

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
FRANCIS G. LOLL d/b/a
FULTON'S STORE

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)~~ :
December 1, 1969 through November 30, 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 20th day of August, 1976, she served the within Notice of Determination by ~~registered~~ mail upon Francis G. Loll d/b/a Fulton's Store (~~representative of~~) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Francis G. Loll d/b/a
Fulton's Store
1128 Lake Street
Elmira, New York 14901
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

20th day of August, 1976

Catherine Steele

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

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FRANCIS G. LOLL d/b/a

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AFFIDAVIT OF MAILING

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 20th day of August, 1976, she served the within
Notice of Determination by ~~certified~~ mail upon Gerald E. DeFilippo, Esq.

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Gerald E. DeFilippo, Esq.
408 East Church Street
Elmira, New York 14901

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

20th day of August, 1976

Catherine Steele

Janet Mack



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

August 20, 1976

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

Francis G. Loll d/b/a
Fulton's Store
1128 Lake Street
Elmira, New York 14901

Dear Mr. Loll:

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,

Paul B. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
FRANCIS G. LOLL	:	DETERMINATION
d/b/a FULTON'S STORE	:	
for Revision of a Determination or for	:	
the Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the period December 1, 1969 through	:	
November 30, 1972.	:	

Applicant, Francis G. Loll, d/b/a Fulton's Store, 1128 Lake Street, Elmira, New York 14901, applied 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, 1969 through November 30, 1972.

A formal hearing was held at the offices of the State Tax Commission, State Office Building, 44 Hawley Street, Binghamton, New York, on October 8, 1974 at 1:30 p.m. before L. Robert Leisner, Hearing Officer. The hearing was continued at the same location on April 22, 1975 at 9:30 a.m. The taxpayer appeared by Gerald E. DeFilippo, Esq. The Sales Tax Bureau appeared by Saul Heckelman, Esq. (Alexander Weiss, Esq. of counsel).

ISSUE

Whether the determination of additional sales and use taxes found due, based upon a Sales Tax Bureau audit of the taxpayer's available records for one calendar quarter, was correct for the period December 1, 1969 through November 30, 1972?

FINDINGS OF FACT

1. The taxpayer, Francis G. Loll, timely filed all required sales and use tax returns for the period December 1, 1969 through November 30, 1972.
2. None of the sales tax returns reported gross sales for the period covered.
3. After a field audit by the Sales Tax Bureau, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 18, 1973 was issued to the taxpayer under File No. 90,750,602 for additional sales tax of \$6,392.11 plus penalty and interest of \$1,494.53 for a total of \$7,886.64.
4. The taxpayer operates a neighborhood grocery store at 1128 Lake Street, Elmira, New York. Items sold at the store include food, cigarettes and other tobacco products, candies, soft drinks, beer and other miscellaneous products.
5. The taxpayer recorded daily totals of retail sales without differentiation as to taxable items, the amount of sales tax collected on individual sales, or the total amount of taxable sales.
6. The petitioner did a large volume of business in the sale of "penny candies", i.e., candy and gum selling for ten cents or less upon which he collected no sales tax.

7. On June 23, 1972, a catastrophic flood inundated the Elmira area, including the taxpayer's store. Water damage destroyed the taxpayer's financial records for the period in issue.

8. Examiners of the Sales Tax Bureau made a field audit of the taxpayer's business in May, 1973. All purchase invoices for the period from September 1, 1972 through November 30, 1972 were individually examined. Categories of products were set up and the amount of purchases in each category was determined from the purchase invoices.

The mark-up percentage for each category was computed by taking the cost from the purchase invoice and comparing it with the selling price as stated by the taxpayer. Total purchases in each category were multiplied by the mark-up percentage to ascertain corrected taxable sales for the test period.

9. Mark-up percentages varied from 123.42 for beer to 149.34 for miscellaneous taxable items on total purchases of \$11,447.91 of taxable items in the test quarter under review.

10. Purchase invoices for beer alone amounted to \$2,756.41. At a mark-up of 123.42 percent, the estimated taxable sales of beer amounted to \$3,401.96. For this period, the taxpayer, Francis G. Loll, reported taxable sales for all taxable items as \$3,349.72. Beer sales alone were 128% of reported total taxable sales.

11. In the absence of records of gross sales, sales tax collected, and segregated receipts from taxable sales, computation of estimated taxable sales was made by the Sales Tax Bureau based upon the available

records of the taxpayer. These were limited largely to purchase invoices. The purchase invoices for the period were complete and accurate.

12. The hearing developed that in the post-flood period immediately preceding the test audit period, there was an inordinately large amount of merchandise purchased which was not resold. Much was pilfered and a considerable amount was donated. There was no record available of the extent to which these factors affected the actual amount of taxable sales in the test audit period.

However, considering the extraordinary circumstances prevailing for the test period, and the unavailability of records for other periods, it may be postulated that at least seventy-five percent of the taxable items purchased by the taxpayer, Francis G. Loll, were sold and the sales tax collected. Based upon the actual purchase invoices audited, the computed taxable purchases would then be \$7,565.93. Compared with the taxable sales of \$3,349.72 reported by the taxpayer for this test period, the percentage of error is 231.8%. This cannot be an accurate figure but is as exact as can be obtained in view of the failure of the taxpayer to complete his sales tax returns in accordance with Sales Tax Bureau instructions which require sales tax returns to separately state gross sales, taxable sales and sales tax collected. Any error in applying the percentage of error to reported sales tax figures may result in understating the sales tax owed by the taxpayer, since the error factor gives full consideration to the possible atypical nature of the only available test period.

13. This determination is limited to the audit of the period December 1, 1969 through November 30, 1972 and the records and tax returns related to that period.

14. The taxpayer filed a timely application for a hearing to review the determination of the Sales Tax Bureau.

CONCLUSIONS OF LAW

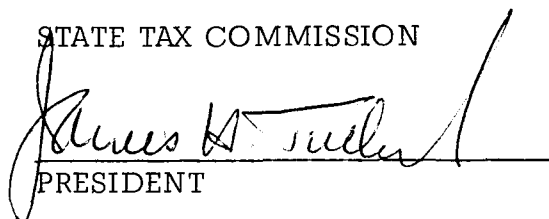
A. That in the light of unavailability of the applicant's records for all but the test period following a flood catastrophe, and the palpable lack of an accurate reporting by the taxpayer of his gross sales, taxable sales and sales tax collected, application by the Sales Tax Bureau of a margin of error percentage to reported taxable sales to arrive at the actual taxable sales for the period under review was both necessary and lawful.

B. That section 1136(a) of the Tax Law mandates that every person required to register and collect sales tax shall file quarterly returns showing the aggregate value of tangible personal property and services sold by him. The taxpayer, Francis G. Loll, failed to show gross sales on his sales tax returns.

C. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is modified to the extent that the amount of sales tax due for the period December 1, 1969 through November 30, 1972 shall be revised to \$2312.96 plus penalties and interest, and that except as so granted, the petition in all other respects is denied.

DATED: Albany, New York
August 20, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER