

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Cioffi Bros., Inc. :
& Joseph Cioffi : 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 3/1/72 - 2/28/75. :

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 12th day of December, 1980, he served the within notice of Decision by mail upon Cioffi Bros., Inc., & Joseph Cioffi, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cioffi Bros., Inc.
& Joseph Cioffi
685 Broadway
Albany, NY 12207

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
12th day of December, 1980.

Jean Schutt

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Cioffi Bros., Inc. :
& Joseph Cioffi : AFFIDAVIT OF MAILING
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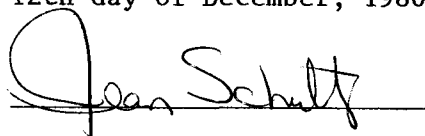
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by mail upon Michael J. Cunningham the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

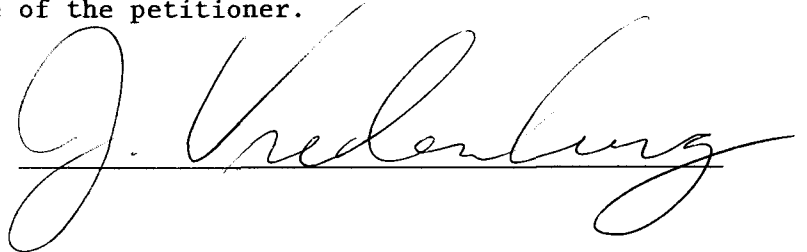
Mr. Michael J. Cunningham
DeGraff, Foy, Conway & Holt-Harris
90 State St.
Albany, NY 12207

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
12th day of December, 1980.





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

December 12, 1980

Cioffi Bros., Inc.
& Joseph Cioffi
685 Broadway
Albany, NY 12207

Gentlemen:

Please take notice of the Decision 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
Michael J. Cunningham
DeGraff, Foy, Conway & Holt-Harris
90 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CIOFFI BROTHERS, INC. and	:	DECISION
JOSEPH CIOFFI	:	
	:	
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 March 1, 1972	:	
through February 28, 1975.	:	

Cioffi Brothers, Inc. and Joseph Cioffi, 685 Broadway, Albany, New York 12207, filed a petition 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 March 1, 1972 through February 28, 1975 (File No. 18884).

A formal hearing was held before David L. Evans, Hearing Officer, at the offices of the State Tax Commission, Building No. 9, State Campus, Albany, New York, on January 22, 1980 at 1:00 P.M. Petitioners appeared by DeGraff, Foy, Conway & Holt-Harris, Esqs. (Michael J. Cunningham, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

I. Whether the deficiency in payment of sales taxes by petitioners was due to erroneous and ambiguous instructions in the form of sales tax schedules for gasoline and diesel fuel furnished to retail service stations through metered pumps.

II. Whether the deficiency for the period March 1, 1972 through August 31, 1972 is barred by the statute of limitations.

FINDINGS OF FACT

1. On June 12, 1975 the petitioner executed a consent extending the period within which to issue an assessment of sales and use taxes for the periods March 1, 1972 to May 31, 1972, to September 20, 1975.

2. Cioffi Brothers, Inc. operates a service station which has gas pumps and performs normal auto maintenance. The president is Joseph Cioffi. A sales tax audit was made of petitioner's books and records for the tax periods March 1, 1972 through February 28, 1975. An error was detected on the computation of gasoline taxes on worksheets. The result was an understatement of tax reported. The gasoline schedule or chart was misinterpreted by petitioner and/or its accountant. They deducted gasoline taxes from the gallon prices before using the gasoline charts or schedules. These errors resulted in an overall error rate of 24.3 percent.

3. On October 6, 1975 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1972 through February 28, 1975 in the amount of \$16,193.22 plus penalty and interest of \$5,538.22 for a total of \$21,731.44 against Cioffi Brothers, Inc. and Joseph Cioffi, individually and as an officer. Petitioners timely filed a protest and applied for a hearing to review said determination.

4. The Regulations of the Department of Agriculture and Markets require that gasoline be sold by metered pump. (1 NYCRR §220.8)

5. The Regulations of the Department of Taxation and Finance (20 NYCRR §530.35(a)) require every retail service station operator selling gasoline or diesel fuel to post a unit selling price which includes all taxes.

6. Section 1111(d) of the Tax Law authorizes the tax commission to prescribe and from time to time amend schedules or charts of the amount of tax

to be collected upon each gallon of motor fuel and diesel motor fuel sold at retail service stations. The current version of this schedule is set forth at 20 NYCRR sections 530.30 and 530.31.

7. The schedules in effect during the audit periods in issue provided in part:

"GASOLINE: The price per gallon shown above includes the 4¢ Federal Tax and the 8¢ State Gasoline Tax, but the sales tax per gallon is based on the price excluding the State Gasoline Tax."

CONCLUSIONS OF LAW

A. That, instead of properly using the bracket schedule promulgated by the Tax Commission pursuant to Section 1111(d) of the Tax Law, petitioner deducted State Gasoline Tax per gallon before reading the chart to find the sales tax per gallon. This is contrary to the instructions for use of the schedule.

B. That the bracket schedule, in effect during the tax periods in issue, and the instructions in connection therewith, were neither confusing nor ambiguous.

C. That the Audit Division was barred from determining sales taxes due from the petitioner for the period March 1, 1972 through August 31, 1972 in accordance with section 1147(b) of the Tax Law. That pursuant to consent, the statute of limitations for this period was extended to September 20, 1975; whereas, the determination of additional taxes was not issued until October 6, 1975.

D. That reasonable cause exists for the waiver of penalty and interest in excess of the minimum statutory rate pursuant to section 1145(a) of the Tax Law.

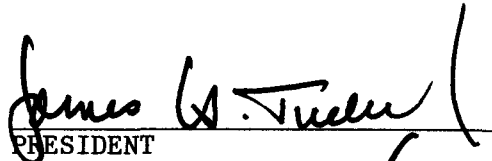
E. That the Audit Division is directed to recompute the tax liability of petitioner in accordance with Conclusions of Law "C" and "D", supra.

F. That the petition of Cioffi Brothers, Inc. and Joseph Cioffi is granted to the extent set forth in Conclusions of Law "C", "D" and "E", supra, and is in all other respects denied.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER