

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
F. Mastellone & Sons, 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 11/30/70 - 8/31/73. :

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 14th day of November, 1980, he served the within notice of Determination by mail upon F. Mastellone & Sons, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

F. Mastellone & Sons, Inc.
8609 18th Ave.
Brooklyn, NY 11214

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
14th day of November, 1980.

Detach & Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
F. Mastellone & Sons, 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 11/30/70 - 8/31/73. :

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 14th day of November, 1980, he served the within notice of Determination by mail upon Howard Bernstein 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. Howard Bernstein
2364 W. 13th St.
Brooklyn, NY 11223

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
14th day of November, 1980.

Deborah A. Bank

J. Vredenburg

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

November 14, 1980

F. Mastellone & Sons, Inc.
8609 18th Ave.
Brooklyn, NY 11214

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
Howard Bernstein
2364 W. 13th St.
Brooklyn, NY 11223
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
F. MASTELLONE & SONS, 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	:	
September 1, 1970 through August 31, 1973.	:	

Applicant, F. Mastellone & Sons, Inc., 8609-18th Avenue, Brooklyn, New York 11214, 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 September 1, 1970 through August 31, 1973 (File No. 10224).

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 August 16, 1979 at 10:45 A.M. Applicant appeared by Howard Bernstein, Esq. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the sales tax determined by the Audit Division properly reflects applicant's sales tax liability.

FINDINGS OF FACT

1. On December 10, 1973, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against F. Mastellone & Sons, Inc. for the period September 1, 1970 through August 31, 1973 for \$11,927.34 tax, plus penalties and interest.
2. Applicant protested the above Notice on January 7, 1974.

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3. Applicant operated a retail grocery store in Brooklyn, New York.
4. The Audit Division made numerous attempts to secure applicant's books and records for the purpose of conducting an audit. Applicant failed to provide the necessary records, but did produce a Federal income tax return for 1971. The Audit Division based its determination on gross sales reported on applicant's 1971 Federal tax return. Taxable sales were estimated to be 40 percent of the gross sales shown on the return. This method was used for the entire audit period, resulting in the additional tax due of \$11,927.34.
5. As a result of an informal conference, it was agreed that applicant would examine purchases for the months of February and August, 1974 to determine a taxable ratio. The schedules prepared by applicant's accountant and the purchase invoices were verified by the Audit Division and necessary corrections made. In addition, taxable sandwich sales were included in the results. Reconstructed cash disbursements were also submitted in support of the test. Based on the submission of these records, the Audit Division recomputed the tax due to \$5,488.40. The Audit Division did not revise the Notice of Determination and Demand.
6. Applicant offered into evidence a reconstruction of purchases for the audit period based for the most part on current estimated taxable purchases to which a 22 percent markup was applied. Applicant contended that this would reflect a more accurate tax liability. Applicant did not offer sufficient documentary evidence to substantiate the estimated taxable purchases or to verify the 22 percent markup.

CONCLUSIONS OF LAW

A. That the sales tax determined by the Audit Division pursuant to its estimate did not properly reflect the applicant's sales tax liability; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against F. Mastellone & Sons, Inc. is reduced to \$5,488.40 pursuant to Finding of Fact "5", supra.

B. That the application of F. Mastellone & Sons, Inc. is granted to the extent indicated in Conclusion "A" 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 December 10, 1973; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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