

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
James Johnson :
d/b/a Johnson's Barbeque Rest. : 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 - 2/28/77. :

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 6th day of August, 1980, he served the within notice of Decision by mail upon James Johnson, d/b/a Johnson's Barbeque Rest., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Johnson
d/b/a Johnson's Barbeque Rest.
790 E. 163rd St.
Bronx, NY 10456

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
6th day of August, 1980.

Detraah A Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
James Johnson :
d/b/a Johnson's Barbeque Rest. : 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 - 2/28/77. :

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 6th day of August, 1980, he served the within notice of Decision by mail upon Wilmot A. Edwards 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. Wilmot A. Edwards
1321 Elder Ave.
Bronx, NY 10472

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
6th day of August, 1980.

Suborah A. Bank

J. Vredenburg

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

August 6, 1980

James Johnson
d/b/a Johnson's Barbeque Rest.
790 E. 163rd St.
Bronx, NY 10456

Dear Mr. Johnson:

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
Wilmot A. Edwards
1321 Elder Ave.
Bronx, NY 10472
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JAMES JOHNSON	:	DECISION
D/B/A JOHNSON'S BARBEQUE RESTAURANT	:	
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	:	
February 28, 1977.	:	

Petitioner, James Johnson d/b/a Johnson's Barbeque Restaurant, 790 East 163rd Street, Bronx, New York 10456, 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 February 28, 1977 (File No. 21247).

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 19, 1980 at 9:15 A.M. Petitioner appeared by Wilmot Edwards, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of additional sales taxes due from petitioner for the period December 1, 1973 through February 28, 1977 was proper and correct.

FINDINGS OF FACT

1. Petitioner, James Johnson d/b/a Johnson's Barbeque Restaurant, operated a take-out restaurant selling such food items as chicken, spare ribs and pigs feet. The business was located at 790 East 163rd Street, Bronx, New York.

2. On October 20, 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 February 28, 1977 for taxes due of \$8,819.11, plus penalty and interest of \$3,773.26, for a total of \$12,592.37.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the period December 1, 1973 through November 30, 1976, to March 19, 1978.

4. On audit, the only records available to the Audit Division for examination were purchase invoices for 1976, a Federal income tax return for the same year and sales tax returns for the period under audit. The Audit Division sent letters to several of petitioner's suppliers requesting information on the amount of purchases made by petitioner. Based on the responses received, the Audit Division determined that petitioner's purchases for 1976 were understated 217 percent. A markup test was performed using costs and selling prices provided by petitioner. The resultant markup of 136 percent was adjusted by the Audit Division to 125 percent because the test was limited and costs were estimated. The markup of 125 percent was applied to adjusted purchases of \$61,324.00 to arrive at taxable sales of \$137,979.00. Petitioner reported taxable sales of \$58,418.00 for the same period, leaving additional taxable sales of \$79,561.00 and tax due thereon of \$7,188.62. Said amount includes unpaid sales taxes of \$883.20 reported on returns filed for the periods ending November 30, 1976 and February 28, 1977.

The Audit Division also examined purchases of recurring expenses from available invoices for 1976 and found that 79.3 percent of the purchases represented items subject to tax. Since no other purchase invoices were available, the Audit Division considered 79.3 percent of expense purchases

reported on petitioner's 1976 Federal income tax return as taxable and was used as a basis for determining use taxes due of \$1,630.49 for the entire audit period.

An analysis of sales tax returns disclosed a discrepancy of \$15,863.00 between gross sales and taxable sales reported thereon. The audit procedures described above reflect the tax due on said sales.

5. Petitioner submitted substantial documentary evidence to show that he purchased meat as an accommodation for friends and organizations. Based on such evidence, the Audit Division conceded that the additional taxable sales of \$79,561.00 be adjusted to \$35,821.00 and accordingly, the additional tax reduced to \$2,794.00 plus the taxes due of \$883.20 on the unpaid returns.

The Audit Division also conceded that the use taxes on expense purchases of \$1,630.49 be reduced to \$815.00.

6. Petitioner contended that he purchased more meat for friends than conceded by the Audit Division; however, this contention was not supported by any further evidence.

7. Petitioner conceded that tax is due on the difference between his reported gross and taxable sales. This error resulted from petitioner's misunderstanding that sales of less than \$1.00 were not subject to tax.

CONCLUSIONS OF LAW

A. That based on Finding of Fact "5", the additional tax due determined by the Audit Division is reduced to \$4,492.20.

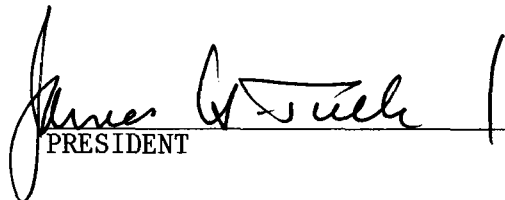
B. That the Audit Division, in the absence of adequate books and records, properly determined petitioner's sales from available information as authorized in section 1138(a) of the Tax Law and that the resultant findings of additional taxes due, as revised herein, for the period December 1, 1973 through February 28, 1977 are correct.

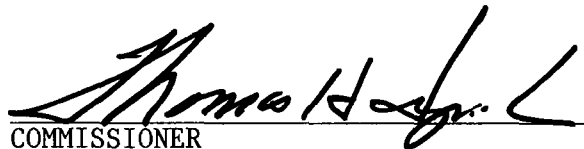
C. That the petition of James Johnson d/b/a Johnson's Barbeque Restaurant is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 20, 1977; and that except as so granted, the petition is in all other respects denied.

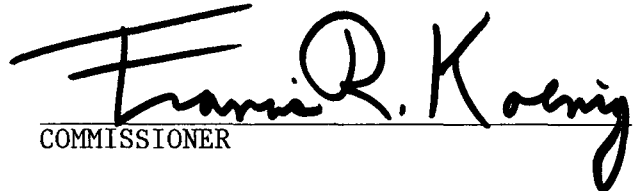
DATED: Albany, New York

AUG 06 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER