

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Dygerts, 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 9/1/73 - 5/31/76. :

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 5th day of September, 1980, he served the within notice of Decision by mail upon Dygerts, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dygerts, Inc.
c/o Arthur Dygert, Pres.
Route 31
Jordan, NY 13050

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
5th day of September, 1980.

Frederic Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dygerts, Inc. :

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for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 9/1/73 - 5/31/76. :

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 5th day of September, 1980, he served the within notice of Decision by mail upon Louis F. Adornato 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. Louis F. Adornato
107 Seventh North St.
Liverpool, NY 13088

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
5th day of September, 1980.

Notary Bank

J. Vredenburg

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

September 5, 1980

Dygerts, Inc.
c/o Arthur Dygert, Pres.
Route 31
Jordan, NY 13050

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
Louis F. Adornato
107 Seventh North St.
Liverpool, NY 13088
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DYGERTS, INC.	:	DECISION
	:	
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, 1973 through	:	
May 31, 1976.	:	

Petitioner, Dygerts, Inc., Route 31, Jordan, New York 13050, 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 September 1, 1973 through May 31, 1976 (File No. 17762).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on May 13, 1980 at 9:15 A.M. Petitioner appeared by Arthur Dygert, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due based on an audit of petitioner's available records.

FINDINGS OF FACT

1. Petitioner, Dygerts, Inc., operated a grocery store located on Route 31 in Jordan, New York.
2. On November 30, 1976, 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 petitioner for the period September 1, 1973 through May 31, 1976 for taxes due of \$17,109.89, plus penalty and interest of \$7,033.31, for a

total of \$24,143.20.

3. On audit, the Audit Division analyzed petitioner's checkbook for the period January 1, 1975 through May 31, 1976 and categorized purchases as drugs and cosmetic aids, other taxable items (which included such items as clothing and housewares), grocery, beer, soda, cigarettes and cigars, sundry, meat, produce and miscellaneous nontaxable. The categories of drugs and cosmetic aids, grocery and sundry contained both taxable and nontaxable items; therefore, the Audit Division analyzed purchase invoices for the month of May, 1976 to determine the percentage of taxable items within said categories. Based on the foregoing procedures, it was determined that 39.1 percent of total purchases for the period analyzed represented items which would result in a taxable sale when sold. A markup test was performed for taxable items in each of the above categories for May, 1976 using individual costs and suggested retail selling prices as shown on purchase invoices or, in some instances, the shelf price. The markup determined for grocery items was adjusted to reflect sales of "loss leaders". The individual markups were applied to taxable purchases to determine a weighted average markup of 24 percent. The taxable percentage of 39.1 percent was applied to total purchases for the audit period to arrive at taxable purchases of \$746,826.00. The weighted average markup of 24 percent was applied to said amount which resulted in additional taxable sales of \$244,427.00.

4. On or about August 21, 1975, a fire occurred on petitioner's premises and destroyed inventory worth \$18,754.00.

5. During the period at issue, petitioner sustained pilferage losses to the extent of 1 percent of purchases.

6. Based on Federal income tax returns filed for the years 1973, 1974 and 1975, petitioner had no significant fluctuations in inventory.

7. Petitioner did not maintain complete books and records during the period at issue for the Audit Division to determine the exact amount of petitioner's taxable sales.

CONCLUSIONS OF LAW

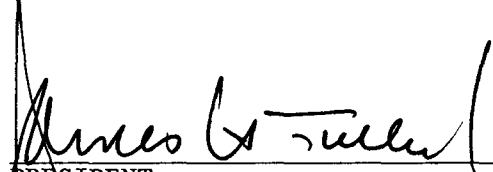
A. That since petitioner did not maintain sufficient books and records for the Audit Division to determine petitioner's exact taxable sales, the Audit Division properly determined petitioner's taxable sales from such information as was available, pursuant to section 1138(a) of the Tax Law. However, the Audit Division failed to give consideration to the factors set forth in Findings of Fact "4" and "5". Accordingly, the additional taxable sales determined for the period September 1, 1973 through May 31, 1976 are reduced to \$226,076.00.

B. That the petition of Dygerts, Inc. is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 30, 1976; and that, except as so granted, the petition is in all other respects denied.

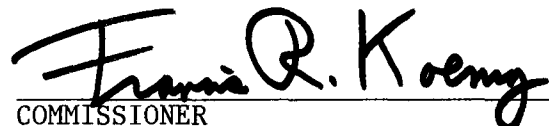
DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER