STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Milton Gellis :

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 - 11/30/76. :

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 Thursday day of March 20, 1980, 1980, he served the within notice of Decision by mail upon Milton Gellis, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton Gellis
115 Demarest Ave.
Englewood Cliffs, NJ 07632

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
Thursday day of March 20, 1980, 1980.

Debbie Bank

J. Vredenburg

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

February 15, 1980

Milton Gellis
115 Demarest Ave.
Englewood Cliffs, NJ 07632

Dear Mr. Gellis:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MILTON GELLIS	:	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 December 1, 1973 through November 30, 1976.	:	

Petitioner, Milton Gellis, 115 Demarest Avenue, Englewood Cliffs, New Jersey 07632, 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 December 1, 1973 through November 30, 1976 (File No. 21572).

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 March 20, 1980 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of additional sales taxes due, based on an audit of petitioner's books and records, was correct.

FINDINGS OF FACT

1. Petitioner, Milton Gellis, operated a liquor store located at 84 Featherbed Lane, Bronx, New York.

2. Petitioner timely filed New York State and local sales and use tax returns for the period December 1, 1973 through November 30, 1976.

STATE OF NEW YORK

SUPREME COURT

In the Matter of the Petition

of

[illegible] (PETITIONER)

For Revocation of a Determination or for
Refund of Taxes and Interest under
Articles [illegible] of the Tax Law for
the Period [illegible] through
November [illegible], 1974.

Petitioner, [illegible], filed a petition dated [illegible], 1980 and filed [illegible] in the Supreme Court, Albany County, seeking to review a determination of the Tax Commission [illegible] Tax Law for the period [illegible] through November [illegible], 1974 (File No. [illegible]).

A small claims hearing was held before Administrative Law Judge [illegible] in the offices of the Commission in Albany, New York. Petitioner, [illegible], appeared by [illegible]. The Tax Commission appeared by [illegible], Esq. (Robert [illegible], Esq., on the brief).

FACTS

Petitioner [illegible] determination of sales and use taxes [illegible] on an audit of petitioner's books and records, was upheld.

ISSUES OF FACT

1. Petitioner [illegible] sales and use taxes [illegible] of the [illegible] of [illegible], [illegible].

2. Petitioner [illegible] New York State and local sales and use taxes [illegible] "[illegible]", [illegible] [illegible], [illegible].

3. On October 25, 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 petitioner for the period December 1, 1973 through November 30, 1976 for taxes due of $12,284.11, plus penalty and interest of $6,136.17, for a total of $18,420.28.

4. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the period in issue to March 20, 1978.

5. On audit, the Audit Division found that petitioner's sales per books agreed with Federal income tax returns; however, the sales tax returns were understated by $33,000.00. Further examination revealed that such discrepancy was due to mathematical errors occurring in the periods ending May 31, 1976, August 31, 1976 and November 30, 1976. The Audit Division categorized petitioner's liquor and wine purchases for the month of April, 1977. It was determined that liquor represented 81.1 percent of the purchases and wine 18.9 percent. A markup test was performed for liquor and wine using purchases made during April, 1977 and selling prices indicated on the bottles at the time the audit was conducted. The test disclosed a liquor markup of 24.3 percent and a wine markup of 46.3 percent. A weighted average markup of 28.6 percent was determined based on the above percentages of liquor and wine purchased for the test month. Said markup was applied to total purchases for the audit period, after allowing $21,000.00 for inventory thefts and employee pilferage, which resulted in additional taxable sales of $102,697.00 and tax due thereon of $7,984.11.

The Audit Division also found that petitioner reported 4 percent tax on sales of merchandise totaling $114,442.00 allegedly delivered to Rockland

County. The Audit Division asserted the additional New York City local tax of $4,300.00 on such sales, since petitioner was unable to substantiate that delivery took place.

6. Petitioner contended that the Rockland County sales were to one individual and that he personally delivered the cases of liquor and wine in his own vehicle and, therefore, cannot show proof of delivery.

7. Petitioner argued that the markups determined by the Audit Division were excessive because his actual selling prices of liquor and wine were lower than the price indicated on the bottle.

8. Petitioner offered no substantial evidence to show that the Audit Division's determination was incorrect.

9. Petitioner did not maintain sufficient books and records for the Audit Division to determine the exact amount of tax due.

10. Petitioner acted in good faith at all times and did not willfully attempt to evade the tax.

CONCLUSIONS OF LAW

A. That the audit procedures used by the Audit Division to determine petitioner's sales were proper pursuant to section 1138(a) of the Tax Law. The resultant findings of additional sales taxes due for the period December 1, 1973 through November 30, 1976 were supported by substantial documentary evidence.

B. That the application of Milton Gellis is granted to the extent that the penalty and interest in excess of the minimum statutory rate are cancelled; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER