

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

GREEN ISLAND GROCERY, INC.,  
D/B/A 24 HOUR KING SUBS & NEWS, INC.

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, 1983  
through February 29, 1984.

---

In the Hatter of the Petition of

of

SHIRLEY DUBRAY,  
OFFICER OF GREEN ISLAND GROCERY, INC.  
D/B/A 24 HOUR KING SUBS & NEWS, INC.

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, 1983  
through February 29, 1984.

---

DECISION

In the Matter of the Petition

of

GREEN ISLAND GROCERY, INC.

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 February 29, 1984.

---

In the Matter of the Petition

of

SHIRLEY DUBRAY,  
OFFICER OF GREEN ISLAND GROCERY, INC.

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 February 29, 1984.

---

Petitioner, Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., 26 Mohawk Street, Albany, New York 12204, 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, 1983 through February 29, 1984 (File No. 58050).

Petitioner, Shirley Dubray, officer of Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., 26 Mohawk Street, Albany, New York 12204, 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, 1983 through February 29, 1984 (File No. 58048).

Petitioner, Green Island Grocery, Inc., 165 Paine Street, Green Island, New York 12183, 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 February 29, 1984 (File No. 58049).

Petitioner, Shirley Dubray, officer of Green Island Grocery, Inc., 26 Mohawk Street, Albany, New York 12204, 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 February 29, 1984 (File No. 58802).

A consolidated hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Building Campus, Albany, New York, on August 19, 1986 at 1:15 P.M., with all briefs submitted by November 28, 1986. Petitioners appeared by Linnan, Shea & Flannery, **Esqs.** (James D. Linnan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUE

Whether petitioners filed petitions for a hearing with the State Tax Commission within ninety days from the date of the notices of determination and demands for payment of sales and use taxes due.

FINDINGS OF FACT

1. On October 24, 1984, the Audit Division issued to Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1983 through February 29, 1984, stating total tax due in the sum of \$8,646.12, penalty of \$1,451.14 and interest of \$1,096.22, for a total amount due of \$11,193.48.

2. On October 24, 1984, the Audit Division issued to Shirley Dubray, as an officer of Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1983 through February 29, 1984, stating total tax due of \$8,646.12, penalty of \$1,451.14 and interest of \$1,096.22, for a total amount due of \$11,193.48.

3. On October 24, 1984, the Audit Division issued to Green Island Grocery, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1981 through February 29, 1984, stating total tax due of \$17,389.68, penalty of \$3,987.62 and interest of \$5,319.90, for a total amount due of \$26,697.20.

4. On October 24, 1984, the Audit Division issued to Shirley Dubray, as an officer of Green Island Grocery, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1981 through February 29, 1984, stating total tax due of \$17,389.68, penalty of \$3,987.62 and interest of \$5,319.90, for a total amount due of \$26,697.20.

5. Each of the four aforementioned notices of determination were issued to the respective petitioners on October 24, 1984 at the addresses supplied by petitioner Green Island Grocery, Inc. in its small business corporation information report for the tax year 1983. A mailing log, date-stamped by the United States Postal Service and return receipts for each of the notices of determination with correlating article numbers, substantiated the issuance of said notices on October 24, 1984 and their receipt by the respective petitioners.

6. Petitioner Green Island Grocery, Inc. filed its 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 February 29, 1984 on January 23, 1985 by hand delivery to the Albany office of the Tax Appeals Bureau. Petitioner Shirley Dubray, as an officer of Green Island Grocery, Inc., 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 February 29, 1984 on January 23, 1985 by mail. Petitioner Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc. 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, 1983 through February 29, 1984 on January 23, 1985 by hand delivery to the Albany office of the Tax Appeals Bureau. Petitioner Shirley Dubray, as an officer of Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., 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, 1983 through February 29, 1984 on January 23, 1985 by hand delivery to the Albany office of the Tax Appeals Bureau. Each of the aforementioned petitions were filed on the ninety-first day after issuance of the four respective notices of determination and demands for payment of sales and use taxes due.

7. Petitioner Shirley Dubray, as officer of Green Island Grocery, Inc., disagreed with the Statement of Proposed Audit Adjustment sent to her on September 17, 1984. Her disagreement was expressed in a letter from James D. Linnan, Esq., which was sent to the Department on October 19, 1984, two days after the thirty day time limit had expired. The Statement of Proposed Audit Adjustment states on its face:

"Failure to either agree or disagree to this Statement of Proposed Audit Adjustment within 30 days will result in the issuance of a Notice of Determination for Sales and Use Taxes Due."

8. James D. Linnan, Esq., had not filed a Power of Attorney with the Department of Taxation and Finance prior to sending the letter disagreeing with the Statement of Proposed Audit Adjustment, and the earliest time Mr. Linnan could have been the authorized representative pursuant to the date on his Power of Attorney was November 30, 1984, over a month after the issuance of the notices of determination and demands for payment of sales and use taxes due issued to each of the four petitioners herein.

#### CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, that:

"Notice of such determination shall be given to the person liable for the collection or payment of tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it **is** assessed, within ninety days after giving 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 20 NYCRR § 601.3(c) states:

"(c) Time Limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition **is** filed by mail, it must be addressed to the particular operating bureau in Albany, New York. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope.... The petition may also be filed with the operating bureau, by delivery, during business hours, at the offices of the particular operating bureau in Albany, New York."

C. That the petitions of Green Island Grocery, Inc., Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., and Shirley Dubray, as an officer of Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., were not timely filed by delivery to the Tax Appeals Bureau **in** Albany, New York, since they were received by the Tax Appeals Bureau on January 23, 1985, the ninety-first day after issuance of the notices **of** determination and demands for payment of sales and use taxes due, dated October 24, 1984.

D. That the petition of Shirley Dubray, as officer **of** Green Island Grocery, Inc., was not timely filed **by** mail since the United States Postal Service postmark on the envelope containing said petition **is** marked January 23, 1985, the ninety-first day after issuance **of** the Notice of Determination and Demand for Payment **of** Sales and Use Taxes Due on October 24, 1984.

E. That section 1138(a) of the Tax Law clearly provides that the Tax Commission's determination **is** final unless the taxpayer applies for a hearing. **No** such hearing was requested and the fact that petitioners protested the Department's Statement **of** Proposed Audit Adjustment cannot serve to supplant the statutory requirement that a hearing be requested within ninety days of the Tax Commission's notice of determination (West Mountain Corp. v. State of New York Department of Taxation and Finance, 105 AD2d 989, 990, affd 64 NY2d 991).

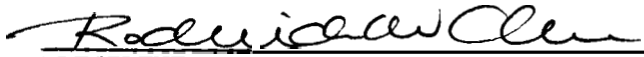
F. That the petitions of Green Island Grocery, Inc., Shirley Dubray, as officer of Green Island Grocery, Inc., Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., and Shirley Dubray, as officer of Green Island Grocery, Inc. d/b/a 24 Hour King Subs & News, Inc., are hereby denied and the notices of determination and demands for payment of sales and use taxes due, dated October 24,

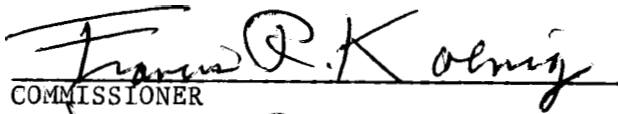
1984, are sustained, together with penalties and such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER