

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Howard Schneider	:	
d/b/a Schneider's Delicatessen	:	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	:	
12/1/73-11/30/77.	:	

State of New York
County of Albany

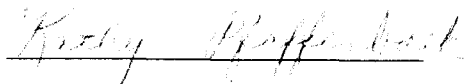
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Howard Schneider, d/b/a Schneider's Delicatessen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

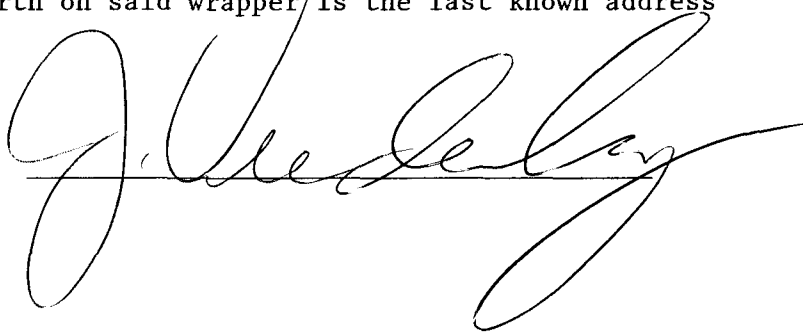
Howard Schneider
d/b/a Schneider's Delicatessen
c/o Joseph A. Gallo
1332 Forest Ave.
Staten Island, NY 10302

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
29th day of December, 1982.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

December 29, 1982

Howard Schneider
d/b/a Schneider's Delicatessen
c/o Joseph A. Gallo
1332 Forest Ave.
Staten Island, NY 10302

Dear Mr. Schneider:

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, 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Morris Liebman
Gallo & Liebman
1332 Forest Ave.
Staten Island, NY 10302
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Howard Schneider	:	
d/b/a Schneider's Delicatessen	:	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 12/1/73-11/30/77.	:	

State of New York
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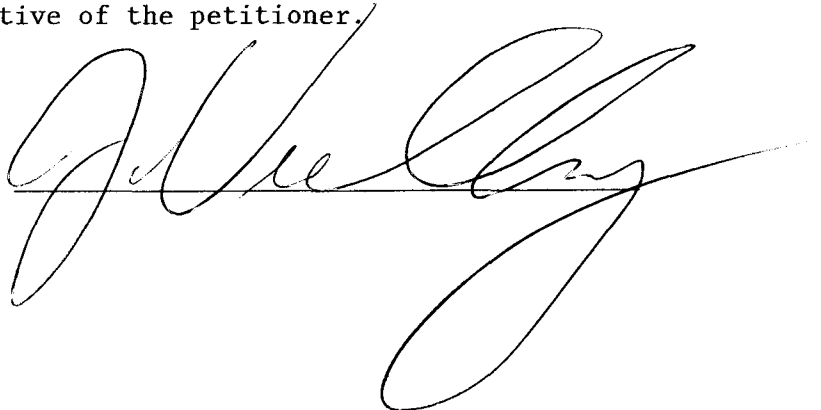
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Morris Liebman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris Liebman
Gallo & Liebman
1332 Forest Ave.
Staten Island, NY 10302

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
29th day of December, 1982.



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HOWARD SCHNEIDER	:	
d/b/a SCHNEIDER'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 December 1, 1973	:	
through November 30, 1977.	:	

Petitioner, Howard Schneider, d/b/a Schneider's Delicatessen, c/o Joseph A. Gallo, 1332 Forest Avenue, Staten Island, New York 10302, 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 December 1, 1973 through November 30, 1977 (File No. 31156).

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 April 28, 1982, at 9:15 A.M. Petitioner appeared by Morris Liebman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period December 1, 1973 through November 30, 1977.

FINDINGS OF FACT

1. During the period at issue, petitioner, Howard Schneider d/b/a Schneider's Delicatessen, operated a grocery store and delicatessen. Sometime thereafter, the business was sold.

2. On April 21, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1975 through November 30, 1977 for taxes due of \$22,000.00, plus penalty and interest of \$8,550.88, for a total of \$30,550.88. The taxes asserted on the foregoing notice were estimated when petitioner failed to respond to the Audit Division's request for certain information regarding the sale of the business.

3. At the time the above notice was issued, the Audit Division in Albany, New York was not aware that an audit of petitioner's books and records was in progress by the New York District Office. The audit disclosed additional taxes due of \$2,983.94 for the period December 1, 1973 through November 30, 1977.

Petitioner executed a consent to fixing of tax on May 17, 1978 whereby he agreed to the taxes found due on audit.

4. On July 21, 1978, petitioner was advised by letter that in accordance with the audit results the taxes estimated pursuant to the notice issued April 21, 1978 have been adjusted to \$2,032.03 and that a notice and demand will be issued for \$951.91 covering the period December 1, 1973 through February 28, 1975. The second notice was issued July 31, 1978. The total amount due, \$3,588.49 including minimum statutory interest, was subsequently paid by petitioner.

5. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1973 through November 30, 1976, to June 20, 1978.

6. On June 12, 1979, petitioner filed an application for a refund of the above \$3,588.49 paid as a result of the audit. Said claim was based on petitioner's contention that the audit overstated beer and soda sales to the extent that 95 percent of such items are sold in six packs rather than the 50 percent used on

audit. Additionally, petitioner contended that the audit did not give consideration to pilferage, breakage and spoilage which petitioner claimed was 5 percent of audited taxable sales.

7. The Audit Division denied petitioner's refund claim on July 21, 1979 on the grounds that petitioner failed to show, by documentary evidence, that the audit was incorrect.

8. On audit, the Audit Division determined taxable grocery sales by applying mark-up percentages to purchases of taxable items. An observation of the operation was made to compute taxable delicatessen sales. Purchases were adjusted to reflect an allowance of one half of one percent for pilferage. The mark-up determined for beer and soda considered that 50 percent was sold in six packs and 50 percent as individual units.

9. Petitioner did not keep a record of actual taxable sales. Such sales were estimated to be 28 percent of gross sales. Petitioner did not retain cash register tapes.

10. Petitioner offered no substantial evidence to establish that the allowances or adjustments referred to in Finding of Fact "8" above, were incorrect.

11. The additional taxable sales determined on audit were overstated by \$479.28 due to a computation error.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain sufficient books and records for the Audit Division to verify the accuracy of taxable sales reported or to determine such sales with any exactness; therefore, the Audit Division properly determined petitioner's sales from available information as provided in section

1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 64 AD 2d 44).

B. That petitioner agreed that the additional taxes found due on audit were owing to New York State; that his subsequent claim for refund of such taxes is not supported by any substantial evidence.

C. That in accordance with Finding of Fact "11", petitioner erroneously paid tax on sales of \$479.28.

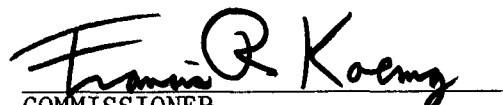
D. That the petition of Howard Schneider d/b/a Schneider's Delicatessen is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to refund the applicable tax plus interest; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER