

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
81st Street Supermarket, Inc. :  
and Albert DiMassa & Anthony DiMassa : 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 - 5/31/76. :

State of New York  
County of Albany

Jean Schultz, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of February, 1980, she served the within notice of Determination by mail upon 81st Street Supermarket, Inc., and Albert DiMassa & Anthony DiMassa, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

81st Street Supermarket, Inc.  
and Albert DiMassa & Anthony DiMassa  
1565 1st Ave.  
New York, NY 10028

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  
29th day of February, 1980.

Joanne Knapp

Jean Schultz

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
81st Street Supermarket, Inc. :  
and Albert DiMassa & Anthony DiMassa : 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 - 5/31/76. :

State of New York  
County of Albany

Jean Schultz, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of February, 1980, she served the within notice of Determination by mail upon Ira B. Marshall the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ira B. Marshall  
515 Madison Ave.  
New York, NY 10019

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  
29th day of February, 1980.

Joanne Knapp

Jean Schultz

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

February 29, 1980

81st Street Supermarket, Inc.  
and Albert DiMassa & Anthony DiMassa  
1565 1st Ave.  
New York, NY 10028

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Ira B. Marshall  
515 Madison Ave.  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
81st STREET SUPERMARKET, INC. and	:	DETERMINATION
ALBERT DI MASSA and ANTHONY DI MASSA	:	
INDIVIDUALLY AND AS OFFICERS	:	
	:	
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Periods September 1, 1972 through	:	
May 31, 1976.	:	

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Applicants, 81st Street Supermarket, Inc. and Albert DiMassa and Anthony DiMassa, 1565 1st Avenue, New York, New York 10028, 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 May 31, 1976 (File No. 18382).

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 September 19, 1979 at 2:45 P.M. Applicants appeared by Ira B. Marshall, CPA. The Audit Division appeared by Ralph Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division were proper and the resultant findings of additional taxable sales for the period September 1, 1972 through May 31, 1976 were correct.

FINDINGS OF FACT

1. Applicant, 81st Street Supermarket, Inc., operated a grocery store located at 1565 1st Avenue, New York, New York.

2. On February 2, 1977, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants, 81st Street Supermarket, Inc. and Albert DiMassa and Anthony DiMassa, individually and as officers, for the period September 1, 1972 through May 31, 1976 for tax due of \$10,056.89, plus penalty and interest of \$4,457.16, for a total of \$14,514.05.

3. Applicant executed consents extending the period for assessment of sales and use taxes for the period September 1, 1972 through August 31, 1975 to December 19, 1977.

4. Applicant estimated that 21 percent of its gross sales were taxable sales when preparing sales tax returns for the period at issue. On audit, the Audit Division analyzed purchase invoices for the test months of July, 1974, August, 1974, January, 1975 and February, 1975 which disclosed that purchases of grocery items that would result in a taxable sale when resold represented 33.963 percent of total grocery purchases. Applicant did not purchase taxable items in the categories of meat, produce and miscellaneous purchases. Therefore, it was determined that 69.298 percent of total sales were grocery sales based on sales recorded in the general ledger for the period September 1, 1972 through March 31, 1975. The taxable ratio (33.963 percent) was applied to grocery sales for the audit period which resulted in additional taxable sales of \$132,040.00. Use tax found due of \$16.59 is not at issue.

5. Applicants contended that the aforementioned audit procedures did not give consideration to any variance in markup percentages between taxable and nontaxable items. Applicant further contended that the test periods used by the Audit Division were not representative in that the audit encompassed the period September 1, 1972 through May 31, 1976 and purchases in the beginning and at the later part of said period may have been significantly different

than during the test periods. Applicant offered no evidence in support of its contentions.

Applicant did not maintain sufficient books and records from which the Audit Division could determine the exact amount of applicant's tax liability.

CONCLUSIONS OF LAW

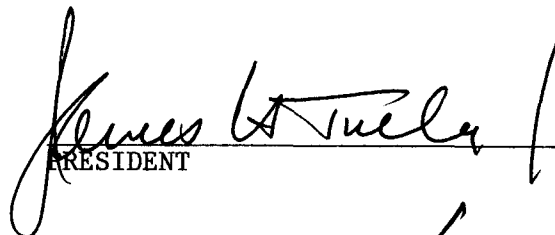
A. That the Audit Division followed generally accepted audit procedures and tests consistent with the nature of the business operation. Since sufficient books and records were not available to determine the exact amount of tax due, the audit was conducted in accordance with the meaning and intent of section 1138(a) of the Tax Law and the resultant findings of additional sales taxes due of \$10,040.30 were supported by substantial evidence. Applicant failed to show what effect alternative audit methods or tests would have on the audit results; therefore, the Audit Division's determination for the period September 1, 1972 through May 31, 1976 is correct.


B. That the application of 81st Street Supermarket, Inc. and Albert DiMassa and Anthony DiMassa is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 2, 1977 is sustained.

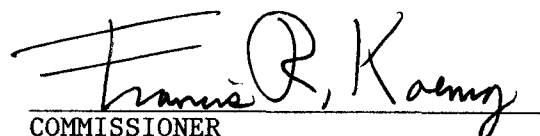
DATED: Albany, New York

FEB 29 1980

STATE TAX COMMISSION

  
RESIDENT

  
COMMISSIONER

  
COMMISSIONER