

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
NBN Newstand Corp. :  
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 6/1/72-5/30/75. :

AFFIDAVIT OF MAILING

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 5th day of September, 1980, he served the within notice of Decision by mail upon NBN Newstand Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

NBN Newstand Corp.  
c/o Murray Radman & Sydney Wolen, Esqs.  
50 Broadway  
New York, NY 10004

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  
5th day of September, 1980.

*Debra Bank*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

NBN Newstand Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

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Sales & Use Tax :

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for the Period 6/1/72-5/30/75. :

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 5th day of September, 1980, he served the within notice of Decision by mail upon Murray Radman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

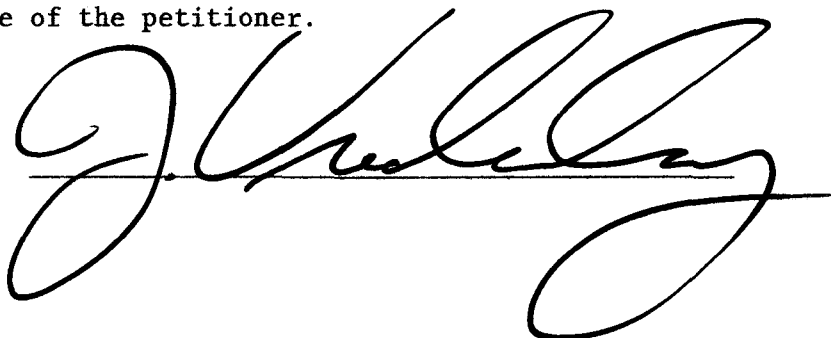
Mr. Murray Radman  
50 Broadway  
New York, NY 10004

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  
5th day of September, 1980.





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

September 5, 1980

NBN Newstand Corp.  
c/o Murray Radman & Sydney Wolen, Esqs.  
50 Broadway  
New York, NY 10004

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  
Murray Radman  
50 Broadway  
New York, NY 10004  
Taxing Bureau's Representative

## STATE TAX COMMISSION

A formal hearing was held before Neil Fabricant, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 15, 1978 at 2:45 P.M. Petitioner appeared by Murray Radman, Esq. The Audit Division appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

## ISSUES

- I. Whether the Audit Division properly estimated sales taxes due where there was a discrepancy in records of petitioner.
- II. Whether the correct mark-up was used in conducting the audit.
- III. Whether the audit properly reflected the correct percentage of non-taxable items.

## FINDINGS OF FACT

1. On September 17, 1975, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Tax Due against NBN Newstand Corp. (Seller) for the periods June 1, 1972 through May 30, 1975 in the amount

of \$36,154.13, plus penalty and interest of \$11,147.00 for a total of \$47,301.13, based upon a field audit. Petitioner timely filed an application for a hearing with respect to the aforementioned determination.

2. The auditor testified that complete records were not made available to her when she conducted the audit. She, therefore, resorted to the purchases as per petitioner's United States Corporation Income Tax Return for 1973. There was a discrepancy between the amount of purchases shown on the income tax return and on the bills produced by petitioner. The auditor claimed that 61 percent of purchase invoices were missing. A test of purchases was made for the period October 1, 1973 to September 30, 1974 to determine what percentage of the total each category of purchases constituted. The taxable purchases were projected to be 55 percent of total sales. Taking the taxable purchases (assuming 25 percent of ice cream as taxable and 75 percent of the miscellaneous category as taxable), the auditor marked ice cream up 33 percent and miscellaneous 35 percent to arrive at total adjusted taxable purchases of \$941,134.00.

3. Witnesses for the petitioner testified that about 75 percent of the petitioner's business during the audit period was in the sale of newspapers and magazines. The chief circulation inspector for the New York Daily News testified that he was familiar with the location of petitioner's newstand; that petitioners sold "approximately better than \$30,000.00" worth of newspapers a week; that about 70 percent to 75 percent of petitioner's total sales were attributable to newspapers and magazines; and that the markup in the type of candy store operated by petitioner was between 18 percent and 22 percent. The president of the petitioner corporation testified that 95 percent of his sales were newspapers and magazines; that he was not asked to present all of the

bills for purchases of merchandise; that the markup in his type of business in the Kings Highway, Brooklyn, New York area was between 18 percent and 22 percent.

CONCLUSIONS OF LAW

A. That since there was a discrepancy between the amount of the purchases in the records and those reported on petitioner's Federal income tax return, it was proper to estimate the total taxable sales in accordance with standard procedures of the Audit Division (section 1138(a) of the Tax Law).

B. That based upon credible evidence, a fair and reasonable percentage of non-taxable sales in this case is deemed to be 65 percent rather than 45 percent as determined on the audit.

C. That a fair and reasonable mark-up in the instant case is deemed to be 22 percent for cigarettes and 25 percent for cigars.

D. That the Audit Division is directed to recompute the sales tax in accordance with Conclusions of Law "B" and "C", supra.


E. That the petition of NBN Newstand Corp. is granted to the extent of Conclusions of Law "B", "C" and "D", supra and is in all other respects denied.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER