

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

AGOSTINO D'ALESSIO and ANNA D'ALESSIO

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)
September 1, 1970 through April 13, 1973

State of New York
County of Albany

John Huhn, 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 13th day of October, 1978, she served the within

Notice of Determination by ~~Registered~~ mail upon Agostino & Anna D'Alessio

~~Representative of~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Agostino & Anna D'Alessio
1908 Hunt Avenue
Bronx, New York 10462

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

13th day of October, 1978.

JP Walker

John Huhn



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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

October 13, 1978

Agostino & Anna D'Alessio
1908 Hunt Avenue
Bronx, New York 10462

Dear Mr. & Mrs. D'Alessio:

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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

JOSEPH CHYRTKATT
HEARING EXAMINER

~~CONFIDENTIAL~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
AGOSTINO and ANNA D'ALESSIO	:	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 September 1, 1970 through	:	
April 13, 1973.	:	

Applicants, Agostino and Anna D'Alessio, 1908 Hunt Avenue, Bronx, New York 10462, 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 September 1, 1970 through April 13, 1973 (File No. 10292).

A small claims hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 1, 1977 at 10:45 A.M. Applicants appeared pro se. The Sales Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether additional sales tax was due from applicants for the period September 1, 1970 through April 13, 1973.

FINDINGS OF FACT

1. On July 17, 1972, applicants, Agostino and Anna D'Alessio, purchased a retail stationery and candy business located at 3207 Westchester Avenue, Bronx, New York, from Raymond and Dorothy Ripollone for \$6,000.00. Applicants failed to notify the Tax Commission of the proposed sale as required by section 1141(c) of the Tax Law.

2. On November 27, 1973, as the result of an audit the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants for taxes due of \$6,788.58, plus penalty and interest, for the period September 1, 1970 through April 13, 1973. Said Notice included sales tax of \$70.00 on the purchase of fixtures, which was subsequently paid.

3. From the time of purchase until they sold the business on April 13, 1973 (a period of approximately nine months), applicants' sales consisted mainly of newspapers, magazines, candy and cigarettes.

4. The audit covered a three-year period and included a period of approximately 23 months prior to applicants' purchase of the business, since applicants failed to notify the Tax Commission of the proposed sale. During the 23-month period, the business had been operated by Raymond and Dorothy Ripollone.

5. On audit, the Sales Tax Bureau examiner found that the records consisted of worksheets showing checkbook disbursements, Federal tax returns and sales tax returns. The examiner found that during the period at issue (September 1, 1970 through April 13, 1973), applicants' and the previous owners' checkbook disbursements totaled \$108,915.00, of which approximately \$77,000.00 was for taxable items. The sales tax returns filed for this period indicated gross sales of \$140,076.00 and taxable sales of \$15,700.00, or a taxable ratio of 11%.

6. The examiner analyzed checkbook disbursements for the months of August of 1972 and February of 1973 and found that the various categories of applicants' purchases (as percentages of applicants' total purchases) were as follows: newspapers and magazines - 34%; cigarettes - 25%; candy - 24%; stationery - 14%; coffee, ice cream and soda - 1% each. The examiner applied the percentage of taxable items included in these categories to total checkbook disbursements, added the appropriate mark-up, and determined taxable sales of \$91,921.00. The examiner also determined additional taxable sales of \$25,105.00 attributable to items not purchased by check, e.g., bread, rolls, milk, cake, syrup and sundry (50% of which were deemed taxable when sold). Audited taxable sales of

\$117,026.00 represented a taxable ratio of 83%. This ratio was applied to reported gross sales for the audit period to determine additional taxable sales and the additional taxes due.

7. The applicants took exception to the test months used by the sales tax examiner. They contended that purchases for August of 1972 were greater than average, since they had purchased the business the previous month and were replenishing stock. Applicants also contended that purchases for February of 1973 were greater than usual because they were replenishing stock after the holiday season and further, that taxable items such as stationery and greeting cards sold by the prior owner were discontinued when applicants purchased the business. Applicants submitted no documentary or other substantial evidence to support their contentions.

8. Applicants knew nothing of their bookkeeping obligations and at all times during their operation of the business relied on their attorney, one Jack M. Marder, to maintain their books and records. Mr. Marder prepared applicant's sales tax returns. Mr. Marder had also maintained the former owners' books and records and prepared their sales tax returns as well.

CONCLUSIONS OF LAW

A. That the additional sales taxes found due by the Sales Tax Bureau, based on an audit of applicants' books and records,

were determined "from such information as may be available," in accordance with the meaning and intent of section 1138(a) of the Tax Law.

B. That applicants failed to sustain the burden of proof required to show that the additional taxes due (as determined by the Sales Tax Bureau) were incorrect.

C. That the penalties are cancelled and interest is reduced to the minimum statutory rate.

D. That the application of Agostino and Anna D'Alessio is granted to the extent indicated in Conclusion "C," above; that allowance is to be made for the payment referred to in Finding of Fact "2"; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 27, 1973, and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
October 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER