

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Islip Men's Shop Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 3/1/73 - 11/30/75. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Determination by mail upon Islip Men's Shop Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Islip Men's Shop Inc.
18 E. Suffolk Ave.
Islip, NY 11730

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
14th day of November, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of
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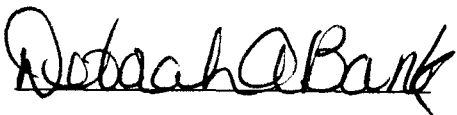
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Determination by mail upon Stephen Schneider the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

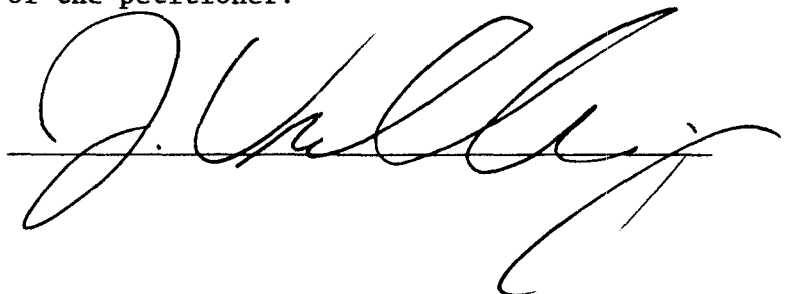
Mr. Stephen Schneider
733 Third Ave., Suite 901
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
14th day of November, 1980.


Notary Public



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

November 14, 1980

Islip Men's Shop Inc.
18 E. Suffolk Ave.
Islip, NY 11730

Gentlemen:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Stephen Schneider
733 Third Ave., Suite 901
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
ISLIP MEN'S SHOP, INC.	:	DETERMINATION
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, 1973 through November 30,	:	
1975.	:	

Applicant, Islip Men's Shop, Inc., 18 East Suffolk Avenue, Islip, New York 11730, filed an application 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, 1973 through November 30, 1975 (File No. 16398).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 25, 1979 at 10:45 A.M. Applicant appeared by Stephen Schneider, Esq. The Audit Division appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUE

Whether a markup of purchases audit by the Audit Division properly reflected the applicant's sales tax liability.

FINDINGS OF FACT

1. On August 6, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the applicant, Islip Men's Shop, Inc., for the period March 1, 1973 through November 30, 1975 in the amount of \$7,364.00 tax plus penalties and interest.

2. Applicant executed a consent extending the period of limitation for assessment to March 20, 1977.

3. The Audit Division found that the applicant did not issue sales invoices, with the exception of sales to the Boy Scouts of America. It also found that cash register tapes were not retained after the current deposits were made. In the absence of these records, the Audit Division proceeded to arrive at sales by marking up purchases. The Audit Division determined that purchases for the audit period were \$612,200.00. The Audit Division used the following computation to arrive at additional taxable sales.

<u>Item</u>	<u>Purchases</u>	<u>Markup</u>	<u>Sales</u>
Boy Scout and All Other Purchases	\$497,953.00	50%	\$746,929.00
Clothing for Hospital Sales	114,247.00	70%	194,221.00*
Audited Gross Sales			\$941,150.00
Less: Exempt Sales & Reported Taxable Sales			835,948.00
Additional Taxable Sales			<u>\$105,202.00</u>

*The hospital sales of \$194,221.00 were accepted as reported on the books. The 70 percent markup was used for the purpose of determining the amount of purchases applicable to hospital sales. The 70 percent was arrived at on the assumption that sales were generally marked up 100 percent and a 15 percent discount was given for sales made to hospital patients.

The Audit Division did not make an allowance for pilferage or for any increase or decrease in inventory.

4. The applicant contended that due to the cyclical nature of the business, the inventory on hand in November, 1975 was larger than that on hand during February, 1973. The applicant maintained that the purchases marked up for the audit period should be reduced by \$26,077.00, which is the difference between purchases paid for in February, 1973 and purchases paid for in November, 1975. Applicant failed to introduce inventory reports for these periods.

5. Applicant contended that hospital patients were given a 15 percent discount on all of their purchases. Therefore, it reasoned that the markup on such sales should be less than the markup on other sales (50 percent).

6. Applicant further contended that the markup categories used by the Audit Division were too broad and vague for the variety of items sold. Gross profit percentages were submitted for the vast categories of items sold along with their percentage in relation to total store sales and percentage sold at the initial markup. This evidence, however, was not conclusive to show that the overall markup percentage was less than 50 percent.

7. Applicant contended that some of its inventory was stolen or pilfered. During the audit period, applicant had losses through pilferage of 2 percent.

8. Sales to hospital patients were made at prevailing selling prices and discounts given thereon.

9. The applicant acted in good faith.

CONCLUSIONS OF LAW

A. That the Audit Division did not give proper consideration to the applicant's sales made to hospital patients; and that the purchases allocated to these sales are adjusted to reflect the same overall markup of 50 percent, as assigned to all other sales.

B. That additionally, it is reasonable to expect that in a retail business of this nature, some pilferage has occurred; and that an allowance of 2 percent is to be made to gross sales for such pilferage.

C. That the balance of the audit performed by the Audit Division on the applicant's available books and records was in accordance with section 1138(a) of the Tax Law; and that the basis for the application of the markup was proper.

D. That the penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the application of Islip Men's Shop, Inc. is granted to the extent indicated in Conclusions "A", "B" and "D" above; that the Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 6, 1976; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER