

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Pine Aire Deli, Inc. :
and John Kozak : 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 2/15/73 - 7/10/75. :

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 2nd day of January, 1980, he served the within notice of Determination by mail upon Pine Aire Deli, Inc., and John Kozak, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Pine Aire Deli, Inc.
and John Kozak
4 Mount Cook Ave.
Farmingville, NY 11738

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
2nd day of January, 1980.

Joanne Krapp

J. Vredenburg

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

January 2, 1980

Pine Aire Deli, Inc.
and John Kozak
4 Mount Cook Ave.
Farmingville, NY 11738

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
PINE AIRE DELI, INC. (Seller)	:	DETERMINATION
and	:	
JOHN KOZAK	:	
Individually and as Corporate Officer	:	
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 February 15, 1973 through	:	
July 10, 1975.	:	

Applicant, Pine Aire Deli, Inc. and John Kozak, individually and as corporate officer, 4 Mount Cook Avenue, Farmingville, New York 11738, 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 February 15, 1973 through July 10, 1975 (File No. 16868).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 17, 1978 at 2:45 P.M. and was continued on December 12, 1978 at 10:30 A.M. Applicant appeared by John Kozak, President. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the determination of additional sales taxes due from applicant Pine Aire Deli, Inc. for the period February 15, 1973 through July 10, 1975, based on a taxable sales analysis of the purchaser's business, accurately reflects applicants' sales tax liability.

FINDINGS OF FACT

1. Applicant Pine Aire Deli, Inc. ("Pine Aire") began business on

February 15, 1973, and continued its operation through July 10, 1975, at which time the business was sold to G & F Deli Hut, Inc.

2. Pine Aire's business activities consisted of a grocery and delicatessen operation, through which both prepared and unprepared foods were sold.

3. On November 12, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Pine Aire for \$13,220.90, plus penalties and interest of \$3,674.09. The additional tax due was based on an estimated taxable ratio of 65%, which percentage was applied to the reported gross sales and to the estimated gross sales for those quarters for which returns were not filed. Taxable sales which were reported were deducted from estimated taxable sales and the difference was held to be taxable. The Notice also included tax due of \$490.00 for furniture and fixtures sold.

4. Applicants filed a timely protest and Pine Aire's books and records were submitted to the Sales Tax Bureau for audit.

5. On audit, the Sales Tax Bureau performed a markup test on Pine Aire's purchases which it sold through its grocery operation. In addition to the markup test, the Sales Tax Bureau arrived at a taxable ratio of 30% for Pine Aire's delicatessen operation, based on an analysis of the purchaser's delicatessen operation. A margin of error which was computed as a result of the above was applied in the following manner:

a. For the period February 15, 1973 through February 28, 1975, the error rate was applied to taxes paid by applicants.

b. For the period April 19, 1975 through July 10, 1975, the error rate was applied to taxes paid by the purchaser. (Purchaser operated the business during this period.)

c. No tax was paid for the period March 1, 1975 through April 18, 1975; therefore, tax was estimated, based on the purchaser's remittances in the

period described in "b", and the error rate was applied thereto.

Application of the margin of error resulted in additional tax due of \$11,482.14. Estimated tax of \$616.42 was determined to be due for the unfiled period March 1, 1975 through April 18, 1975. Furniture and fixtures sold in conjunction with the bulk sale resulted in a tax liability of \$490.00.

6. On September 23, 1976 as a result of the field audit, the Sales Tax Bureau issued a Notice of Assessment Review and adjusted the tax to \$12,588.56, plus penalties and interest of \$5,644.88. A payment of \$490.00 by the purchaser for the tax on furniture and fixtures which were sold was applied, leaving a balance of tax due of \$12,098.56.

7. The purchaser, G & F Deli Hut, Inc., installed a pizza oven on the premises after the purchase of the business, and also rearranged the floor plan to accommodate tables for eating. Pine Aire sold no pizza during the operation of its business. The taxable ratio for the delicatessen operation for the period February 15, 1973 through July 10, 1975 was 20%.

8. Applicant introduced into evidence books which purported to show daily purchases of merchandise from various vendors and the total sales made each day. These records did not disclose taxable or exempt sales or the tax collected. Sales tax returns were prepared by applying a predetermined percentage to purchases made during a quarter.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "...if a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices..."; that the method used in the determination of applicants sales tax liability was proper, with the exception

that consideration shall be given for the change in operation of the business by the purchaser relating to pizza sales; therefore, the taxable sales ratio from the delicatessen operation shall be reduced to 20%, to reflect applicants' said operation.

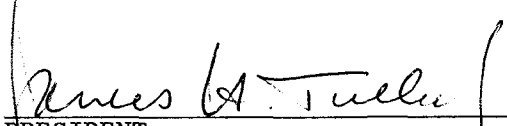
B. That the penalties and interest in excess of the minimum statutory rate are cancelled, with the exception of the period March 1, 1975 through April 18, 1975.

C. That the application of Pine Aire Deli, Inc. and John Kozak, individually and as corporate officer, is granted to the extent indicated in Conclusions of Law "A" and "B"; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on November 12, 1975 and adjusted by a Notice of Assessment Review issued on September 23, 1976; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

JAN 2 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER