

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Carole's Corner, Inc.

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: 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:  
6/1/74-11/30/77.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Carole's Corner, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carole's Corner, Inc.  
741 Lexington Ave.  
New York, NY 10022

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  
6th day of November, 1981.

Carole A. Harsland

Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
Carole's Corner, Inc.

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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 6/1/74-11/30/77

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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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Steven M. Coren the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven M. Coren  
485 Madison Ave.  
New York, NY 10022

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  
6th day of November, 1981.

*Annice A. Hazelwood*

*J. Vredenburg*

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

November 6, 1981

Carole's Corner, Inc.  
741 Lexington Ave.  
New York, NY 10022

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  
Steven M. Coren  
485 Madison Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CAROLE'S CORNER, INC.	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 & 29	:	
of the Tax Law for the Period June 1, 1974	:	
through November 30, 1977.	:	

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Petitioner Carole's Corner, Inc., 741 Lexington Avenue, New York, New York 10022, 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 November 30, 1977 (File No. 24865).

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 April 29, 1981 at 1:15 P.M. and continued on June 23, 1981 at 1:15 P.M. Petitioner appeared by Steven M. Coren, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's books and records accurately determined additional sales and use taxes due for the period June 1, 1974 through November 30, 1977.

FINDINGS OF FACT

1. Petitioner, Carole's Corner, Inc., operated a fast food restaurant located at 59th Street and Lexington Avenue, New York, New York.

2. On October 23, 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 covering the period June 1, 1974 through November 30,

1977 for taxes due of \$18,598.77, plus penalty of \$4,057.61 and interest of \$5,562.21, for a total of \$28,218.59. On November 21, 1978, the Audit Division issued a Notice of Assessment Review which revised the penalty to \$4,369.53.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1974 through May 31, 1977 to June 19, 1979.

4. On audit, the Audit Division reconciled petitioner's gross and taxable sales from the books and records with such sales reported on sales tax returns and corporation income tax returns and found no discrepancies. A markup test was performed for two menu items (hamburger and frankfurter) based on the unit cost for each item, plus the cost for a roll and condiments, and selling prices in effect as of January 1978. The resultant average markup of 239 percent was applied to total food purchase for the audit period to arrive at taxable sales of \$1,334,210.06. Petitioner reported taxable sales of \$1,111,344.30 for the same period, leaving additional taxable sales of \$222,865.76 and tax due thereon of \$17,762.77.

The Audit Division also reviewed petitioner's corporation income tax returns which revealed that the fixed assets increased \$10,150.00 for the fiscal year ended March 31, 1977. Petitioner did not provide purchase invoices to show that sales tax was paid on such acquisitions and therefore, use taxes of \$812.00 were asserted thereon.

5. Petitioner did not issue guest checks to its customers. The posted sales price for all menu items included sales tax in accordance with a sign displayed on the premises.

6. Petitioner's menu consisted of approximately thirty items, including sandwiches, ice cream, cakes, donuts, coffee and soft drinks.

7. The Audit Division's markup computation did not consider certain factors that occur in petitioner's business operation, such as, pilferage in the form of walk outs, waste and spoilage. Moreover, consideration was not given to employee meals. Employee's are entitled to two free meals during each of the days worked.

8. Petitioner's reported markups on corporation income tax returns filed for fiscal years ending March 31, 1975, 1976 and 1977 were 203 percent, 179 percent and 154 percent, respectively.

9. Petitioner argued that the increase in fixed assets consisted of the replacement of the store front that was damaged in two separate accidents and such replacements were capital improvements to real property.

Petitioner executed a contract dated September 8, 1976 with Superior Metal Store Fronts, Inc. to replace the existing store front for the sum of \$3,650.00.

10. The Audit Division failed to establish that petitioner's books and records were inadequate to verify taxable sales reported and conduct a complete audit.

11. Petitioner acted in good faith at all times.

#### CONCLUSIONS OF LAW

A. That the food markup computed by the Audit Division, limited to a test of two items and applied to the food cost for approximately thirty food items, was neither a reasonable nor accurate method of determining petitioner's taxable sales. Moreover, the Audit Division did not consider the factors enumerated in Findings of Fact "5" and "7". Accordingly, the Audit Division's determination of additional sales taxes due of \$17,762.77 is cancelled.

B. That the work performed pursuant to the contract referred to in Finding of Fact "9" constituted a capital improvement to real property and

therefore, was not subject to tax. That petitioner failed to establish that the remaining balance of the increase in fixed assets was attributable to purchases not subject to tax. Accordingly, the use taxes asserted of \$812.00 are reduced to \$520.00.

C. That the penalty and interest in excess of the minimum statutory rate are cancelled.

D. That the petition of Carole's Corner, Inc. is granted to the extent indicated in Conclusions of Law "A", "B" and "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 23, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER