

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
M & A Luncheonette, 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 8/31/74-3/16/77. :

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 31st day of October, 1980, he served the within notice of Decision by mail upon M & A Luncheonette, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

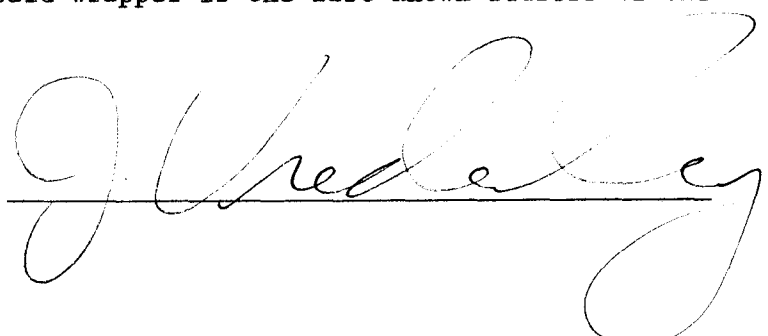
M & A Luncheonette, Inc.  
c/o Bernard Kessler  
1900 Hempstead Tpke.  
East Meadow, NY 11554

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  
31st day of October, 1980.

Deborah A Bank

A large, stylized handwritten signature, likely of Jay Vredenburg, is written over a horizontal line.

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
M & A Luncheonette, 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 8/31/74-3/16/77. :

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 31st day of October, 1980, he served the within notice of Decision by mail upon Bernard Kessler the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

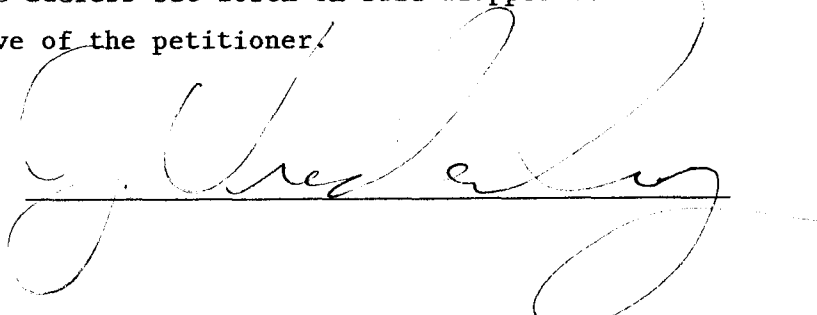
Mr. Bernard Kessler  
Jacob M. Kessler & Co.  
1900 Hempstead Tpke.  
E. Meadow, NY 11554

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  
31st day of October, 1980.

Deborah A Bank

A large, stylized handwritten signature, likely of Jay Vredenburg, is written over a horizontal line. The signature is in cursive and spans across the right side of the page.

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

October 31, 1980

M & A Luncheonette, Inc.  
c/o Bernard Kessler  
1900 Hempstead Tpke.  
East Meadow, NY 11554

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  
Bernard Kessler  
Jacob M. Kessler & Co.  
1900 Hempstead Tpke.  
E. Meadow, NY 11554  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
M & A LUNCHEONETTE, 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 June 1, 1974 through March 16, :  
1977. :  

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Petitioner, M & A Luncheonette, Inc. c/o Bernard Kessler, 1900 Hempstead Turnpike, East Meadow, New York 11554, 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 June 1, 1974 through March 16, 1977 (File No. 20591).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 6, 1980 at 10:00 A.M. Petitioner appeared by Bernard Kessler, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly valued furniture and fixtures which petitioner sold pursuant to a sale, transfer or assignment in bulk.

II. Whether the audit techniques and procedures used by the Audit Division properly reflect the petitioner's sales tax liability.

FINDINGS OF FACT

1. Petitioner, M & A Luncheonette, Inc., timely filed New York State and local sales and use tax returns for the period June 1, 1974 through March 16, 1977. Although the corporate name denotes a luncheonette, the business activity

was that of a newstand selling newspapers, magazines, soda and tobacco products.

2. On September 9, 1977, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner and Alan Utianski, William Utianski, Steven Utianski and Elia Utianski, individually and as officers of M & A Luncheonette, Inc. for \$12,578.47, plus penalties and interest of \$4,640.68.

3. The Audit Division conducted an examination of books and records furnished by petitioner. The gross sales per Federal returns were compared with gross sales per books and sales tax returns and did not match. An explanation for the difference was not given at the time of the examination (or at the Small Claims Hearing of March 6, 1980). Accordingly, the Audit Division determined that the sales tax returns filed were incorrect and insufficient.

4. On audit, the Audit Division performed a taxable ratio test. It analyzed purchases for September and October 1976 and determined that 35.9 percent of petitioner's purchases were taxable when resold. The taxable percentage of 35.9 percent was applied to gross sales as reported on petitioner's sales tax returns. This resulted in additional sales tax due of \$10,405.83. The Audit Division also determined that the sales price of furniture and fixtures (valued at \$5,000.00 on the Notification of Sale in Bulk) sold pursuant to a bulk sale was erroneous. Since the petitioner did not produce a contract of sale verifying the sale price of furniture and fixtures, the Audit Division used the book value per Federal income tax returns (\$32,158.00) to determine the sales price of the furniture and fixtures. This increased sales price resulted in additional sales tax due of \$2,172.64.

5. On March 16, 1977, all assets of petitioner, M & A Luncheonette, Inc., were sold to MSA Stationery, Inc. for \$255,000.00. On the Notification

of Sale, Transfer or Assignment in Bulk, the purchaser reported that \$5,000.00 of the sales price was for furniture and fixtures and paid a sales tax of \$400.00.

6. Although given the opportunity to do so at and subsequent to the small claims hearing of March 6, 1980, the sales contract was not submitted for examination. No sworn testimony was rendered by the corporate officers of M & A Luncheonette, Inc. or of MSA Stationery, Inc. as to the sales price of the furniture and fixtures sold.

7. Petitioner argued that the Audit Division did not give consideration to the increase in inventory or that sales tax was included in the sales price of its items. Petitioner did not introduce any documentary or substantial evidence to show that sales tax was included in gross sales, or an increase in inventory would affect the additional taxable sales as computed by the Audit Division. Petitioner also argued that the assignment of book value as a sales price for furniture and fixtures was erroneous, since book value was dependent upon the depreciation method chosen at the time of acquisition.

8. Petitioner did not raise an issue regarding the application of penalty and interest.

#### CONCLUSIONS OF LAW

A. That the assignment of a sales price by the Audit Division based on external indices is an appropriate audit procedure in the absence of adequate evidence establishing the actual sales price of the furniture and fixtures sold.

B. That the audit procedure utilized by the Audit Division resulted in a proper determination of tax in accordance with the meaning and intent of section 1138(a) of the Tax Law.

C. That petitioner, M & A Luncheonette, Inc., did not provide any oral or documentary evidence establishing that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the sum of \$17,219.15 was erroneous or inaccurate.

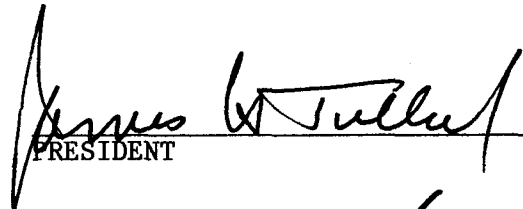
D. That the penalty and interest imposed by the Audit Division are sustained.


E. That the petition of M & A Luncheonette, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 9, 1977 is sustained.

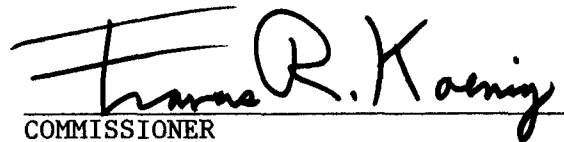
DATED: Albany, New York

OCT 31 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER