

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
James March :
d/b/a Al & Jim's Grocery & Deli. : 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 12/1/69-5/31/75. :

State of New York
County of Albany

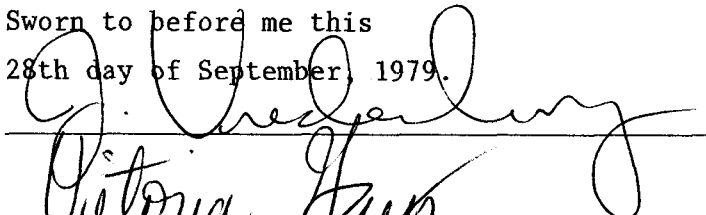
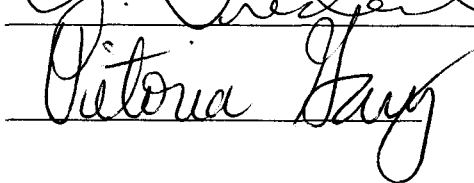
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by mail upon James March, d/b/a Al & Jim's Grocery & Deli., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James March
d/b/a Al & Jim's Grocery & Deli.
9818 4th Ave.
Brooklyn, NY 11209

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
28th day of September, 1979.

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

James March
d/b/a Al & Jim's Grocery & Deli.
9818 4th Ave.
Brooklyn, NY 11209

Dear Mr. March:

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,

A handwritten signature in dark ink, appearing to read "John J. Sollecito", written in a cursive style.

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 1, 1978 at 2:45 P.M. Applicant appeared pro se. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau's audit of applicant's books and records properly reflected applicant's additional sales tax liability.

FINDINGS OF FACT

1. On March 11, 1974 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 \$5,977.56, plus

penalty and interest of \$1,977.25, for a total of \$7,954.81, for the period December 1, 1969 through November 30, 1972.

2. Applicant operated a delicatessen which sold cold cuts, salads and sandwiches, as well as beer, soda and cigarettes. The business was sold on May 20, 1975.

3. On audit, the Sales Tax Bureau analyzed purchases of resale items for the months of February and August of 1972. The purchases were categorized as taxable or nontaxable when resold. The taxable purchases represented 30.6% of total purchases for the two-month test period. Because the analysis of purchases did not reflect the sale of prepared foods, the taxable ratios were increased to 35% for periods prior to July 1, 1971 and to 40% for periods thereafter.

The Sales Tax Bureau estimated applicant's markup percentage to be 25%. This percentage was applied to purchases obtained from the general ledger to determine audited gross sales of \$210,650.70 prior to July 1, 1971, and \$208,632.93 for subsequent periods. The taxable ratios of 35% and 40% were applied to the gross sales to arrive at audited taxable sales of \$157,180.92. Reported taxable sales of \$66,419.00 were deducted from this amount, leaving additional taxable sales of \$90,752.71, with tax due thereon of \$5,977.56.

4. On December 11, 1975, the Sales Tax Bureau issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for the period December 1, 1972 through May 20, 1975, in the amount of \$6,191.86, plus penalty and interest of \$2,179.18, for a total of \$8,371.04. Said Notice was issued when the Sales Tax Bureau was notified that the business was being sold.

The tax was computed by using the margin of error determined from the audit findings described in Finding of Fact "3".

5. Applicant made \$996.30 in sales of taxable items to exempt organizations during 1972. Since 1972 was representative of applicant's business activity, exempt sales for the period December 1, 1969 through November 30, 1972 are determined to be \$2,989.00.

6. Applicant failed to submit any other evidence to show that the audit findings were incorrect.

CONCLUSIONS OF LAW

A. That the audit conducted by the Sales Tax Bureau did not give consideration to sales of taxable items made to exempt organizations; therefore, the additional taxable sales are reduced by \$2,989.00 for the period December 1, 1969 through November 30, 1972. The margin of error used to compute the tax due on the Notice issued December 11, 1975 will be adjusted to reflect a similar ratio of exempt sales.

B. That in all other respects, the Sales Tax Bureau's audit of applicant's books and records followed generally accepted audit procedures consistent with the nature of applicant's business operation.

C. That the application of James March d/b/a Al and Jim's Grocery and Delicatessen, is granted to the extent indicated in Conclusion of Law "A"; that the Sales Tax Bureau is hereby directed to accordingly modify the notices of determination and demand issued March 11, 1974 and December 11, 1975, together with interest

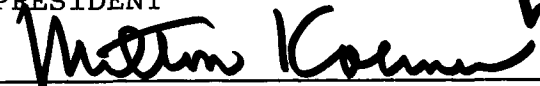
computed at the minimum statutory rate; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER