

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph Stern :
d/b/a Hideaway Service Station : 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 9/1/72-8/31/75. :

State of New York
County of Albany

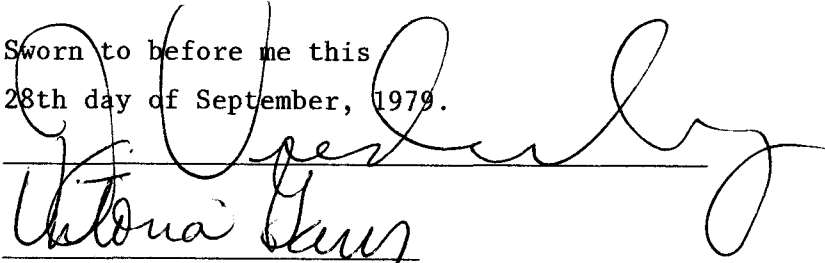
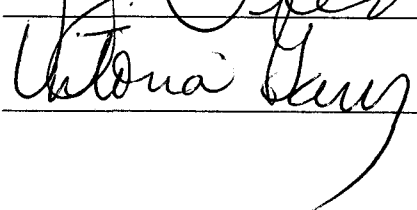
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by mail upon Joseph Stern, d/b/a Hideaway Service Station, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Stern
d/b/a Hideaway Service Station
2772 W. 15th St.
Brooklyn, NY 11224

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.

STATE OF NEW YORK
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of :
Joseph Stern :
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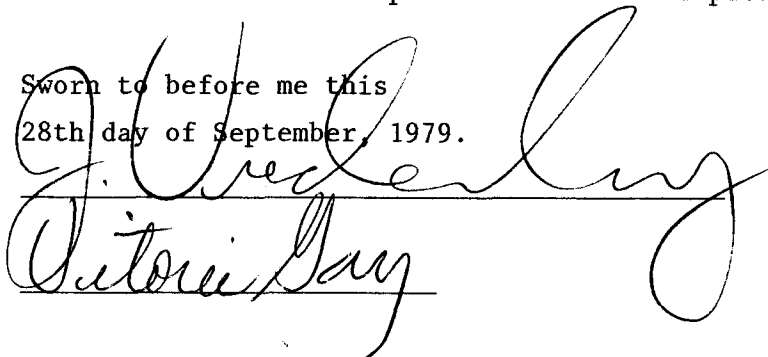
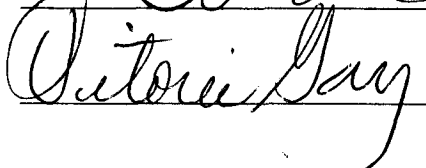
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by mail upon Martin I. Cohen the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Martin I. Cohen
93 Nassau St.
New York, NY 10038

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
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

Joseph Stern
d/b/a Hideaway Service Station
2772 W. 15th St.
Brooklyn, NY 11224

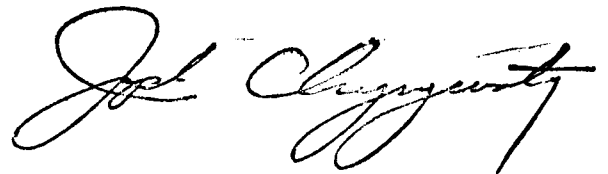
Dear Mr. Stern:

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,



cc: Petitioner's Representative
Martin I. Cohen
93 Nassau St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
JOSEPH STERN	:	DETERMINATION
D/B/A HIDEAWAY SERVICE STATION	:	
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 September 1,	:	
1972 through August 31, 1975.	:	

Applicant, Joseph Stern d/b/a Hideaway Service Station, 2772 West 15th Street, Brooklyn, New York 11224, 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 September 1, 1972 through August 31, 1975 (File No. 13837).

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 September 25, 1978 at 2:45 P.M. Applicant appeared by Martin I. Cohen, PA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the results of an audit by the Sales Tax Bureau of applicant's books and records for the period September 1, 1972 through August 31, 1975 properly reflected applicant's additional sales tax liability.

FINDINGS OF FACT

1. For the period under review, applicant, Joseph Stern d/b/a Hideaway Service Station, operated a garage-service station which sold Getty gasoline, at 2772 West 15th Street, Brooklyn, New York.

2. On January 13, 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 the period September 1, 1972 through August 31, 1975, for additional taxes due of \$2,242.44, plus penalty and interest.

3. During the audit period, applicant did not maintain a record of sales by categories, but recorded (on a daily basis) the totals of the cash sales and credit sales only.

4. On audit, the Sales Tax Bureau's auditor analyzed applicant's purchase records. Using current costs and selling prices, the auditor determined the following markup percentages: 32% for tires, batteries and accessories; 76.15% for oil; 25.234% for gasoline. Since sales invoices for repair work were not available, the auditor considered an average markup of 300% for parts. These markups produced an error rate of 37.86%, which resulted in additional taxable sales of \$28,965.00 and sales tax due of \$2,143.74. In addition, \$1,410.00 worth of tangible personal property was found to have been acquired without tax having been paid. This resulted in a compensating use tax due of \$98.70.

5. Applicant contended that the 300% markup on repair parts' purchases was inequitable in that no consideration was given to the fact that applicant's business was in a depressed neighborhood, and that there was nearby competition which prohibited him from charging high prices.

6. Applicant's markup for repair parts is more accurately reflected by 200%, since his repair activities were carried on without the aid of an assistant and in a depressed neighborhood, having both discount parts stores and highly competitive low-price specialty repair shops located nearby.

7. Applicant acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that where a return which is 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, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees, or other factors.

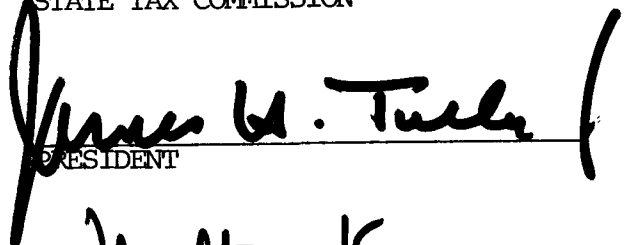
B. That the Sales Tax Bureau erroneously estimated applicant's markup for repair parts as explained in Finding of Fact "6". The correct markup of 200% results in an error rate 15.14%, and additional taxable sales of \$11,585.00.

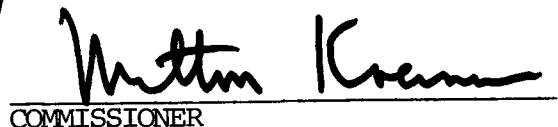
C. That the application of Joseph Stern d/b/a Hideaway Service Station is granted to the extent indicated in Conclusion of Law "B"; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 13, 1976; that the tax due shall be recomputed together with interest at the minimum statutory rate; and that, except as so granted, the application is in all other respects denied.

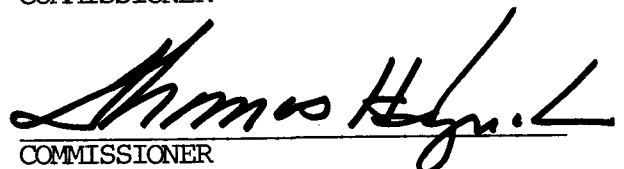
DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER