

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Canaan Lake 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 6/1/74 - 5/31/77. :

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 23rd day of January, 1981, he served the within notice of Decision by mail upon Canaan Lake Delicatessen, Inc, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Canaan Lake Delicatessen, Inc  
c/o R. Klein  
183 Ohls St.  
No. Patchogue, NY 11772  
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  
23rd day of January, 1981.

Connie A. Hageland

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Canaan Lake Delicatessen, Inc :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

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Sales & Use Tax :

under Article 28 & 29 of the Tax Law

for the Period 6/1/74 - 5/31/77. :

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 23rd day of January, 1981, he served the within notice of Decision by mail upon David Klein, CPA 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. David Klein, CPA  
474 New York Ave.  
Huntington, NY 11743

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  
23rd day of January, 1981.

*Connie G. Hagelund*

*J. Vredenburg*

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

January 23, 1981

Canaan Lake Delicatessen, Inc  
c/o R. Klein  
183 Ohls St.  
No. Patchogue, NY 11772

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  
David Klein, CPA  
474 New York Ave.  
Huntington, NY 11743  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CANAAN LAKE DELICATESSEN, 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 June 1, 1974 through May 31,	:	
1977.	:	

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Petitioner, Canaan Lake Delicatessen, Inc., c/o R. Klein, 183 Ohls Street, No. Patchogue, New York 11772, 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 June 1, 1974 through May 31, 1977 (File No. 22919).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 18, 1980 at 10:45 A.M. Petitioner appeared by David Klein, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the results of a field audit performed by the Audit Division using a markup of purchases method properly reflected petitioner's taxable sales.

FINDINGS OF FACT

1. On June 12, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Canaan Lake Delicatessen, Inc. for the period June 1, 1974 through May 31, 1977 in the amount of \$6,632.15 tax, plus minimum interest, as a result of a field audit.

2. Petitioner executed a consent extending the period of limitation for assessment to September 20, 1978.

3. Petitioner's books and records were insufficient for the verification of the exact amount of its taxable sales; therefore, the Audit Division performed a markup test of petitioner's purchases. Based on a test period of July and August, 1976 and February, 1977, the Audit Division determined that 36.96 percent of petitioner's purchases were taxable when resold. It further segregated the taxable purchases into categories and applied the following markups (The markups were based on current purchase invoices and selling prices in effect on August 9, 1977):

<u>MARKUP PERCENT</u>	
Beer	43.4
Soda	55.3
Cigarettes	81.5
Candy & Tobacco	40.0
Miscellaneous	49.6

Upon application of the appropriate markups to the taxable purchases, the Audit Division determined taxable sales in the amount of \$248,364.00.

An observation test of prepared foods sold was made by the Audit Division on August 9, 1977 and consolidated with tests made by petitioner's accountant on July 13, 1976 and November 24, 1976. Sales of prepared food were determined to be 2.72 percent of gross sales and resulted in taxable prepared food sales of \$16,195.00 for the audit period.

Petitioner reported taxable sales of \$170,414.00 on its sales and use tax returns filed for the period audited. The Audit Division determined additional taxable sales of \$94,145.00 and tax due thereon of \$6,590.15. A use tax assessed on fixed assets of \$42.00 included in the assessment is not at issue.

4. At a pre-assessment conference, reduction in additional tax due of \$894.00 was offered by the Audit Division giving recognition to reduced selling prices on beer, soda and cigarettes. This reduction, however, was not made to the audit findings and, therefore, remains in controversy.

5. Petitioner argued that the selling prices used in the markup test performed on August 9, 1977 were not representative of the entire audit period. He contended that specials on beer and soda are offered during fall to spring months. He therefore reasoned that if the specials were included in the markup test, the resultant markup percentage would be lower.

Testimony was given by one of petitioner's regular customers that the store always has at least one item on special. Petitioner submitted an affidavit showing reduced selling prices offered during prior periods. The testimony and affidavit were general and not conclusive in showing to what extent the audit results would be affected.

6. Petitioner's merchandise is displayed for self service. During the period in issue, the petitioner sustained losses attributable to pilferage equal to one percent of purchases.

#### CONCLUSIONS OF LAW

A. That the Audit Division did not give proper consideration in the markup test to reduced selling prices offered during other months in the audit period. That the additional tax due assessed is reduced by \$894.00 to reflect the occurrence of these reduced prices as computed by the Audit Division in Finding of Fact "4".

B. That the amount of petitioner's purchases marked up on audit is reduced by 1 percent to allow for pilferage sustained in the business operation.

C. That except as noted in Conclusions "A" and "B" above, the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

D. That the Audit Division is directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 12, 1978; that such tax due shall be together with interest at the minimum statutory rate; and that, except as so granted, the petition of Canaan Lake Delicatessen, Inc. is in all other respects denied.

DATED: Albany, New York

JAN 23 1981

STATE TAX COMMISSION

*James A. Tully*  
\_\_\_\_\_  
PRESIDENT

*Thomas H. Gault*  
\_\_\_\_\_  
COMMISSIONER

*Frank R. Koenig*  
\_\_\_\_\_  
COMMISSIONER