

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter	of the Petition	:	
	of	:	
CONNIE'S DELICATESSEN		:	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 September 1, 1977	:		
through August 31, 1980.	:		

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Petitioner, Connie's Delicatessen, c/o Margaret Fagan Hulbert, 6447 107th Terrace, Pinellas Park, Florida 33565, 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 September 1, 1977 through August 31, 1980 (File No. 60821).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 2, 1985 at 2:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed a petition for a hearing with the State Tax Commission.

II. Whether the Audit Division properly determined petitioner's additional sales tax due.

FINDINGS OF FACT

1. On November 20, 1980, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Blake Fagan and Margaret Fagan d/b/a Connie's

Delicatessen<sup>1</sup> in the amount of \$23,341.59, plus penalty of \$4,067.17 and interest of \$3,687.50, for a total due of \$31,096.26 for the period September 1, 1977 through August 31, 1980.

2. On February 26, 1981, petitioner wrote a protest letter to the Bronx District Office. This was the first correspondence from petitioner regarding the assessment. The Audit Division afforded petitioner the opportunity to resolve the matter at several conferences. Pursuant to additional information supplied by petitioner at the conferences, the assessment was reduced twice. A Notice of Assessment Review issued November 24, 1981 notified petitioner that the adjusted tax due was \$15,764.96, plus interest of \$3,601.79, for a total due of \$19,366.75. Petitioner disagreed with the revised assessment and filed a petition with the State Tax Commission on January 5, 1982.

3. The original notice of determination issued November 20, 1980 contained the following note in the upper left hand corner:

"NOTE: This determination shall be final unless an application for hearing is filed with the State Tax Commission within 90 days from the date of this notice or unless the Tax Commission shall redetermine the tax."

4. The Audit Division maintains that the petition was untimely and that accordingly petitioner has no right to a hearing. Petitioner argues that she was misled into believing that she still had time to file an appeal. Petitioner alleges that certain statements were made to her by Audit Division employees to the effect that she would not have to file an appeal until attempts at settlement had been exhausted. She also submitted letters which she maintains led her to

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1 Blake and Margaret Fagan have since divorced and only Margaret, whose current married name is Hulbert, appeared at the hearing. For the sake of convenience, all references to petitioner will be to her.

conclude that, as of November 2, 1981, she still had time to appeal the assessment. One letter, dated June 23, 1981, from Stuart Hefter, Director, District Office Audit Bureau, stated, in part:

"In the event this conference does not result in a resolution which you feel is satisfactory, Mr. Meyers will be happy to explain to you what your appellate rights are and how you may proceed."

Another letter, dated November 2, 1981, from Boris Meyers, District Tax Supervisor, stated, in part:

"Enclosed are copies of the revised worksheets and I have also enclosed a copy of the booklet (TA-9) informing you of the procedures in resolving the matter at a higher level."

5. Petitioner operated a small grocery store in partnership with her husband. Her husband left her in April, 1978 and petitioner continued to operate the business as a sole proprietorship. The store sold soda, beer, sandwiches, cigarettes, salads and cold cuts by the pound. Petitioner's books and records were incomplete having no original sales documents and missing purchase invoices. As a result, the auditor resorted to a markup test utilizing a two month test period of January and June, 1980. Purchase invoices available for those months were compared to selling prices supplied by petitioner to compute markup percentages for various items. Applying the markups to total purchases, the auditor arrived at additional taxable sales. The additional taxable sales represented a 103.36 percent increase over taxable sales as reported on sales tax returns.

#### CONCLUSIONS OF LAW

A. That a notice of determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 90 days after giving of notice of such determination, shall apply to the State Tax Commission for a hearing. Tax Law §1138(a)(1). The burden of proving timely application for

such hearing is upon petitioner. The original notice of determination was issued November 20, 1980 and, pursuant to section 1138(a)(1), an application for a hearing should have been filed by February 20, 1981. The first written communication which could be construed as such an application was petitioner's letter of February 26, 1981 which was sent beyond the last date for filing a petition. It is unfortunate that petitioner may have received any misinformation regarding appeal rights, however, this Commission is not bound by misinterpretations of the law by Department of Taxation and Finance employees. Certainly, no Audit Division employee has the authority to orally extend the time period specified by law for filing an application for hearing. It should also be noted that neither of the written communications discussed in Finding of Fact "4" can be interpreted as extending the application date; they merely advised petitioner of ways to determine what appellate rights she had available. Petitioner's application for a hearing was, therefore, untimely.

B. That in view of the foregoing, it is unnecessary to rule on the second issue raised by petitioner.

C. That the petition of Connie's Delicatessen is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 20, 1980, as revised, is sustained.

DATED: Albany, New York

**FEB 18 1986**

STATE TAX COMMISSION

*R. Andrew Allen*  
PRESIDENT

*Francis Q. Koenig*  
COMMISSIONER

*Mark J. Smith*  
COMMISSIONER