

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Jack & Josephine Toia :  
Toia's Deli, 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 - 11/22/76. :

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 26th day of November, 1979, he served the within notice of Determination by mail upon Jack & Josephine Toia, Toia's Deli, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack & Josephine Toia  
Toia's Deli, Inc.  
21 Richmond Pl.  
Peekskill, NY 10566

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 :  
Jack & Josephine Toia :  
Toia's Deli, Inc. : AFFIDAVIT OF MAILING  
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under Article 28 & 29 of the Tax Law :  
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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 26th day of November, 1979, he served the within notice of Determination by mail upon Steven Schissler 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. Steven Schissler  
27 Highland Blvd.  
Dix Hills, NY 11746

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.

Joanne Knapp

J. Vredenburg

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

November 26, 1979

Jack & Josephine Toia  
Toia's Deli, Inc.  
21 Richmond Pl.  
Peekskill, NY 10566

Dear Mr. & Mrs. Toia:

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  
Steven Schissler  
27 Highland Blvd.  
Dix Hills, NY 11746  
Taxing Bureau's Representative

## STATE TAX COMMISSION

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 November 22, 1976.

1. On March 10, 1977, 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 Toia's Deli, Inc. ("Toia's") for the period December 1, 1973 through November 22, 1976 in the amount of \$7,353.84, plus penalty and interest of \$2,663.73, for a total of \$10,017.54.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was also issued on the same date against Jack and Josephine Toia, as officers of Toia's Deli, Inc., in the amount of \$7,270.40, plus penalty and interest. Use tax of \$83.44 was not included in the assessment against Jack and Josephine Toia.

2. Applicant Toia operated a delicatessen at 1206 Grundy Avenue, Holbrook, New York until November 22, 1976 when said business was sold. Sales consisted primarily of cold cuts, salads, homemade meats and cheeses. Applicant also sold beer, soda, cigarettes, coffee and sandwiches.

3. On audit, the Sales Tax Bureau's auditor analyzed Toia's purchase invoices for the months of January and July 1975. The purchases of items that would be taxable when sold were categorized as beer, soda, miscellaneous, candy and cigarettes. A markup percentage was computed for each category. The markup percentages were applied to said purchases resulting in taxable sales of \$186,247.89.

Taxable food sales were determined pursuant to an observation test conducted November 18, 1976 between 7:00 A.M. and 2:00 P.M. Taxable food sales represented 11.26 percent of the day's total receipts. This percentage was applied to gross sales to arrive at taxable food sales of \$97,741.97. Gross sales were adjusted to reflect a six-day week.

The combined audited taxable sales totaled \$283,989.86. Applicant reported taxable sales of \$186,626.00, which left additional taxable sales of \$97,363.86 and tax due thereon of \$6,815.40.

The auditor determined the book value of the fixed assets which sold with the business to be \$14,000.00 and a tax due thereon of \$980.00. Credit was given for the \$525.00 bulk sale tax received by the Sales Tax Bureau and the remaining \$455.00 was assessed. The auditor also found \$83.44 use tax due on expense purchases. The only phase of the audit at issue is the one-day observation test.

4. Applicant Toia contended that the day observed by the Sales Tax Bureau was not representative of its prepared food business for the following reason:

There are two other delicatessens in the same neighborhood. One delicatessen has a similar operation to that of applicant, while the other specialized in sandwiches. On the day the Sales Tax Bureau conducted their observation test, the latter deli was closed, therefore increasing applicant Toia's sandwich sales.

5. Applicant Toia's taxable food sales on the day of the observation test were fifty percent greater than on an average business day; therefore, taxable food sales was 7 percent of gross sales.

6. Applicants acted in good faith at all times.

CONCLUSIONS OF LAW

A. That in accordance with Finding of Fact "5", applicant Toia's taxable food sales determined by the Sales Tax Bureau for the period December 1, 1973 through November 22, 1976 were incorrect. That the percentage of taxable food sales to gross sales is 7 percent.

B. That the penalty and interest in excess of the minimum statutory rate is cancelled.

C. That the application of Jack and Josephine Toia and Toia's Deli, Inc. is granted to the extent indicated in Conclusion of Law "A" and "B". The Sales Tax Bureau is hereby directed to modify accordingly the notices of determination and demand for payment of sales and use taxes due issued March 10, 1977; and 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