

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

PAT DI PAOLA

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Sales & Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the ~~Year(s)~~ Period(s)
June 1, 1971 through August 4, 1972.

State of New York
County of Albany

Catherine Steele, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 30th day of November, 1976, she served the within
Notice of Determination by ~~(certified)~~ mail upon Pat DiPaola
~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Mr. Pat DiPaola
14 Briggs Street
Hicksville, New York
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)~~
~~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

30th day of November, 1976.

Janet Mack

Catherine Steele



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

November 30, 1976

TELEPHONE: (518) **457-3850**

Mr. Pat DiPaola
14 Briggs Street
Hicksville, New York

Dear Mr. DiPaola:

Please take notice of the **DETERMINATION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(s) **1138 & 1243** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,

Frank J. Puccia
Supervisor of Small
Claims Hearings

Enc.

cc: ~~Production's Representative~~

Taxing Bureau's Representative:

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
PAT DI PAOLA	:	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 June 1, 1971 through August	:	
4, 1972.	:	

Applicant, Pat DiPaola, 14 Briggs Street, Hicksville, New York, has 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 June 1, 1971 through August 4, 1972. A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 7, 1976, at 2:45 P.M. Applicant appeared pro se. The Sales Tax Bureau appeared by Peter Crotty, Esq., (Irwin Levy of counsel).

ISSUE

Was the margin of error, which was computed by the Sales Tax Bureau and applied to vendor's reported taxable sales, correct?

FINDINGS OF FACT

1. Applicant, Pat DiPaola, owned and operated a Carvel ice cream store in Hicksville, New York from 1968 to August 4, 1972, at which time he sold the business. The sales consisted of

ice cream cones, prepackaged ice cream and some miscellaneous dairy products.

2. Applicant computed his taxable sales daily, by restocking all shelf items to a predetermined capacity. This method was used in the absence of a cash register with a tax key.

3. The applicant, Mr. Pat DiPaola, filed New York State and local sales and use tax returns for the period June 1, 1971 through August 4, 1972.

4. Applicant, Pat DiPaola, timely filed a Notification of Sale, Transfer or Assignment in Bulk (ST274) with the Sales Tax Bureau which indicated the date of sale to be August 4, 1972. A check for \$1,575.00 was also remitted to the Sales Tax Bureau for the sales tax due on furniture, fixtures and equipment.

5. On October 11, 1972, the Sales Tax Bureau issued a Notice of Determination and Demand for payment of sales and use taxes due against applicant, Pat DiPaola, in the sum of \$1,544.67. The Sales Tax Bureau held 50% of the applicant's reported gross sales to be taxable, which resulted in the additional tax due.

6. The applicant, Pat DiPaola, filed a timely application for hearing to review determination on November 21, 1972.

7. The Sales Tax Bureau subsequently performed a bulk sale audit on the books and records of the applicant to determine the validity of the original assessment which held 50% of gross sales to be taxable. The Sales Tax Bureau reviewed purchases made during the period July 1, 1971 through June 30, 1972. These purchases were identified as to their use in reselling the taxable ice cream items. An allowance was given

for 50% of the cones and 66% of certain ice cream dishes which were to be sold tax exempt. The selling prices per item were then applied to the remaining number of cones, cups and dishes purchased to arrive at audited taxable sales. By comparing audited taxable sales to reported gross sales the taxable percentage was 38% as compared to the original 50%. The tax due was reduced to \$817.48, which the applicant, Pat DiPaola, paid.

8. The applicant, Pat DiPaola, offered no evidence that an allowance for the breakage of ice cream cones was a significant element of his business or that the allowance of 50% given for cones sold tax exempt did not reflect an element of breakage.

CONCLUSIONS OF LAW

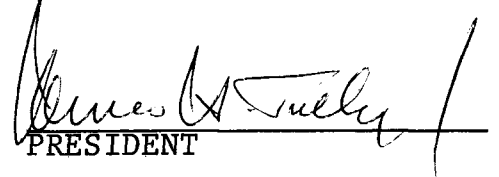
A. That the examination of applicant, Pat DiPaola's books and records by the Sales Tax Bureau was properly conducted as authorized in section 1142 of the Tax Law.

B. That the margin of error percentage computed by the Sales Tax Bureau and applied to applicant, Pat DiPaola's reported taxable sales, was correct and the resulting findings of additional sales tax due for the period June 1, 1971 through August 4, 1972 were supported by substantial evidence.

C. That the application of Pat DiPaola is denied and the Notice of Determination and Demand for payment of sales and use taxes due issued October 11, 1972 is sustained.

DATED: ALBANY, NEW YORK
November 30, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER