

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Lemmes, 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 12/1/71 - 11/30/74. :

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 7th day of July, 1980, he served the within notice of Determination by mail upon Lemmes, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lemmes, Inc.  
205 Lark St.  
Albany, NY 12210

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  
7th day of July, 1980.

Robert A. Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Lemmes, 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 12/1/71 - 11/30/74.

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 7th day of July, 1980, he served the within notice of Determination by mail upon John G. Miller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

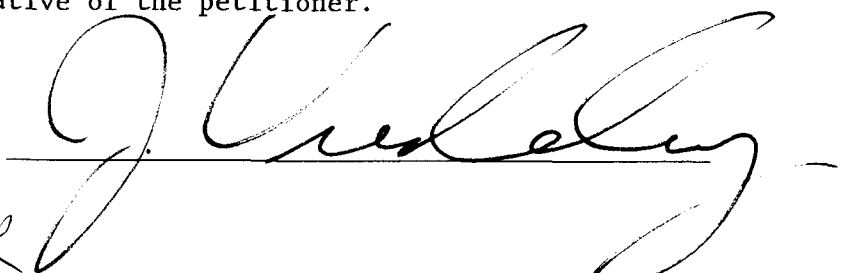
Mr. John G. Miller  
Walquist & Renodin  
11 N. Pearl St.  
Albany, NY 12207

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  
7th day of July, 1980.

Deborah A. Bank



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

July 7, 1980

Lemmes, Inc.  
205 Lark St.  
Albany, NY 12210

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  
John G. Miller  
Walquist & Renodin  
11 N. Pearl St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application :

of :

LEMME, 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 December 1, :  
1971 through November 30, 1974.

---

Applicant, Lemme, Inc., 205 Lark Street, Albany, New York 12210, 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 December 1, 1971 through November 30, 1974 (File No. 10861).

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 22, 1979 at 2:45 P.M. Applicant appeared by John G. Miller, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau properly and accurately projected additional sales tax due based on a markup of applicant's purchases.

FINDINGS OF FACT

1. On June 6, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for the period December 1, 1971 through November 30, 1974, for \$10,253.41, plus penalty and interest. Said notice was issued in accordance with the provisions of section 1138 of the Tax Law.

2. Applicant timely filed an application for a hearing to review the aforementioned notice on August 25, 1975.

3. The Sales Tax Bureau based its determination on a field audit. On audit, the Bureau examined grocery purchases for the period October 1, 1973 through November 4, 1973. The Bureau determined that 25.76 percent of these purchases was of a taxable nature. This percentage was applied to total grocery purchases to arrive at taxable grocery purchases for the audit period. These taxable grocery purchases were added to beverage purchases and were marked up to 26.45 percent to arrive at taxable sales. The 26.45 percent markup was the average markup based on applicant's Federal tax returns filed for 1972, 1973 and 1974. This audit method resulted in additional tax due of \$10,253.41. The Sales Tax Bureau offered to expand the aforementioned sample period, but applicant declined since it objected to the audit method used.

4. Applicant contended that proper sales records were maintained in that the cash register tapes showed all taxable sales and that such sales were properly posted to journals and reported on applicant's sales tax returns. Applicant contended that the procedure used by the Sales Tax Bureau should be applied only in cases where inadequate sales records exist. Applicant submitted a sampling of register tapes showing accumulated totals and journals for the period at issue. The register tapes, however, were not conclusive as to the proper application of tax to the individual items sold.

5. The applicant's books and records were not adequate for the Audit Division to determine the exact amount of the applicant's taxable sales or sales tax liability. Because of the inadequate records, the Audit Division performed a markup on the applicant's purchases.

6. Applicant further argued that the audit gave no consideration for specials (items sold below their normal selling price) and for pilferage.

7. Applicant acted in good faith.

CONCLUSIONS OF LAW

A. That the Sales Tax Bureau's projection of additional taxable sales and additional sales tax due, based on the application of a markup to applicant's purchases, is proper and in accord with the meaning and intent of section 1138(a) of the Tax Law.

B. That the penalty and interest in excess of the minimum statutory rate are cancelled.

C. That the application of Lemmes, Inc. is granted to the extent indicated in Conclusion "B" above. The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 6, 1975; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER