

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter	of the Petition	:	
	of	:	
IRVING AND MARY GLICKSMAN		:	DECISION
D/B/A SUBWAY STOP LUNCHEONETTE		:	
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 March 1, 1980		:	
through May 31, 1983.		:	

Petitioners, Irving and Mary Glicksman d/b/a Subway Stop Luncheonette, 149 Bay 23rd Street, Brooklyn, New York 11218, 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 March 1, 1980 through May 31, 1983 (File No. 49936).

A small claims 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 February 4, 1985 at 1:15 P.M., with additional evidence to be submitted by February 28, 1985. Petitioners appeared by Emanuel Chartash, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether petitioners timely applied for a hearing.
- II. Whether the Audit Division properly determined additional sales taxes due from petitioners based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioners, Irving and Mary Glicksman d/b/a Subway Stop Luncheonette, operated a luncheonette and newsstand located at 6317 20th Avenue, Brooklyn, New York. The business was sold in or about May, 1983.

2. As the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 20, 1983, against petitioners covering the period March 1, 1980 through May 31, 1983 for taxes due of \$11,379.76, plus penalty and interest of \$4,730.19, for a total of \$16,109.95.

3. Petitioner Mary Glicksman executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through August 31, 1980 to December 20, 1983.

4. On audit, the Audit Division found that petitioners did not maintain any records of sales for the business. A comparison of gross sales reported on sales tax returns with those shown on federal income tax returns disclosed that the sales on the federal returns for 1981 exceeded the sales tax returns by \$48,639.00 and for 1982 by \$42,745.00. It was also found that purchase records were incomplete.

In order to determine petitioners' taxable sales, the Audit Division analyzed purchase invoices for the period September, 1982 through November, 1982. The purchases were categorized as follows: nontaxable - \$6,554.83 (46.25%); food and soda - \$4,617.25 (32.58%); candy - \$722.63 (5.1%); and cigarettes - \$2,277.46 (16.07%).

The Audit Division estimated markup percentages of 150 percent for food and soda and 50 percent for candy. These markups were based on audit experience with similar businesses. The actual markup for cigarettes was 37.6 percent.

The Audit Division determined total purchases by category for the audit period using the percentages found for the test period and then applied the applicable markup percentage to such purchases to arrive at taxable sales of \$197,707.00. Petitioners reported taxable sales of \$57,669.00 for the

same period, leaving additional taxable sales of \$140,038.00 and tax due thereon of \$11,379.76.

5. On December 5, 1983, the Tax Appeals Bureau received a petition dated July 15, 1983 from petitioners' representative seeking revision of the determination of additional tax due. Petitioners alleged that this petition was a duplicate of a petition sent by certified mail on July 15, 1983. A copy of a return receipt purportedly for the July 15, 1983 mailing was offered in evidence; however, the "addressed to" section was incomplete and the postmark date was illegible.

Although the notice of determination was dated July 20, 1983, it was sent certified mail on July 14, 1983.

6. Petitioners agreed to submit the original of the return receipt after the hearing to establish the timely mailing date of the petition; however, no such receipt was received.

7. With respect to the audit, petitioners argued that markup percentages estimated by the Audit Division were excessive because, during the time of the audit, wholesale prices for items purchased increased substantially while retail selling prices did not increase in the same proportion.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that a notice of determination of tax due shall be given to the person liable for the collection or payment of the tax and such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination shall apply to the Tax Commission for a hearing, or unless the Tax Commission of its own motion shall redetermine the same.

B. That section 1147(a)(1) of the Tax Law provides that notice of determination shall be mailed promptly by registered or certified mail and that any period of time which is determined according to the provisions of Article 28 by the giving of notice shall commence to run from the date of mailing of such notice.

Subsection (2) provides that if any return, claim, statement, application, or other document required to be filed within a prescribed period under Article 28 is delivered after such period, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.

C. That the Audit Division gave petitioners notice of the additional taxes due on July 14, 1983. The Tax Commission received an application for a hearing with respect thereto postmarked December 2, 1983 which is more than ninety days from the date the Audit Division gave notice of the taxes due. Petitioners failed to establish that a petition was mailed to the Tax Commission prior to said date. Accordingly, petitioners' liability was finally and irrevocably fixed.

D. That Issue II is moot.

E. That the petition of Irving and Mary Glicksman d/b/a Subway Stop Luncheonette is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 14, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER