

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Star Supermarket, 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 of the Tax Law :  
for the Period 6/1/68-8/31/74. :

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 18th day of September, 1979, he served the within notice of Determination by mail upon Star Supermarket, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Star Supermarket, Inc.  
175 Humboldt St.  
Rochester, NY 14610

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  
18th day of September, 1979.

Jay J. Vredenburg  
Victoria Henry

STATE OF NEW YORK  
STATE TAX COMMISSION

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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 18th day of September, 1979, he served the within notice of Determination by mail upon Justin L. Vigdor 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. Justin L. Vigdor  
Martin, Dutcher, Mousaw, Vigdor & Reeves  
25 E. Main St.  
Rochester, NY 14614

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

18th day of September, 1979.

Jay J. Vredenburg  
Victoria Gary

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

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

September 18, 1979

Star Supermarket, Inc.  
175 Humboldt St.  
Rochester, NY 14610

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,

A handwritten signature in black ink, appearing to read "Alayn J. Mendez". The signature is fluid and cursive, with the first name "Alayn" being more prominent and the last name "Mendez" following in a similar style.

cc: Petitioner's Representative  
Justin L. Vigdor  
Martin, Dutcher, Mousaw, Vigdor & Reeves  
25 E. Main St.  
Rochester, NY 14614  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
STAR SUPERMARKETS, INC.,	:	
WALLACE E. FEARNLEY and WILLIAM A. JENNY,	:	DETERMINATION
Individually and as Officers	:	
for Revision of a Determination of for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Period June 1, 1968 through August 31,	:	
1974.	:	

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Applicants, Star Supermarkets, Inc., Wallace E. Fearnley and William A. Jenny, individually and as officers, 175 Humboldt Street, Rochester, New York 14610, 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 June 1, 1968 through August 31, 1974 (File No. 10311).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 20, 1976. The hearing was continued and held on October 21, 1976, October 22, 1976, December 21, 1976, March 9, 1977 and March 10, 1977. Applicants appeared by Martin, Dutcher, Mousaw, Vigdor & Reeves (Justin L. Vigdor, Esq. and Robert J. Pearl, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the determination and demand for payment of sales and use taxes against applicant Star Supermarkets, Inc. was proper.

II. Whether assessments for any part of the period in issue are barred by the statute of limitations.

FINDINGS OF FACT

1. On June 19, 1975 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 Star Supermarkets, Inc. for the period June 1, 1968 through August 31, 1974, in the amount of \$516,729.23, plus penalty and interest of \$210,141.36, for a total due of \$726,870.59.

2. Applicant Star Supermarkets, Inc. is a supermarket grocery chain of forty stores, operating in six counties in the western New York area. It timely filed sales tax returns during the periods in issue and consented to extend the periods of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law.

Its system of accounting commenced with its cash register tapes. The registers were balanced daily with cash on hand. Final figures for sales and sales tax collected were telephoned to the data processing department and were accumulated into the accounts ledger.

3. In an audit of applicant Star Supermarkets, Inc. for the period June 1, 1968 to November 30, 1972 completed on January 29, 1973, the Sales Tax Bureau's examiner found that no additional sales tax was

due and that a certain amount of use taxes was due for various purchases. This was to be modified due to nonrecurring items, such as the remodeling of various stores and new stores being opened. Available records were sales journal, cash receipts journal, cash register tapes, ledger accounts, purchases journal, check disbursements journal, purchase invoices, cancelled checks, copies of sales tax returns and sales tax summary worksheets. The examination of sales tax records disclosed that Star Supermarkets, Inc. reported and paid sales tax collected and that proper sales tax was reported upon examination and correlation of cash register tapes, daily cash receipts tapes and computer ledger runs.

4. Another audit conducted in October of 1973 on applicant Star Supermarkets, Inc. involving the test period of June 17, 1972 to June 16, 1973 and using schedules prepared by its assistant comptroller, could not be used because innumerable adjustments had to be made and the arbitrary percentages used were not tested satisfactorily.

5. In October of 1974, a re-audit was conducted of applicant Star Supermarkets, Inc. for the audit period of June 1, 1968 to August 31, 1974, using the following reports and records:

- (1) a gross profit turnover report which showed cost, expected mark-up and expected gross sales.
- (2) direct shipment report which showed goods delivered directly to the stores by vendors.
- (3) general ledgers
- (4) sales journals
- (5) cash disbursements journal

- (6) check registers
- (7) purchase invoices
- (8) sales tax returns

A taxable ratio was determined by examining the gross-profit turnover book and direct shipment report for the test period January 1, 1973 to September 7, 1974, which represented 36.7% of total sales. Using the weeks ending March 9, 1974 and August 10, 1974, the taxable ratio for medicine and drugs was found to be 82.6% and the test represented 2.5% of this category's sales for the test period. Using the week ending September 7, 1974, the taxable ratio for specialty foods was found to be 31.6%. Using the last weeks of August of 1974 and the first week of September 1974, the taxable ratio for newspapers, magazines and cards was found to be 45.7%.

Regarding delicatessen sales, an agreement was made that taxable sales per department approximated \$50.00 per week per store. Thirteen delicatessen departments operating 13 months and 14 delicatessen departments operating 7 months of the period resulted in a total of \$53,400.00 for taxable sales during the test period. For bakery, produce and meat sales, it was determined that there were no taxable sales. For flowers and plants (a consignment account), tax was to be collected and remitted to the vendor.

Adjustments were made to the ratio tests as follows:

- (a) Gross profit turnover report was adjusted for non-taxable juices picked up as being taxable during the test period, and for glass cruets sold in package deals with dressing mix.
- (b) Direct shipments were adjusted to reflect the differences of family centers in applicant's stores, from 6 to 10 in operation, at the end of test period. Adjustment lowered ratio from 82.6% to 82.4% and expected taxable sales were reduced by \$10,601.00.
- (c) Some specialty food non-taxables resulted in an adjustment of \$17,443.00 in the direct shipment area.
- (d) A more complete test for magazines, newspapers and cards resulted in a taxable ratio of 43.74% down from 45.74%, resulting in a reduction of \$22,093.00.
- (e) Coupons for various items had to be adjusted. There were \$670,093.00 in coupons redeemed during the test period, of which \$89,453.00 represented reductions on taxable items.
- (f) Allowance for breakage and spoilage was estimated at .25% of expected sales less meat, produce and deli sales. This reduced expected gross sales by \$465,127.00, of which 33.75% was taxable.
- (g) Allowance for inventory shortage was mutually agreed to so that the ratio between taxable and non-taxable was set at 50%.
- (h) Allowances had to be made for the store inventory, cookware inventory and a promotional coupon item.

Gross sales during the test period were thus reduced to \$268,166,983.00. This was \$1,539,339.00 or .06% more than reported gross sales. However, gross sales as reported were accepted on the final computation.



Adjustments were not made for bad checks taken during the audit period, amounting to \$130,000.00 yearly. Also, no adjustment was made for inventory destroyed at the Brockport store.

In the review of invoices for use tax in the capital and expense areas, the actual amount found to be due from invoices was \$16,947.80 and \$4,954.86, respectively, for a total of \$21,902.66, an amount applicant acknowledges to be correct. A projection into periods not tested amounted to \$56,769.00 for the entire audit period.

6. Applicant Star Supermarkets, Inc.'s turnover report (which represented 45% of the total value of its purchases and included 3,500 different products) and the direct shipment report (which represented 25% of the total volume of purchases and which also included 3,500 items) were applicant-buyer tools and were not intended to be precise documents. These reports were subject to "measurement error." Therefore, combining these statistically in any ratio would not produce an accurate estimate of a true taxability ratio. Also, since no two test periods would be identical, the statistical possibility existed that the results might be widely disparate.

The direct shipment report was an aid to help determine the price at which the individual retail stores were billed for the product directly delivered by vendors. Applicant used an average mark-up figure which was computed approximately every three or four months and then applied to weekly invoices to arrive at the retail price for

the products. These prices did not reflect (nor were they intended to reflect) the selling price at any single point in time.

The turnover report, a record of mark-ups, mark-downs and price changes that took place within applicant's retail system did not adjust the total sales figure for the effects of price changes upon existing inventories, nor did it reflect the effect of insufficient inventory levels at the warehouse, so as to fully cover orders from the retail stores, although these stores were billed as though the entire order was shipped. Neither simple mistakes nor substitutions of these orders showed up on the turnover report.

No adjustment was made to reflect effects of price changes upon existing levels of inventory at the various outlets in either the direct shipment report or the turnover report.

SUMMARY OF SALES RATIO TEST

	<u>TOTAL SALES</u>	<u>TOTAL TAXABLE SALES</u>	<u>TOTAL NON-TAXABLE SALES</u>
Gross Profit & Turnover Report	\$117,089,342.00	\$40,692,387.00	\$ 76,396,955.00
Direct Shipment Report	60,099,877.00	21,192,177.00	38,907,700.00
Bakery Delivery Summary	6,570,599.00	-	6,570,599.00
Produce Sales - Financial Sta- tistics	19,942,460.00	-	19,942,460.00
Meat Sales - Financial Sta- tistics	64,990,935.00	-	64,990,935.00
Deli Sales - Financial Sta- tistics	2,243,351.00	53,400.00	2,189,951.00
Parrdine Flowers - Transfers & Receipts	289,762.00	289,762.00	-
	<u>\$271,226,326.00</u>	<u>\$62,227,726.00</u>	<u>\$208,998,600.00</u>

	<u>TOTAL SALES</u>	<u>TOTAL TAXABLE SALES</u>	<u>TOTAL NON-TAXABLE SALES</u>
<u>ADJUSTMENTS</u>			
Gross Profit & Turnover Report	-	\$ (11,523.00)	\$ 11,523.00
Direct Shipments Report	-	(50,137.00)	50,137.00
Coupon Sales	\$ (670,478.00)	(89,453.00)	(581,025.00)
Breakage Allowance	(465,127.00)	(156,980.00)	(308,147.00)
Inventory Shortage	(496,522.00)	(248,261.00)	(248,261.00)
Inventory Change	(1,392,343.00)	(696,171.00)	(696,172.00)
Coupon Inventory	(34,873.00)	(34,873.00)	-
	<u>\$268,166,983.00</u>	<u>\$60,940,328.00</u>	<u>\$207,226,655.00</u>
	100%	22.725%	77.275%
Gross Sales Per Return - Test Period			\$267,298,122.00
Reduction of Sales for Coupon Redemptions			670,478.00
Sales (On Same Basis as Test) (L26 - L25)			<u>\$266,627,644.00</u>
Taxable Ratio Per Test (Per L21)			22.725% -
Taxable Sales Per Audit (L29 x L28)			<u>\$ 60,591,132.00</u>
Taxable Sales Reported (Per St100)			57,982,048.00
Additional Taxable Sales (L30 - L31)			<u>\$ 2,609,084.00</u>
Margin of Error 2,609,084. ÷ 57,982,048.			4.4998%
Audit Period Tax Reported (Per St100)			\$ 10,155,990.00
Margin of Error			4.4998%
Additional Tax Due on Sales			<u>\$ 456,999.00</u>

7. Applicant Star Supermarkets, Inc., by its vice-president William A. Jenny, signed the following eleven consents extending limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law:

<u>Consent Dated</u>	<u>For Taxable Period</u>	<u>Assessment to be Determined on or Before</u>
September 2, 1971	6/1/68 through 8/31/68	12/20/71
November 22, 1971	6/1/68 through 11/30/68	3/20/72
February 17, 1972	6/1/68 through 2/28/69	6/20/72
May 5, 1972	6/1/68 through 5/31/69	9/20/72
August 11, 1972	6/1/68 through 8/31/69	12/20/72
November 29, 1972	9/1/69 through 11/30/69	6/20/73
December 7, 1972	6/1/68 through 8/31/69	6/20/73
March 20, 1973	6/1/68 through 11/30/70	3/20/74
December 19, 1973	6/1/68 through 5/31/71	12/20/74
November 8, 1974	6/1/68 through 2/28/72	6/20/75
June 16, 1975	6/1/68 through 5/31/72	7/ 7/75

The Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Star Supermarkets, Inc., Wallace E. Fearnley and William A. Jenny, individually and as officers, in the amount of \$726,870.59 was dated and issued on June 19, 1975.

#### CONCLUSIONS OF LAW

A. That section 1147(c) of the Tax Law provides:

"Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period...."

That except for the period ending August 31, 1971, applicant Star

Supermarkets, Inc. did consent in writing that such periods be extended and that the Sales Tax Bureau's assessment issued June 19, 1975 (except for said period) was, therefore, timely.

B. That section 1135 of the Tax Law provides:

"Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and the tax payable thereon, in such form as the tax commission may by regulation require...Such records shall be available for inspection and examination at any time upon demand...and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer...."

Applicant Star Supermarkets, Inc. properly kept all records as required and had them always available for inspection and examination.

C. That section 1138(a) of the Tax Law provides that:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid...or other factors."

Applicant Star Supermarkets, Inc. timely filed its sales tax returns for the periods June 1, 1968 to August 31, 1974 and remitted the tax due thereon. It was not necessary to estimate the tax for any of the periods in issue because Star Supermarkets, Inc. had adequate records for inspection and examination at all times. Furthermore, the audit approach used to estimate the sales tax due was statistically invalid

because non-accounting records were used and there were unscientific projections of test results into untested periods of time.

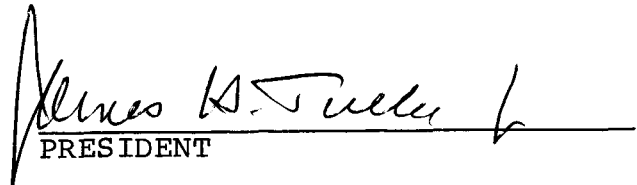
D. That applicant Star Supermarkets, Inc. admitted that use tax in the amount of \$21,902.66 was due and owing.

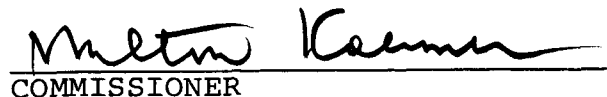
E. That the Notice of Determination and Demand for Sales and Use Taxes Due is modified to the extent that the amount of sales and use taxes due for the period June 1, 1968 to August 31, 1974 shall be revised to \$21,902.66, plus penalties and interest, and that, except as so granted, the application of Star Supermarkets, Inc., Wallace E. Fearnley and William A. Jenny, individually and as officers, is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 18 1979

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER