

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dieter & Juergen Klein :
d/b/a Lakeview Delicatessen : 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 3/1/73-5/31/76. :

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 18th day of June, 1980, he served the within notice of Determination by mail upon Dieter & Juergen Klein, d/b/a Lakeview Delicatessen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dieter & Juergen Klein
d/b/a Lakeview Delicatessen
678 Woodfield Rd.
W. Hempstead, NY 11552

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of
Dieter & Juergen Klein :
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for the Period 3/1/73-5/31/76. :

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 18th day of June, 1980, he served the within notice of Determination by mail upon Harold W. Seidman 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. Harold W. Seidman
Fielman, Alcott & Seidman
37-06 30th Ave.
Long Island City, NY 11103

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 18, 1980

Dieter & Juergen Klein
d/b/a Lakeview Delicatessen
678 Woodfield Rd.
W. Hempstead, NY 11552

Dear Mr. & Mrs. Klein:

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
Harold W. Seidman
Fielman, Alcott & Seidman
37-06 30th Ave.
Long Island City, NY 11103
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
DIETER KLEIN and JUERGEN KLEIN	:	DETERMINATION
d/b/a LAKEVIEW DELICATESSEN	:	
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, 1973	:	
through May 31, 1976.	:	

Applicants, Dieter Klein and Juergen Klein d/b/a Lakeview Delicatessen, 678 Woodfield Road, West Hempstead, New York 11552, 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 March 1, 1973 through May 31, 1976 (File No. 17574).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 23, 1979 at 1:15 P.M. Applicants appeared by Harold W. Seidman, CPA. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

- I. Whether the results of the examination of applicants' books and records properly reflected their sales tax liability.
- II. Whether sales tax was paid on the purchase of assets.
- III. Whether an adjustment is warranted for spoilage of prepared food in the operation of the delicatessen.

FINDINGS OF FACT

1. On December 16, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants,

Dieter Klein and Juergen Klein d/b/a Lakeview Delicatessen, for the period March 1, 1973 through May 31, 1976, for \$13,901.00 tax, plus penalties and interest.

2. Applicants executed a consent extending the period for assessment of sales and use taxes for the period March 1, 1973 through November 30, 1975 to June 20, 1977.

3. The applicants filed a protest to the above notice on February 24, 1977.

4. On audit, the applicants presented for examination cash receipts and cash disbursements journals, Federal income tax returns, purchase invoices and copies of sales tax returns. However, the books and records made available were insufficient for the auditor to determine the exact amount of applicants' tax liability.

5. The Audit Division based its determination on a field audit, a portion of which consisted of an observation test of prepared foods sold for take out. Taxable sales of this nature were determined to be 20.69 percent of total sales for the one day observed, and the percentage was applied to total sales for the audit period. The percentage of these sales is not at issue.

6. The determination applicable to the grocery operation was based on a markup of taxable purchases. A three-month sample of purchases made during October, 1974, and April and May, 1975 resulted in a taxable purchase ratio of 35.6 percent. A markup of 49.1 percent on taxable items was determined based on one current week's purchases since only current selling prices were available. The application of the audited markup to the taxable portion of purchases resulted in audited taxable sales for the grocery operation of \$295,777.00. Taxable sales through the deli operation were \$151,310.00 for the audit period. Applicants reported taxable sales of \$254,738.00 and the balance of \$192,349.00

was held as additional taxable sales, resulting in tax due of \$13,464.43.

7. During the course of its audit, the Audit Division determined that applicants purchased fixed assets for \$6,235.01 on which no sales tax was paid. At the hearing, applicants submitted invoices which showed that they paid sales tax on \$4,244.75 of these fixed assets.

8. Applicants contended that the markup test performed was not reflective of the entire audit period since current markups which were generally higher were applied to prior years' purchases. However, applicant submitted two invoices from a major grocery supplier which reinforced the Audit Division's computation.

9. The Audit Division's audit made no allowance for pilferage or waste. Applicants contended that some food from the deli operation was not sold due to spoilage. They also contended that due to the layout of the store and the fact that the business is located in a residential neighborhood near a school, pilferage of small items occurred.

10. Applicants acted in good faith.

CONCLUSIONS OF LAW

A. That the audit conducted by the Audit Division did not give an allowance for pilferage; accordingly, the taxable sales computed for the grocery operation by the Audit Division are hereby reduced by 2 percent to allow for pilferage. The Audit Division's examination of applicants' books and records properly reflected their sales tax liability with the exception of the aforementioned pilferage adjustment and that such audit was performed in accordance with section 1138(a) of the Tax Law.

B. That the amount of fixed assets on which no sales tax was paid is reduced to \$1,990.26.

C. That an adjustment for spoilage of food in the delicatessen operation is not warranted since the ratio used to arrive at delicatessen sales was applied to total sales and not to purchases.

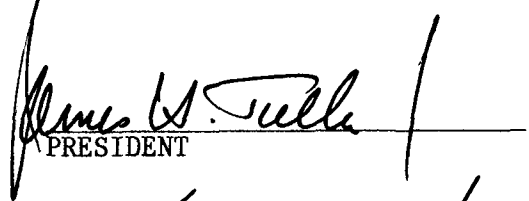
D. That the penalties and interest in excess of the minimum statutory rate are cancelled.

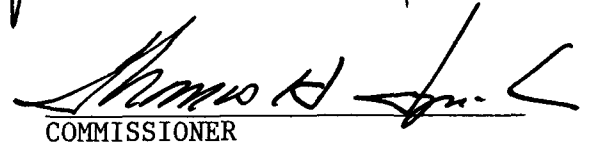
E. That the application of Dieter Klein and Juergen Klein d/b/a Lakeview Delicatessen is granted to the extent indicated in Conclusions "A", "B" and "D" above; that the Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 16, 1976; and that, except as so granted, the application is in all other respects denied.

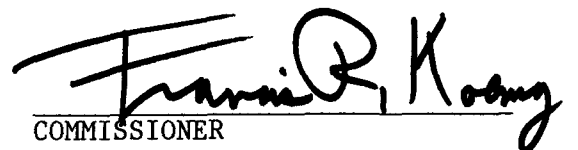
DATED: Albany, New York

JUN 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER