

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Syldor Restaurant, 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 6/1/81 - 5/31/84.

\_\_\_\_\_  
State of New York :

ss.:

County of Albany :

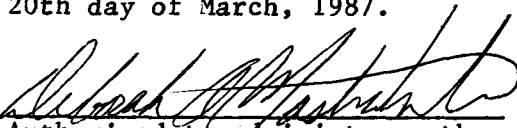
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of March, 1987, he/she served the within notice of decision by certified mail upon Syldor Restaurant, Inc. the petitioner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

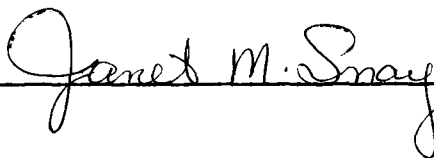
Syldor Restaurant, Inc.  
c/o Samuel J. Grabel  
1633 East 29th Street  
Brooklyn, NY 11229

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 March, 1987.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
\_\_\_\_\_  
Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Syldor Restaurant, 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 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 March, 1987, he served the within notice of decision by certified mail upon Samuel J. Grabel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

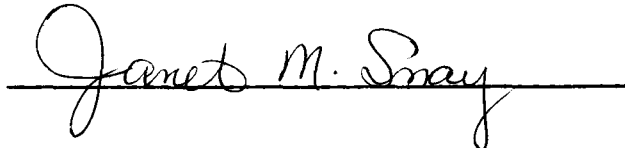
Samuel J. Grabel  
1633 East 29th Street  
Brooklyn, NY 11229

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 March, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

March 20, 1987

Syldor Restaurant, Inc.  
c/o Samuel J. Grabel  
1633 East 29th Street  
Brooklyn, NY 11229

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:  
Samuel J. Grabel  
1633 East 29th Street  
Brooklyn, NY 11229

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SYLDOR RESTAURANT, INC.	:	DECISION
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.	:	

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Petitioner, Syldor Restaurant, Inc., c/o Samuel J. Grabel, 1633 East 29th Street, Brooklyn, New York 11229, 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. 54987).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 21, 1986 at 9:15 A.M. Petitioner appeared by Samuel J. Grabel, CPA. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division correctly determined the value of furniture, fixtures and equipment transferred in the bulk sale of petitioner's business assets.

II. Whether the bulk sale of petitioner's business assets was cancelled by virtue of the purchaser's default in payment of certain promissory notes provided in the contract of sale.

FINDINGS OF FACT

1. Petitioner, Syldor Restaurant, Inc., operated a restaurant and bar located at 77 Fulton Street, New York, New York. The business was sold on April 30, 1984.

2. On August 14, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, covering the period June 1, 1981 through May 31, 1984, for taxes due of \$40,098.10, plus penalty and interest of \$9,298.03, for a total of \$49,396.13. The taxes due on the notice were estimated prior to the completion of a field audit of petitioner's books and records. When the audit was completed, the actual tax found due was \$5,530.18 which was based on the transfer of furniture, fixtures and equipment in the bulk sale of the business assets. Petitioner's sales were accepted as reported on sales tax returns filed.

3. The Audit Division used the book value from schedule 4562 of the Federal income tax return filed by petitioner for the fiscal year ended June 30, 1984 as a basis for computing the tax due as follows:

<u>Account</u>	<u>Date Acquired</u>	<u>Cost or Other Basis</u>	<u>Depreciation</u>	<u>Book Value</u>
Furniture & Fixtures	7/14/80	\$100,000.00	\$38,333.00	\$ 61,667.00
Leasehold & Equipment	7/14/80	294,000.00	86,691.00	207,309.00

The applicable tax rate (8½%) was applied to the book value of the furniture and fixtures to arrive at tax due of \$5,087.53. With respect to the leasehold and equipment account, the Audit Division estimated that 5 percent represented the equipment portion of the account and computed the tax due on \$10,365.45, or \$855.15. The estimate was based on the auditor's observation of the premises made on December 14, 1984. The purchaser paid a bulk sales tax of \$412.50 based on a value of \$5,000.00, which left additional tax due of \$5,530.18.

4. The total purchase price of the business was \$425,000.00, which included all chattels and merchandise contained in the premises, together with all equipment used in the operation of the business, the right to use petitioner's trade name and telephone number and the lease of the business premises. The agreement of sale placed a value of \$5,000.00 on fixtures sold with the business.

5. When petitioner purchased the business in July 1980, the seller and petitioner agreed that the purchase price of the fixtures and equipment was \$5,000.00 and petitioner remitted bulk sales tax of \$400.00 computed thereon. Petitioner did not acquire any further furniture, fixtures or equipment during the period it operated the business. The Audit Division did not assess any additional tax on this prior bulk sale.

6. Petitioner's general ledger had an account entitled "lease, equipment, leasehold" which showed an entry on July 14, 1980 for \$394,000.00. Petitioner argued that its tax return reflecting a breakdown of \$100,000.00 for fixtures and equipment and \$294,000.00 for leasehold and equipment was incorrect.

7. Petitioner took the position that the sale of fixtures for \$5,000.00 in the agreement of sale was an arm's length transaction and was the proper value for the personal property transferred to the purchaser.

8. The purchaser of the business from petitioner operated the restaurant from May 1984 until approximately October 1985 at which time the purchaser was evicted from the premises by the landlord. The purchaser defaulted on the promissory notes provided in the agreement of sale. Petitioner concluded that since the purchaser defaulted, it did not receive payment for the furniture, fixtures and equipment and, therefore, the bulk sale was never consummated. Petitioner offered no evidence to establish that the promissory notes were uncollectible and thereby considered a bad debt for sales tax purposes.

CONCLUSIONS OF LAW

A. That the bulk sales tax was paid by the purchaser on the value of \$5,000.00 placed on the fixtures in the contract of sale. The sales price allocated to the personal property is subject to review as to fairness and must have a provable basis for such allocation. The Tax Commission had the right and obligation to arrive at a fair sales price of the personal property for sales tax purposes (Matter of WEBR, Inc. v. State Tax Commission, 58 AD2d 471). Under the circumstances herein, the book value determined by the Audit Division set forth in Finding of Fact "3" was the proper basis for determining the bulk sales tax (Matter of Faliro Enterprises, Inc., State Tax Commission, June 19, 1986). Accordingly, petitioner is liable for the additional bulk sales tax of \$5,530.18 which it failed to collect from the purchaser pursuant to section 1133(a) of the Tax Law.

B. That the nonpayment of promissory notes by the purchaser of petitioner's business assets was not a bad debt under the provisions of 20 NYCRR 534.7.

C. That the petition of Syldor Restaurant, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 14, 1984, as revised to \$5,530.18, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

Roderick W. Allen  
PRESIDENT

Francis R. Kolmg  
COMMISSIONER

Michael J. Smith  
COMMISSIONER