

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
E & E Deli., 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 :
Periods 3/1/74-2/28/77 and 3/1/77-11/30/77. :

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon E & E Deli., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

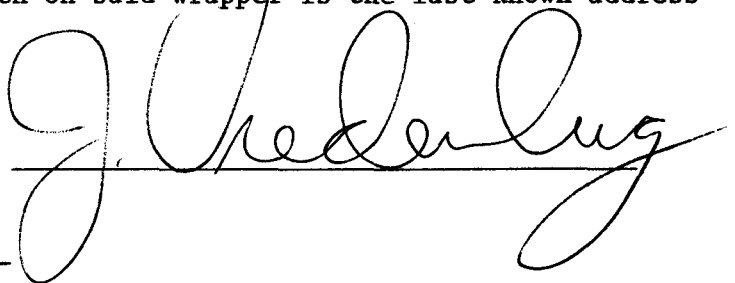
E & E Deli., Inc.
Att: Jerry Rastelli
96 Washington Dr.
Centerport, NY 11721

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
27th day of November, 1981.





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

November 27, 1981

E & E Deli., Inc.
Att: Jerry Rastelli
96 Washington Dr.
Centerport, NY 11721

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

E & E DELI, 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 Periods March 1, 1974
through February 28, 1977 and March 1, 1977
through November 30, 1977.

Petitioner, E & E Deli, Inc., 96 Washington Avenue, Centerport, New York 11721, 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 periods March 1, 1974 through February 28, 1977 and March 1, 1977 through November 30, 1977 (File No. 22745).

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 27, 1981, at 1:15 P.M. Petitioner appeared by Jerry Rastelli, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division to determine additional sales taxes due from petitioner were proper.

FINDINGS OF FACT

1. Petitioner, E & E Deli, Inc. operated a neighborhood grocery and delicatessen located at 96 Washington Avenue, Centerport, New York.

2. On June 5, 1978, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes due

against petitioner for the periods March 1, 1974 through February 28, 1977 and March 1, 1977 through November 30, 1977 for taxes due of \$6,979.36 and \$3,006.38, respectively, plus applicable penalty and interest.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1974 through February 28, 1977 to June 20, 1978.

4. Petitioner recorded purchases in its cash disbursements journal in four categories: beer, soda, cigarettes and food. Purchases of beer, soda and cigarettes amounted to \$62,619.00 for the period March 1, 1974 through May 31, 1977. Taxable sales from the books and records for the same period were \$64,182.00. Sales and purchase records were not available for periods thereafter. The Audit Division analyzed purchases for the months of May 1976 and October 1976 which revealed the following taxable categories and percentages to total purchases for the test months: beer - 5.68 percent, soda - 2.91 percent, candy - 2.15 percent, tobacco - .12 percent, cigarettes - 7.06 percent and miscellaneous taxable - 2.35 percent. These percentages were applied to total purchases from the cash disbursements journal to determine purchases in each category for the period March 1, 1974 through May 31, 1977. A markup test was performed on items in the foregoing categories based on cost and selling prices in effect at the time of the audit. The individual markups were applied to applicable purchases resulting in taxable sales of \$109,229.37 for the period March 1, 1974 through May 31, 1977.

In order to determine petitioner's taxable food sales, the Audit Division conducted a one day observation test on October 19, 1977 between the hours of 7:30 A.M. and 1:30 P.M. which disclosed that 9.23 percent of the day's gross receipts were taxable food sales. This percentage was applied to gross sales

for the period March 1, 1974 through May 31, 1977 (adjusted to a six day week) to arrive at total taxable food sales for said period of \$35,424.70.

The taxable sales as determined above for the period March 1, 1974 through May 31, 1977 were 32.30 percent of gross sales for the same period. Since petitioner did not have records for the period June 1, 1977 through November 30, 1977, the Audit Division estimated gross sales of \$45,000 for each quarter based on sales reported for the corresponding quarter in previous years. The taxable ratio of 32.30 percent was applied to estimated gross sales to arrive at taxable sales of \$29,075.00 for said periods. Taxable sales determined from the above audit procedures totaled \$173,729.00 with tax due thereon of \$12,161.03. Petitioner paid sales taxes of \$2,684.88 for the same period, leaving additional taxes due of \$9,476.15. This amount reflects petitioner's failure to file returns for the periods September 1, 1975 through November 30, 1975 and March 1, 1976 through November 30, 1977.

Use taxes of \$509.59 determined on purchases of fixed assets and expenses are not at issue.

5. The Audit Division conceded that the taxes due should be adjusted to \$7,248.46 to reflect payments made by petitioner on returns that were not filed at the time of the audit and assessments issued for returns filed without remittance.

6. Petitioner argued that the audit procedures employed by the Audit Division did not accurately determine its sales tax liability. Petitioner adduced no evidence to support its argument.

7. Petitioner's cash register did not have the capability of accounting for sales tax collected. Petitioner placed the sales tax in a box next to the

register. Petitioner counted the monies in the box at the end of the day and entered said amount in a day book.

8. The books and records maintained by petitioner were inadequate for the Audit Division to verify taxable sales reported or to determine the exact amount of petitioner's sales and use tax liability.

9. Petitioner has not shown that reasonable cause existed for the abatement of penalty and interest.

CONCLUSIONS OF LAW

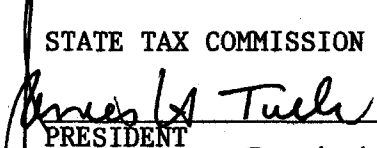
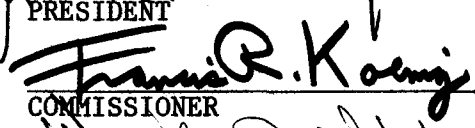
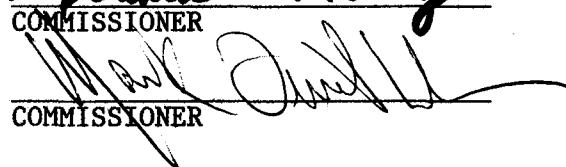
A. That the petitioner's record keeping was insufficient, therefore, the audit procedures and tests adopted by the Audit Division to determine petitioner's taxable sales and taxes due were proper in accordance with section 1138(a) of the Tax Law.

B. That based on Finding of Fact "5", the total additional taxes due for the periods March 1, 1974 through February 28, 1977 and March 1, 1977 through November 30, 1977 are reduced to \$7,248.46.

C. That the petition of E & E Deli, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued June 5, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER