

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

New Delsen's Inc. :

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 12/1/73 - 8/31/76. :

State of New York

County of Albany

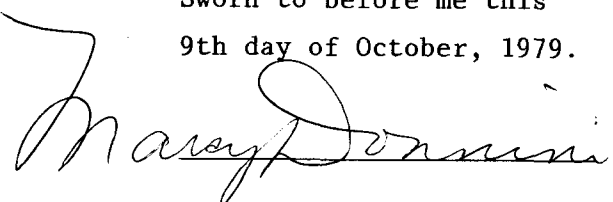
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Determination by mail upon Seymour Levy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

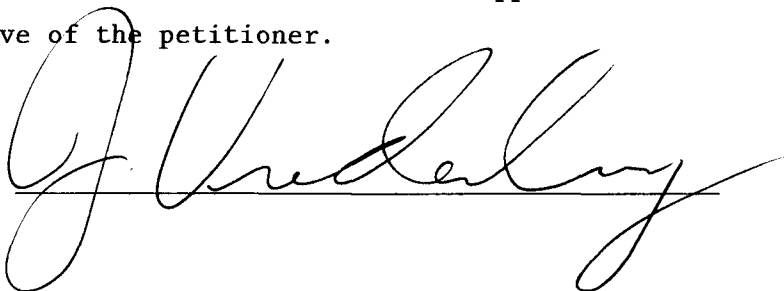
Mr. Seymour Levy
63-25 Saunder St.
Rego Park, NY 11374

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
9th day of October, 1979.

Mary Donnan

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of

New Delsen's Inc.

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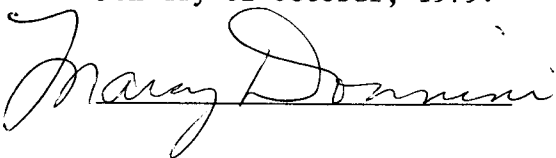
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1979, he served the within notice of Determination by mail upon New Delsen's Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

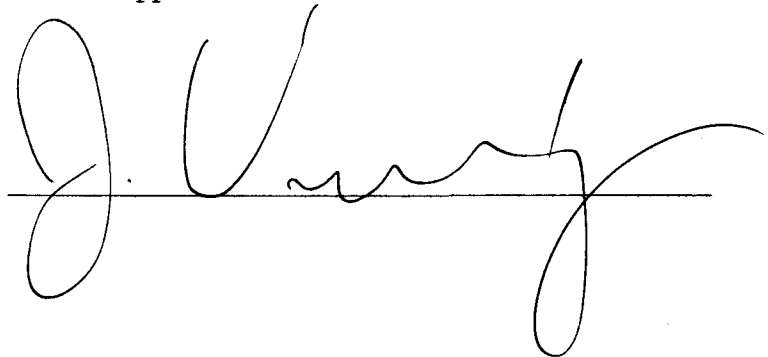
New Delsen's Inc.
43 E. Main St.
Bay Shore, NY 11706

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
9th day of October, 1979.


Mary Donneni


Jay Vredenburg

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

October 9, 1979

New Delsen's Inc.
43 E. Main St.
Bay Shore, NY 11706

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

Sincerely,

STATE TAX COMMISSION

cc: Petitioner's Representative
Seymour Levy
63-25 Saunder St.
Rego Park, NY 11374
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
NEW DELSENS, 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 December 1, 1973 through	:	
August 31, 1976.	:	

Applicant, New Delsens, Inc., 43 East Main Street, Bayshore, New York 11706, 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 December 1, 1973 through August 31, 1976 (File No. 18908).

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 December 1, 1978 at 9:15 A.M. Applicant appeared by Seymour Levy, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the results of an observation test and markup-of-purchases audit by the Sales Tax Bureau properly reflect applicant's sales tax liability.

FINDINGS OF FACT

1. Applicant, New Delsens, Inc., a kosher-style restaurant/delicatessen, filed New York State sales and use tax returns for the period December 1, 1973 through August 31, 1976. On these returns, applicant reported an overall taxable ratio of 34%.

2. The Sales Tax Bureau obtained timely consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of

the Tax Law from applicant.

3. On April 6, 1977, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against New Delsens, Inc., and Martin Levy and Robert Topper, individually and as officers. Said Notice was issued as the result of a field audit which disclosed additional sales tax due of \$14,714.85, plus penalty and interest of \$6,480.93, for a total due of \$21,195.78, for the period December 1, 1973 through August 31, 1976.

4. The Sales Tax Bureau's auditor conducted an observation test of applicant's sales for December 15, 1976 (a Wednesday) which disclosed a taxable ratio of 64.3%. The auditor then conducted a markup test on nontaxable items, which resulted in a markup of 100%. The markup on taxable items was estimated to be 150%. The overall markup of both taxable and nontaxable items was 131.12%. Total purchases per records of \$227,727.04 were marked up 131.12%, which resulted in audited sales of \$526,322.73. The application of the taxable ratio of 64.3% resulted in audited taxable sales of \$338,425.50. Credit of \$128,198.00 was made for taxable sales reported, which resulted in additional taxable sales of \$210,237.50 and additional sales tax due of \$14,174.85.

5. Based on a re-examination by the Sales Tax Bureau of applicant's records, the following adjustments to the original assessment were recommended:

- (a) That total purchases of \$227,727.04 be reduced by paper products of \$5,486.61 included in purchases, and by an allowance of \$4,320.00 for employee meals.
- (b) That the average markup ratio percentage of 131.12% be reduced to 122.3%.
- (c) That the taxable ratio percentage of 64.3% be reduced

to 50.52%.

- (d) That the additional sales tax due, after the above adjustments are made, be reduced from \$14,714.85 to \$8,157.77.

6. Applicant contended that the revised audited taxable sales ratio was too high, although it stated that the taxable sales ratio that was reported (34%) might be low. Applicant presented no documentary or other substantial evidence to show that the revised taxable sales ratio of 50.52% was erroneous.

CONCLUSIONS OF LAW

A. That the Sales Tax Bureau's determination of additional sales taxes due, as adjusted on re-examination (Finding of Fact "5"), was correct, within the meaning and intent of section 1138(a) of the Tax Law.

B. That the application of New Delsens, Inc. is granted to the extent indicated in Finding of Fact "5"; 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 on April 6, 1977; and that, except as so granted, the application is in all other respects denied.

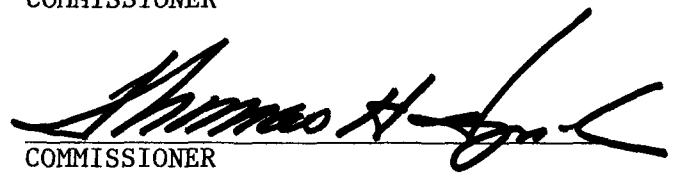
DATED: Albany, New York

OCT 9 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER