

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Schultz's Delicatessen, 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 12/1/73-11/19/76. :

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 Determination by mail upon Schultz's Delicatessen, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Schultz's Delicatessen, Inc.  
250 W. 94th St.  
New York, NY

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.

Frederic Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Schultz's Delicatessen, Inc. :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Sales & Use Tax :  
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AFFIDAVIT OF MAILING

State of New York  
County of Albany

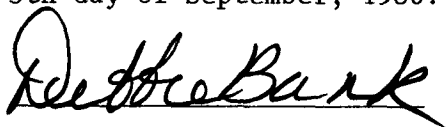
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Determination by mail upon Robert J. Giant the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

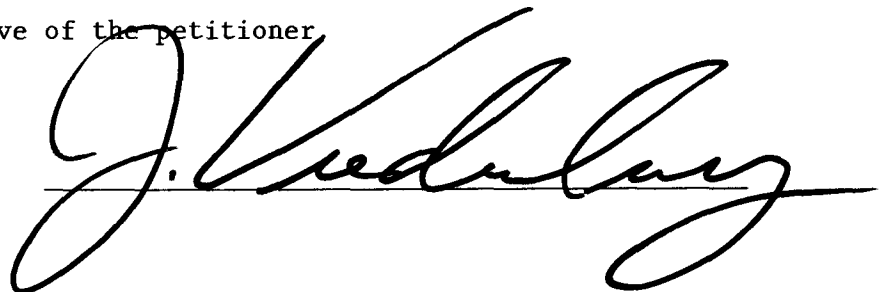
Mr. Robert J. Giant  
501 Fifth Ave.  
New York, NY 10017

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

Schultz's Delicatessen, Inc.  
250 W. 94th St.  
New York, NY

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  
Robert J. Giant  
501 Fifth Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application :

of :

SCHULTZ'S DELICATESSEN, 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, 1973 :  
to November 19, 1976. :

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Applicant, Schultz's Delicatessen, Inc., 250 West 94th Street, New York, New York, 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, 1973 to November 19, 1976 (File No. 18331).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 12, 1978 at 2:50 P.M. Applicant appeared by Robert J. Grant, CPA. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the result of an audit performed by the Audit Division properly reflects applicant's sales tax liability for the period December 1, 1973 to November 19, 1976.

FINDINGS OF FACT

1. On March 1, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Herbert Schultz, President, Schultz's Delicatessen, Inc., for the period December 1, 1973 to November 19, 1976 in the amount of \$31,044.11, plus penalty and interest of \$11,239.02, for a total of \$42,283.13.

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2. Applicant, Schultz's Delicatessen, Inc. operated a grocery and delicatessen store seven days a week during the period in issue. It was located in the Bronx at the end of a subway line. It was open from 9:00 A.M. to midnight. Applicant sold the business on November 19, 1976.

3. An audit was performed upon applicant after the sale of the business. There were no cash register tapes, bank statements or deposit records to verify sales, no cash or check disbursement records, and no cancelled checks or deposit slips. The daybooks were available. Applicant's sales tax returns reflected declining sales volume during the periods in issue.

4. A 15.5 hour observation test by auditors, performed Wednesday, February 23, 1977, indicated that total sales for the day were \$883.52, of which taxable sales were \$454.55. Taxable items reflected 51.4 percent of total sales. Gross sales for the entire period reported by applicant was \$885,543.00. The gross sales for the first year in the audit period was \$333,994.00, the second year \$285,776.53 and the third year \$266,162.64. The amount of adjusted gross sales for the three year audit period was computed by taking the gross sales for the first year (\$333,994.00) as representative:

3 x \$333,994.00 = \$1,001,982.00	Adjusted gross sales for audit period
51.4% of \$1,001,982.00 = \$515,500.00	Adjusted taxable sales for audit period
\$161,267.00	Reported taxable sales for audit period
\$515,500.00 - \$161,267.00 = \$354,233.00	Additional taxable sales
\$40,112.93 adjusted sales tax due computed using appropriate tax for each period	
9,308.82 tax paid by petitioner	
<u>\$30,804.11</u> tax due on sales.	

5. The average taxable sales for the type of business operated by applicant was between 31 percent and 50 percent. The purchasers of the business stocked a greater number of paper goods, disposable diapers and pet foods than petitioner; the auditor acknowledged that this could amount to a difference of 3 to 5 percent in taxable sales.

[illegible]

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

6. Applicant's reported sales were on the decline during the period in issue while purchases remained stable. The mark-up based on reported sales was 100 percent the first year of the period in issue, 75 percent the second year and then 60 percent the third year. The auditor testified that in his experience the mark-up remained relatively stable, with a fluctuation of 5 percent or 10 percent in this type of enterprise.

7. The value of the furniture and fixtures transferred to purchasers by applicant on November 19, 1976 was \$3,000.00. Tax of \$240.00 was calculated on the bulk sale, which is included in the assessment.

8. Applicant paid sales tax for the period August 31, 1975 through November 19, 1976 in the amount of \$3,382.12, which included the bulk sales tax of \$240.00.

9. Applicant offered no documentary or other substantial evidence to show that the recomputed additional taxes due did not reflect additional sales tax liability.

#### CONCLUSIONS OF LAW

A. That the Audit Division's determination of additional taxes due was determined "from such information as may be available", in accordance with the meaning and intent of section 1138(a) of the Tax Law.

B. That in view of the increased sale of paper goods, disposable diapers and pet foods by the purchaser, all of which are taxable, adjusted gross sales of \$1,001,982.00 are reduced by 5 percent.

C. That except as provided in Conclusion of Law "B", applicant failed to sustain the burden of proof required to show that the additional taxes due were incorrect.

D. That the penalties are cancelled and interest is reduced to the minimum statutory rate.

E. That the application of Schultz's Delicatessen, Inc., is granted to the extent indicated in Conclusions of Law "B" and "D" above; that allowance is to be made for the payment referred to in Finding of Fact "8"; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 1, 1977; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION

*James G. Truhy*  
PRESIDENT

*Thomas H. [unclear]*  
COMMISSIONER

*Francis R. Koenig*  
COMMISSIONER

The following information was obtained from the records of the  
Department of the Interior, Bureau of Land Management, on  
the subject of the land owned by the United States in  
the State of California, and is hereby certified to be true  
and correct.

Walter K. [unclear]  
[unclear]  
[unclear]  
[unclear]

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