

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

BERGERS AT WESTBURY, INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~Year(s)~~ Period(s) :
March 1, 1972 through February 28, 1975.

State of New York
County of Albany

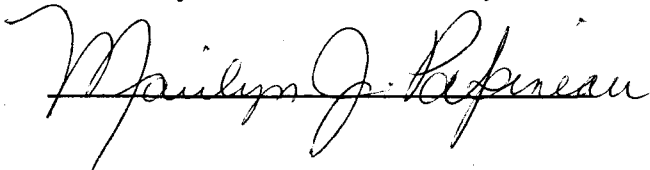
John Huhn , being duly sworn, deposes and says that
He is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 15th day of March , 1979 , he served the within
Notice of Determination by (~~certified~~) mail upon Bergers at Westbury,
Inc. (~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Bergers at Westbury, Inc.
594 Old Country Rd.,
Westbury, NY 11590

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

15th day of March , 1979.


Marilyn J. Repareau


John Huhn

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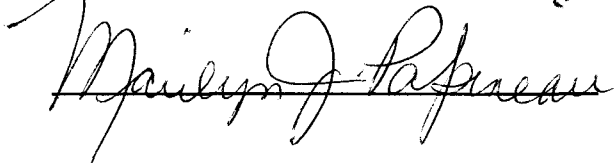
John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 15th day of March , 19 79, she served the within
Notice of Determination by (~~certified~~) mail upon Marvin Poris, P.A.

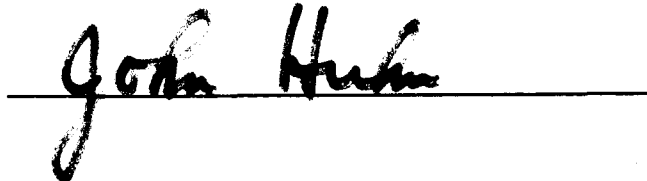
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Marvin Poris, P.A.
c/o Singer and Poris, Acc'ts
1120 Old Country Road
Plainview, NY 11803
and by depositing same enclosed in a postpaid properly addressed 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

15th day of March , 1979.







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

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

March 15, 1979

Bergers at Westbury, Inc.
594 Old Country Road
Westbury, NY 11590

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 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 Chyrywaty
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
BERGERS AT WESTBURY, 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, 1972 through :
February 28, 1975. :
:

Applicant, Bergers At Westbury, Inc., 594 Old Country Road, Westbury, New York 11590, 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, 1972 through February 28, 1975 (File No. 13007).

A small claims hearing was held before Raymond Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 16, 1977 at 1:15 P.M. Applicant appeared by Alan Singer, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUE

Whether the taxable sales computed by the Sales Tax Bureau and the determination of additional sales taxes due were correct.

FINDINGS OF FACT

1. Applicant, Bergers at Westbury, Inc., filed New York state and local sales and use tax returns for the period March 1, 1972 through February 28, 1975.

2. On January 30, 1976 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 applicant for \$16,306.94, plus penalty and interest, for the period March 1, 1972 through February 28, 1975.

3. During the period at issue, applicant operated a retail kosher delicatessen with facilities for on-premises consumption. Sales consisted mainly of hot and cold sliced meats, sandwiches, smoked fish, salads and appetizers. On audit, the Sales Tax Bureau's examiner conducted observation tests at applicant's premises on a Thursday in June of 1975, and on a Monday in October of 1975, to determine the taxable sales' ratio. This ratio was weighed to allow for a greater percentage of non-taxable sales on weekends. The examiner's test disclosed a weighted taxable ratio of 65.5% and audited taxable sales for the entire audit period of \$464,024.16. Reported taxable sales were subtracted from audited taxable sales, resulting in additional taxable sales of \$230,541.00.

4. The examiner also found purchases subject to use tax totaling \$2,478.00, which were not contested by applicant. The additional taxable sales, plus the purchases subject to use tax, resulted in the above Notice.

5. Applicant did not retain register tapes or guest checks.

6. Applicant contended that the results of a two-day test by the Sales Tax Bureau were not representative of its tax liability for the three-year period. Applicant argued that the business activities changed gradually during the audit period to that of a kosher delicatessen, so that there may have been a higher taxable ratio at the time of the Sales Tax Bureau's observation tests.

7. Applicant presented in evidence tests of sales consisting of a Monday, Thursday, Saturday and two Sundays in October of 1976. The register tapes submitted with the test summaries did not indicate taxable or non-taxable sales, nor sales tax charged.

CONCLUSIONS OF LAW

A. That the method used by the Sales Tax Bureau to determine taxable sales and resultant sales tax liability were correct, according to the meaning and intent of section 1138(a) of the Tax Law.

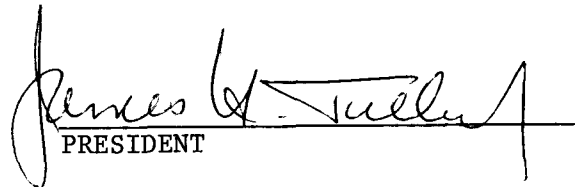
B. That applicant, Bergers at Westbury, Inc., has not presented sufficient documentary evidence to sustain the burden of proof necessary to refute the findings of the Sales Tax Bureau.

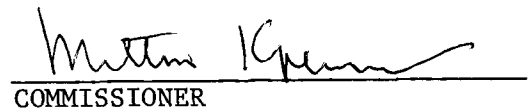
C. That the application of Bergers at Westbury, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 30, 1976 is sustained.

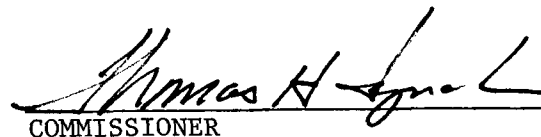
DATED: Albany, New York

March 15, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER