

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Breezy Point Hardware, 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 9/1/74 - 8/31/77. :

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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 1st day of May, 1981, he served the within notice of Decision by mail upon Breezy Point Hardware, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Breezy Point Hardware, Inc.  
202-34 Rockaway Point Blvd.  
Rockaway Point, NY 11697

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  
1st day of May, 1981.

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*Ernie A. Hagelund*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Breezy Point Hardware, Inc. :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Sales & Use Tax :  
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for the Period 9/1/74 - 8/31/77. :

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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 1st day of May, 1981, he served the within notice of Decision by mail upon Robert Semple 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 Semple  
26-10 N. Federal Hwy.  
Boynton Beach, FL 33435

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  
1st day of May, 1981.

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*Orme R. Haglund*

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

May 1, 1981

Breezy Point Hardware, Inc.  
202-34 Rockaway Point Blvd.  
Rockaway Point, NY 11697

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  
Robert Semple  
26-10 N. Federal Hwy.  
Boynton Beach, FL 33435  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
BREEZY POINT HARDWARE, 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 September 1, 1974	:	
through August 31, 1977.	:	

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Petitioner, Breezy Point Hardware, Inc., 202-34 Rockaway Point Boulevard, Rockaway Point, New York 11697, 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 September 1, 1974 through August 31, 1977 (File No. 22216).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 2, 1980 at 1:15 P.M. Petitioner appeared by Robert Semple, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due based on an audit of petitioner's available records.

FINDINGS OF FACT

1. Petitioner, Breezy Point Hardware, Inc., operated a retail hardware store located at 202-34 Rockaway Point Boulevard, Rockaway Point, New York. Petitioner opened a second location during the summer months at 430 B. 129th Street, Rockaway Beach.

2. On January 4, 1978, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against petitioner for the period September 1, 1974 through August 31, 1977 for taxes due of \$5,273.52, plus penalty and interest of \$1,992.21, for a total of \$7,265.73.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1974 through August 31, 1977, to December 20, 1978.

4. The only records made available for audit by petitioner were purchase invoices and a checkbook for the period June 1, 1977 through August 31, 1977. The Audit Division analyzed the purchase invoices and categorized purchases as paint, housewares, plumbing, toys, tools and sundry. Said purchases totaled \$18,478.58 for the test period. Since no other purchase information was available, the Audit Division estimated total purchases for the audit period of \$126,482.00 on the basis that gross sales for the test period represented 14 percent of total sales and accordingly determined purchases were made in the same proportion. A markup test was performed for selected items in each of the above categories using costs for that period and selling prices in effect at the time of the audit. The markups were applied to applicable purchases which resulted in additional taxable sales of \$65,919.00 and tax due thereon of \$5,273.52.

5. Subsequent to the audit, petitioner produced Federal income tax returns for 1975 and 1976, the checkbook for the audit period, additional purchase invoices, and data regarding exempt sales. Based on said documents, the Audit Division calculated the following adjustments:

- a. Actual purchases were \$138,688.00 or 9.65 percent greater than the amount estimated.
- b. Reduction in the markup on sundry items.
- c. The amount of purchases allocated to categories.
- d. An allowance of 43 percent of reported nontaxable sales.

The foregoing adjustments resulted in taxes due of \$6,280.64; however, the Audit Division did not assert a greater deficiency.

6. Petitioner contended that the markups determined by the Audit Division were excessive and that the audit did not give consideration to pilferage, theft and damaged merchandise.

7. Petitioner did not maintain cash register tapes or books of original entry.

8. Reasonable cause does not exist for the abatement of penalty and interest.

CONCLUSIONS OF LAW

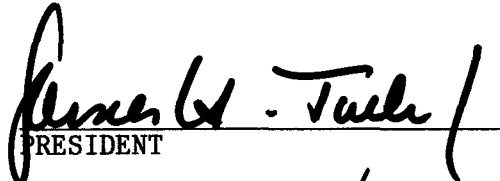
A. That petitioner did not maintain complete or sufficient books and records for the Audit Division to determine the exact amount of taxable sales and as such, the Audit Division properly determined petitioner's taxable sales from such information as was available, pursuant to section 1138(a) of the Tax Law.


B. That the petition of Breezy Point Hardware, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 4, 1978 is sustained.

DATED: Albany, New York

MAY 01 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER