

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leonard Sandberg, : AFFIDAVIT OF MAILING
President of Sandrest Corp. d/b/a The Stork Club :

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 :
Periods 3/1/78-8/31/78 & 12/1/78-5/31/78.

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 12th day of August, 1987, he/she served the within notice of Decision by certified mail upon Leonard Sandberg, President of Sandrest Corp. d/b/a The Stork Club the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

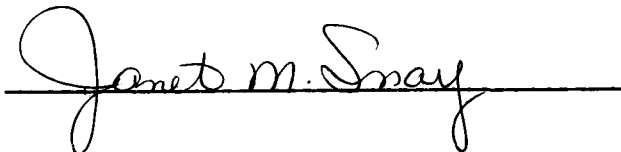
Leonard Sandberg,
President of Sandrest Corp. d/b/a The Stork Club
2224 Embassy Drive
West Palm Beach, FL 33401

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
12th day of August, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Leonard Sandberg, :
President of Sandrest Corp. d/b/a The Stork Club

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 :
Periods 3/1/78-8/31/78 & 12/1/78-5/31/78.

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 12th day of August, 1987, he served the within notice of Decision by certified mail upon Philip H. Kalban, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

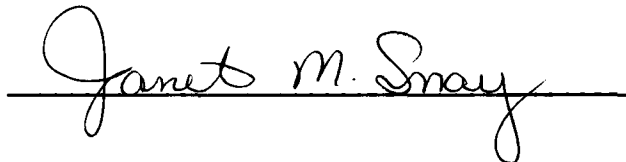
Philip H. Kalban
Parker, Chapin, Flattau & Klimpl
1211 Avenue of the Americas
New York, NY 10036

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
12th day of August, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

August 12, 1987

Leonard Sandberg,
President of Sandrest Corp. d/b/a The Stork Club
2224 Embassy Drive
West Palm Beach, FL 33401

Dear Mr. Sandberg:

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) 1139 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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Philip H. Kalban
Parker, Chapin, Flattau & Klimpl
1211 Avenue of the Americas
New York, NY 10036

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
LEONARD SANDBERG,
PRESIDENT OF SANDREST CORP. D/B/A THE STORK CLUB :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods March 1, 1978 :
through August 31, 1978 and December 1, 1978 :
through May 31, 1979. :

DECISION

Petitioner, Leonard Sandberg, President of Sandrest Corp. d/b/a The Stork Club, 2224 Embassy Drive, West Palm Beach, Florida 33401, 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 periods March 1, 1978 through August 31, 1978 and December 1, 1978 through May 31, 1979 (File No. 45300).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 5, 1987 at 10:45 A.M. Petitioner appeared by Philip H. Kalban, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the New York State Tax Commission has the authority to hold a hearing in this matter.

II. Whether petitioner is entitled to a refund of penalty and interest.

FINDINGS OF FACT

1. On May 20, 1980, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due to Leonard Sandberg which stated tax due of

\$68,412.28, penalty of \$15,454.71 and interest of \$12,288.97, for a total amount due of \$96,155.96. This amount was found due for the periods ended May 31, 1978, August 31, 1978, February 28, 1979 and May 31, 1979 (the "audit period").

2. For the periods ended May 31, 1978 and August 31, 1978, forms ST-100, New York State and local sales and use tax returns were filed with only partial payment of the tax stated. For the periods ended February 28, 1979 and May 31, 1979, petitioner filed forms ST-810, quarterly returns for part-quarterly filers, failing to remit any tax with regard to the former period and only partially remitting the amount set forth as due for the latter period. All four returns were signed by Leonard Sandberg, petitioner herein.

3. Petitioner was the secretary and treasurer of Sandrest Corp. until sometime in 1979 when he became president. Petitioner has never contended that he was not a responsible officer of Sandrest Corp.

4. Sandrest Corp. operated a restaurant known as The Stork Club located at 112 Central Park South in New York City. The club closed sometime in the spring of 1979.

5. Petitioner does not dispute the total tax due as stated on the Notice and Demand for Payment of Sales and Use Taxes Due issued on May 20, 1980, but does dispute the propriety of the penalty and interest assessment.

6. On April 30, 1981, petitioner made a partial payment of \$25,000.00. On July 8, 1981, petitioner made a second payment of \$9,000.00. However, because of financial "adversity" alleged to be due to loss of business resulting from alleged improprieties and embezzlement of funds by an employee, loss of income for the year 1979 and severe illness, no further payments were made towards the outstanding assessment. The New York State Department of Taxation

and Finance obtained a warrant against petitioner and levied against one of his bank accounts, collecting \$78,316.37, which constituted the entire outstanding balance due at that time. This levy took place on March 12, 1982.

7. Immediately prior to the levy, petitioner learned that the manager employed by Sandrest Corp. for The Stork Club had been arrested for alleged credit card fraud and entering the United States as an illegal alien. The employee, Robert James Jackson, has since been deported from this country.

8. Petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax on August 5, 1982, received by the Department of Taxation and Finance on August 16, 1982, seeking \$43,904.39, which amount was set forth on the compliance agent's levy as "statutory additions". By letter dated June 8, 1983, the Audit Division denied petitioner's application for refund and informed petitioner that he had 90 days from the date of the letter to apply for a hearing in accordance with the provisions of Tax Law § 1139(b).

9. Petitioner, by his representatives, Booth, Lipton & Lipton, protested the denial of his refund in a letter timely received by the Tax Appeals Bureau on July 8, 1983.

CONCLUSIONS OF LAW

A. That the State Tax Commission has jurisdiction to hear this matter pursuant to the provisions of Tax Law § 1139(b), which states that the determination to deny petitioner's application for refund or credit, in whole or in part, shall be final and irrevocable:

"unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing."

This situation is distinguishable from that in the case of Hall v. New York State Tax Commission, 108 AD2d 488, which held that the Tax Commission did not have authority under Tax Law § 1138(a)(1) to hold hearings concerning the assessment of sales and use taxes due from a petitioner for a period for which a correct and sufficient return was filed but no payment made. The Hall case also held that jurisdiction to hold such a hearing was not conferred by Tax Law § 171(21). The instant situation clearly falls within section 1139(b) as stated above and the Commission is authorized to hold a hearing on the merits of this matter. All amounts due were paid and a proper refund application filed. This hearing concerns that claim.

B. That during the period in issue, Tax Law § 1145(a)(1) granted the Commission the discretion to remit all or any part of assessed penalty and that portion of interest that exceeds the minimum amount. Although the language changed between 1978 and 1979, the salient provisions remained the same. The prior provision authorized the remittance of penalty and interest if the Tax Commission was satisfied that the delay in payment of taxes was excusable and the later provision provided that remittance could be authorized in the discretion of the Commission when the Commission determined that the failure or delay in paying taxes was due to reasonable cause and not due to willful neglect.

C. That petitioner has not demonstrated that there was reasonable cause for his failure to pay over taxes due within the time required by Article 28 of the Tax Law. Petitioner's illnesses took place long after the audit period, as did his good faith negotiations with and payments to the Department of Taxation and Finance. Further, claims of embezzlement and fraud by an employee were not substantiated and, in any event, as a responsible officer who signed all the


returns for the periods in issue, petitioner should have known what payments of sales tax were being made during the periods in issue.


D. That the petition of Leonard Sandberg is denied and the denial of the claim for refund dated June 8, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 12 1987


PRESIDENT


COMMISSIONER


COMMISSIONER