

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Christos Dimkos :  
d/b/a Willis Ave. Market :  
: 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 :  
9/1/72 - 2/29/76. :

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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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Christos Dimkos, d/b/a Willis Ave. Market the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Christos Dimkos  
d/b/a Willis Ave. Market  
1001 Willis Ave.  
Syracuse, NY 13204

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  
30th day of October, 1981.

*Carmie P. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Christos Dimkos :  
d/b/a Willis Ave. Market :  
: 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 9/1/72 - 2/29/76. :

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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 30th day of October, 1981, he served the within notice of Decision by certified mail upon John S. Kenny the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John S. Kenny  
Limpert, Kenny & Siracusa  
108 W. Jefferson St.  
Syracuse, NY 13202

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  
30th day of October, 1981.

*Annie A. Hagelund*

*J. Vredenburg*

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

October 30, 1981

Christos Dimkos  
d/b/a Willis Ave. Market  
1001 Willis Ave.  
Syracuse, NY 13204

Dear Mr. Dimkos:

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  
John S. Kenny  
Limpert, Kenny & Siracusa  
108 W. Jefferson St.  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CHRISTOS DIMKOS	:	DECISION
D/B/A WILLIS AVENUE MARKET	:	
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,	:	
1972 through February 29, 1976.	:	

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Petitioner, Christos Dimkos d/b/a Willis Avenue Market, 1001 Willis Avenue, Syracuse, New York 13204, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period September 1, 1972 through February 29, 1976 (File No. 16665).

A Small Claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 333 E. Washington Street, Syracuse, New York, on October 28, 1980 at 2:45 P.M. Petitioner appeared by John S. Kenny, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner's taxable purchase ratio for a three-month period which was applied to gross sales properly reflected petitioner's taxable sales.

FINDINGS OF FACT

1. On June 25, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Christos Dimkos d/b/a Willis Avenue Market for the period September 1, 1972 through February 29, 1976. The Notice was issued as a result of a field audit and asserted tax due of \$15,621.95 plus penalties and interest.

2. Petitioner consistently filed his sales and use tax returns beyond their date due. The return for the period September 1, 1972 through November 30, 1972 was received on August 27, 1974. The return for the period December 1, 1972 through February 28, 1973 was received on December 31, 1973. The return for March 1, 1973 through May 31, 1973 was received January 3, 1974. Therefore, the Notice was timely issued within the statute of limitation for assessment for all periods involved.

3. Petitioner operated two grocery stores and reported sales from Willis Avenue Market and Fay Road Market on consolidated sales and use tax returns. The taxable sales reported and the tax due thereon were estimated by petitioner.

4. On audit, the Audit Division found petitioner's sales records to be incomplete and no cash register tapes available for the verification of sales. Petitioner's purchase invoices for periods prior to October, 1975 were also incomplete.

The Audit Division examined purchase invoices for January, February and March, 1976 and found that 54.35 per cent of petitioner's purchases were taxable when resold. Gross Sales from petitioner's Federal Income Tax Returns were accepted as filed for 1972, 1973 and 1974. Gross sales for 1975 and two months of 1976 were estimated by the Audit Division based on the figures available since the federal return for 1975 had not been filed. The Audit Division then applied the taxable ratio of purchases to the gross sales for the audit period to determine taxable sales. Taxable sales for the audit period were found to be \$286,948.00 and tax due thereon to be \$20,086.40. Petitioner reported sales tax of \$4,464.45 on his sales and use tax returns filed. The Audit Division thereby determined additional tax due of \$15,621.95.

5. Petitioner argued that the mark up on taxable items was not necessarily the same as the mark up on non-taxable items sold; therefore, the ratio of taxable purchases applied to gross sales could distort the amount of his taxable sales. Petitioner offered no evidence to show that his mark up on taxable items differed from non-taxable or that the taxable sales as determined by the Audit Division were incorrect.

6. Petitioner failed to show reasonable cause existed for the cancellation of penalties.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law states that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases.

B. That petitioner's books and records were insufficient for the determination of an exact amount of tax; therefore, the audit procedure employed by the Audit Division was proper and in accordance with section 1138(a) of the Tax Law. (Matter of Chartair, Inc. v. State Tax Commission, 65 AD2d 44, 411 N.Y.S. 2d 41).

C. That the petition of Christos Dimkos d/b/a Willis Avenue Market is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 25, 1976 is sustained with applicable penalties and interest thereon.

Dated: Albany, New York

OCT 30 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER