

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Delmar Foodorama, Inc. :
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 9/1/71-5/31/74. :

AFFIDAVIT OF MAILING

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 15th day of February, 1980, he served the within notice of Determination by mail upon Delmar Foodorama, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Delmar Foodorama, Inc.
4 North Ferry 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
15th day of February, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Delmar Foodorama, Inc. :
for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law
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AFFIDAVIT OF MAILING

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 15th day of February, 1980, he served the within notice of Determination by mail upon Carmen D. Traffiletti the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sirs Carmen D. Traffiletti
and John Treffiletti
4 N. Ferry 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
15th day of February, 1980.

Joanne Knapp

[Signature]

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

February 15, 1980

Delmar Foodorama, Inc.
4 North Ferry St.
Albany, NY 12207

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
Carmen D. Traffiletti
and John Treffiletti
4 N. Ferry St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
DELMAR FOODORAMA, INC.	:	DETERMINATION
	:	
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, 1971 through May 31,	:	
1974.	:	

Applicant, Delmar Foodorama, Inc., 4 North Ferry Street, Albany, New York 12207, 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, 1971 through May 31, 1974 (File No. 11002).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on May 23, 1979 at 11:30 A.M. Applicant appeared by Carmen D. Treffiletti, President and John Treffiletti, Vice-President. The Audit Division appeared by Peter Crotty, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the application of a taxable purchase ratio to the applicant's reported gross sales properly reflected the applicant's sales tax liability.

FINDINGS OF FACT

1. On March 19, 1975, as a result of a field audit the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Delmar Foodorama, Inc. for the period September 1, 1971 through May 31, 1974, for tax due of \$8,102.74 plus penalties and interest.

2. Applicant filed a timely protest to the Notice on May 28, 1975.

3. On audit, the Sales Tax Bureau reviewed applicant's purchase invoices of grocery items for a three-month period. It found that 36 percent of these purchases were taxable items. This ratio was applied to gross sales of groceries for the three-month period tested and the tax computed thereon. An error rate of 22.9193 percent was determined based on the tax reported on its sales tax returns. This error rate was applied to the tax paid for the entire audit period and resulted in tax due of \$8,102.74. No allowance was made for pilferage in the audit since the taxable ratio was applied to sales made.

4. Applicant contended that the review of invoices for the three-month period was subject to error and misclassification. It also contended that because the test covered only three months of a thirty-six month period and that the three months were from the same year the sample was not dependable. Additionally, applicant argued that the markup was higher on nontaxable items which would effect the error rate used by the Sales Tax Bureau. Applicant offered no documentary evidence to substantiate its contentions were correct.

5. Applicant contended that an allowance should be made, for pilferage sustained but did not offer any documentary evidence to substantiate its claim.

6. During the course of the hearing, the Sales Tax Bureau waived the penalty.

CONCLUSIONS OF LAW

A. That the audit performed was in accordance with section 1138(a) of the Tax Law and such audit properly reflected the applicant's sales tax liability.

B. That the penalty is cancelled.

C. That the application of Delmar Foodorama, Inc. is granted to the extent indicated in Conclusion "B" above; that the Audit Division is hereby

directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 19, 1975; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

FEB 15 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER