

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Burstiner Supermarket, Inc. :
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 3/1/75-2/28/77. :

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 9th day of January, 1981, he served the within notice of Decision by mail upon Burstiner Supermarket, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burstiner Supermarket, Inc.
c/o Solomon Burstiner
17 Priscilla Ave.
Yonkers, NY 10710

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
9th day of January, 1981.

Connie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Burstiner Supermarket, 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 3/1/75-2/28/77. :

State of New York
County of Albany

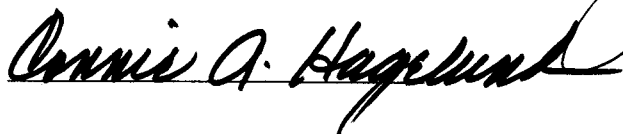
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of January, 1981, he served the within notice of Decision by mail upon Bernard Resnick the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

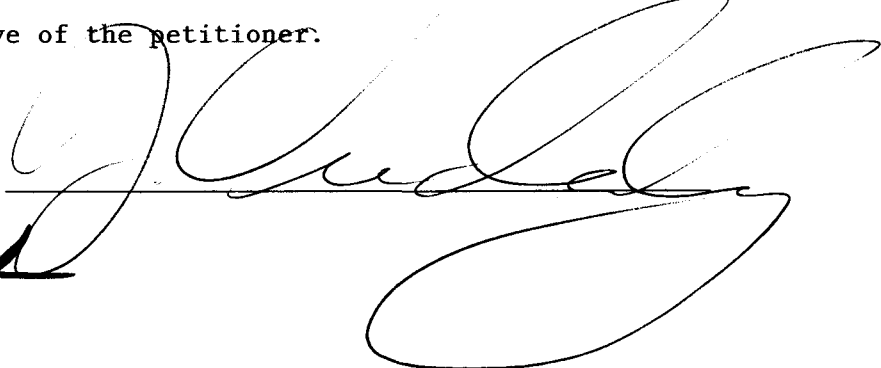
Mr. Bernard Resnick
26 Court St.
Brooklyn, NY 11242

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
9th day of January, 1981.


Connie A. Haglund



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

January 9, 1981

Burstiner Supermarket, Inc.
c/o Solomon Burstiner
17 Priscilla Ave.
Yonkers, NY 10710

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
Bernard Resnick
26 Court St.
Brooklyn, NY 11242
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

BURSTINER SUPERMARKET, 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 March 1, 1975 through February 28, :
1977. :

Petitioner, Burstiner Supermarket, Inc., c/o Solomon Burstiner, 17 Priscilla Avenue, Yonkers, New York 10710, 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 March 1, 1975 through February 28, 1977 (File No. 23552).

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 July 17, 1980 at 10:45 A.M. Petitioner appeared by Bernard Resnick, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether the Audit Division's estimate of petitioner's taxable sales, based on the results of a prior audit, was proper.

FINDINGS OF FACT

1. During the period at issue, petitioner, Burstiner Supermarket, Inc., operated a grocery store located at 705 East Gun Hill Road, Bronx, New York. Petitioner discontinued business operations on or about March 22, 1977 when a fire destroyed the premises. Petitioner previously operated a similar business at 3548 White Plains Road until January 1, 1972.

2. On June 12, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period March 1, 1975 through February 28, 1977 for taxes due of \$6,793.28, plus penalty and interest of \$3,247.14, for a total of \$10,040.42. Said Notice was issued as a result of petitioner's failure to produce books and records for audit.

3. The Audit Division estimated the amount of tax due based on its findings from a prior audit of petitioner's books and records for the period December 1, 1968 through November 30, 1971 at the White Plains Road location. Said audit disclosed that 19.5 percent of petitioner's gross were taxable sales and resulted in a tax deficiency of \$2,860.04 which was agreed to by petitioner. Therefore, the Audit Division applied 19.5 percent to gross sales of \$1,627,821.00 obtained from sales tax returns filed for the period at issue to determine taxable sales of \$317,424.00. Petitioner's reported taxable sales of \$232,508.00 was deducted from this amount, leaving additional taxable sales of \$84,916.00 and tax due thereon of \$6,793.28.

4. Petitioner's business at the Gun Hill Road location differed from the White Plains Road store in that it (Gun Hill Road) sold a substantial volume of fresh meat. Such sales amounted to approximately 25 percent of gross sales, whereas there were no meat sales at the previous location.

5. Petitioner's books and records were kept in an office located in the basement of the store. The books and records were destroyed when the basement suffered extensive water damage in the fire and thereby were not available for examination by the Audit Division.

6. Petitioner acted in good faith at all times and did not willfully attempt to evade the tax.

CONCLUSIONS OF LAW

A. That the Audit Division in the absence of books and records properly determined petitioner's taxable sales from such information as was available, pursuant to section 1138(a) of the Tax Law. However, the Audit Division failed to give consideration to the change in petitioner's business operation as set forth in Finding of Fact "4"; therefore, the additional taxable sales determined for the period March 1, 1975 through February 28, 1977 were incorrect. That petitioner's reported taxable sales adequately reflect its actual sales tax liability after giving consideration to meat sales.

B. That the petition of Burstiner Supermarket, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 12, 1978, is cancelled.

DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER