

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
ACP Superette Inc. (Seller) :
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 3/1/72-2/28/75. :

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 26th day of November, 1979, he served the within notice of Determination by mail upon ACP Superette Inc. (Seller), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

ACP Superette Inc. (Seller)
30 Fairview Pl.
Bronx, NY

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
26th day of November, 1979.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
ACP Superette Inc. (Seller) :
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 3/1/72-2/28/75. :

AFFIDAVIT OF MAILING

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 26th day of November, 1979, he served the within notice of Determination by mail upon Robert Wein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

CPA Robert Wein
570 Seventh Ave.
New York, NY 10018

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
26th day of November, 1979.

Jeannette Knapp

J. Vredenburg

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

November 26, 1979

ACP Superette Inc. (Seller)
30 Fairview Pl.
Bronx, NY

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert Wein
570 Seventh Ave.
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
ACP SUPERETTE, INC. (Seller)	:	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, ACP Superette, Inc. (Seller), c/o Angel Concepcion, president, 30 Fairview Place, Bronx, New York, 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. 17010).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 21, 1978 at 9:15 A.M. Applicant appeared by Robert Wein, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued by the Sales Tax Bureau against applicant properly reflects applicant's sales and use tax liability for the period March 1, 1972 through February 28, 1975.

FINDINGS OF FACT

1. Applicant, ACP Superette, Inc. (Seller), operated a grocery store at 1639 University Avenue, Bronx, New York, during the period March 1, 1972 through February 28, 1975.

2. Applicant filed and paid sales tax totaling \$1,263.95 for five of the twelve quarters in said period.

3. On March 6, 1975, the Sales Tax Bureau received a Notification of Sale, Transfer or Assignment in Bulk (Form ST-274) signed by the president of University Superette, Inc. (Purchaser), which was dated February 28, 1975. The scheduled date of sale of the business was stated to be February 28, 1975, with the total sales price being \$27,750.00, and with \$1,000.00 being the sales price of the furniture, fixtures, etc.

4. On August 22, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for the period March 1, 1972 through February 28, 1975 for taxes due of \$10,396.13. Said amount was reduced to \$9,516.33 after applying payments of \$287.00 and \$592.80 which were received from the purchaser for the sales tax quarters ended November 30, 1974 and February 28, 1975, respectively.

5. The Sales Tax Bureau determined that applicant's books and records were incomplete for audit purposes. As an alternative, it conducted an observation test of sales made by the purchaser, University Superette, Inc. The one-day observation test revealed that the purchaser had daily gross sales of \$272.00, and that 51% of the purchaser's sales were taxable. The Sales Tax Bureau projected the \$272.00 in daily sales over the audit period, which resulted in gross sales by applicant of \$297,024.00, with 51% of these sales being held taxable. In addition, the Sales Tax Bureau place a value of \$10,000.00 on the tangible personal property transferred in the bulk sale.

6. The Sales Tax Bureau projected the finding of the observation test and the tax due on the restated value of the tangible personal property transferred in the bulk sale transaction. This resulted in additional sales and

use tax due of \$10,396.13, which was ultimately reduced to \$9,516.33, as stated in Finding of Fact "4".

7. The Contract for Sale of Business made on October 21, 1974 between the purchaser and the seller stated that the value of the fixtures in the bulk sale was \$1,000.00, which was a true value of the fixtures transferred.

8. Applicant contended that the total sales recorded on its books for the period March 1, 1972 through August 31, 1974 are correct and that projected through February 28, 1975, the total sales should be \$197,472.00. It also contended that based on an analysis of purchases per its books, taxable sales are 38.5% of total sales. Applicant's summary of returns reveal an overall average of taxable sales of 23%.

CONCLUSIONS OF LAW

A. That applicant, ACP Superette, Inc. (Seller), failed to present records which are required to be kept in accordance with the meaning and intent of section 1135 of the Tax Law. Because of the incomplete records presented by applicant, the Sales Tax Bureau properly conducted the audit using such information and external indices as may be available, in accordance with the meaning and intent of section 1138(a) of the Tax Law.

B. That the additional tax due of \$720.00 which was assessed on tangible personal property transferred in the bulk sale is to be deleted from the assessment, based on Finding of Fact "7".

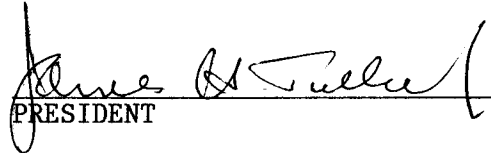
C. That the application of ACP Superett, Inc. (Seller) is granted to the extent of reducing the additional taxes due for the period March 1, 1972 through February 28, 1975 from \$9,516.33 to \$8,796.33, as indicated in Conclusion of Law "B"; that the Sales Tax Bureau is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued


August 22, 1975; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

NOV 26 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER