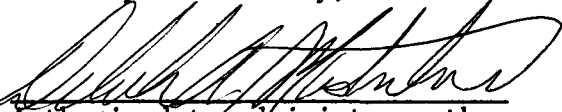
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of February, 1987, he served the within notice of Decision by certified mail upon Stewart Berger, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

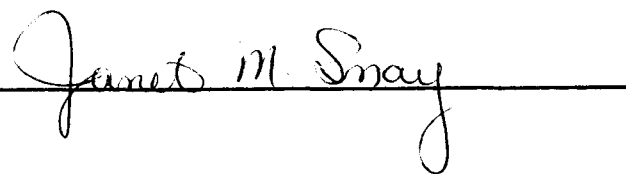
Stewart Berger
Louis Sternbach & Co.
501 Fifth Ave.
New York, NY 10017

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
20th 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 20, 1987

John Natalie
d/b/a Natalie's Famous Pizza
4364 Culver Road
Rochester, NY 14622

Dear Mr. Natalie:

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:
Stewart Berger
Louis Sternbach & Co.
501 Fifth Ave.
New York, NY 10017

STATE TAX COMMISSION

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 June 1, 1981
through May 31, 1984. :

Petitioner John Natalie, d/b/a Natalie's Famous Pizza, 4364 Culver Road, Rochester, New York 14622 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 June 1, 1981 through May 31, 1984 (File No. 59355).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1986 at 9:30 A.M. Petitioner appeared by Louis Sternbach and Co. (Stewart Berger, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

Whether petitioner substantiated its claimed nontaxable sales.

1. On February 6, 1985, as the result of a field audit, the Audit Division issued to petitioner, John Natalie, d/b/a Natalie's Famous Pizza, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1981 through May 31, 1984, asserting sales and use taxes due in the amount of \$17,760.46 plus penalty and interest.

2. On September 18, 1984, petitioner's accountant, holding petitioner's power of attorney, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1981 through August 31, 1981 to December 20, 1984.

3. On December 17, 1984, petitioner's accountant executed a second consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1981 through November 30, 1981 to March 20, 1985.

4. Petitioner operated a takeout food business, selling pizza, chicken wings, submarine sandwiches and beverages. On audit, the auditor was presented with State sales tax returns, State and Federal income tax returns and purchase invoices for September, October and November 1983. A comparison of petitioner's Federal Schedule C and his State sales tax returns disclosed a substantial discrepancy (over \$200,000.00) between gross sales reported on the Federal and State returns. Furthermore, petitioner had no record of individual sales, such as cash register tapes or guest checks, to verify reported sales. The auditor performed a markup test for the period September 1, 1983 through November 31, 1983 and computed a markup figure of 200 percent. This markup was the same as that reported on petitioner's 1983 Federal Schedule C. The auditor then applied the 200 percent markup figure to the cost of goods sold for the entire audit period as reported on petitioner's Schedules C for 1981 and 1982. This resulted in total audited sales for the audit period of \$351,978.00 with tax due on this amount of \$24,638.46. After the tax reported and paid by petitioner was subtracted from this amount, petitioner's remaining tax liability was found to be \$17,760.46.

5. The auditor considered all of petitioner's sales to be taxable because of the nature of the business and because he saw no indication of nontaxable sales in a brief visit to the pizzeria.

6. After a Tax Appeals Bureau conference, the Audit Division agreed that petitioner's gross sales, as reported on his Schedules C, would be accepted as total taxable sales for state sales tax purposes. This resulted in a reduced tax liability of \$15,148.83 plus penalty and interest.

7. Petitioner asserts that the difference between his gross sales and reported taxable sales is attributable to: (1) sales of nontaxable items, such as bread, cold cuts and uncooked pizza dough, (2) sales for resale and (3) sales to tax exempt organizations. To substantiate his claims, petitioner submitted the following documents:

(a) A packet of exempt organization certificates from various schools, churches and charitable organizations in the Rochester area;

(b) testimonials in which three organizations estimated their purchases from petitioner during the three month test period as follows:

Hellenic Men's Club	-	\$ 20.00 - \$30.00 per day
Seabreeze Volunteer Fire Assoc.	-	129.00
Parkview Bowl	-	75.00 - 100.00 per week;

(c) a packet of testimonials from approximately 12 customers, each one stating that bread, dough or cold cuts had been purchased from petitioner during the audit period and estimating the approximate amount of such purchases.

8. Petitioner estimated that his total nontaxable sales equalled 27 percent of his gross receipts.

CONCLUSIONS OF LAW

A. That section 1105(d)(i) of the Tax Law imposes a tax upon the receipts of every sale of food or drink when sold by a restaurant for consumption on or off the premises. An exclusion is provided for food or drink sold in an

unheated state when the items sold are of a type commonly sold by food stores for off premises consumption (Tax Law §1105[d][1][2]). In addition, sales to certain exempt organizations are not subject to the sales tax (Tax Law §1116). However, there is a presumption in the Tax Law that all receipts from a restaurant's sale of food or drink are subject to tax until the contrary is established by the person required to collect the tax (Tax Law §1132[c]).

B. That without verifiable records of actual sales, the exemption certificates and testimonials from petitioner's customers are insufficient to overcome the presumption of taxability.


C. That in accordance with Finding of Fact "6", petitioner's tax liability is reduced to \$15,148.83 plus penalty and interest.

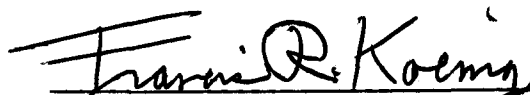
D. That the petition of John Natalie d/b/a Natalie's Famous Pizza is granted to the extent indicated in Conclusion of Law "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on February 6, 1985 will be modified accordingly; and that in all other respects the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER