

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edison Super Market, 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:
9/1/74 - 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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Edison Super Market, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edison Super Market, Inc.
565 Flatbush Ave.
Brooklyn, NY 11225

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.

Annie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edison Super Market, 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 9/1/74 - 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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Samuel Weinstock the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel Weinstock
561 Flatbush Ave.
Brooklyn, NY 11225

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
27th day of November, 1981.

Daniel A. Haglund

J. Vredenburg

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

November 27, 1981

Edison Super Market, Inc.
565 Flatbush Ave.
Brooklyn, NY 11225

Dear Mr. Basher:

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
Samuel Weinstock
561 Flatbush Ave.
Brooklyn, NY 11225
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDISON SUPER MARKET, 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	:	
September 1, 1974 through November 30, 1977.	:	

Petitioner, Edison Super Market, Inc., 565 Flatbush Avenue, Brooklyn, New York 11225, 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 September 1, 1974 through November 30, 1977 (File No. 25042).

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 30, 1981 at 10:45 A.M. Petitioner appeared by Samuel Weinstock, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Edison Super Market, Inc., operated a grocery store located at 565 Flatbush Avenue, Brooklyn, New York.
2. On September 18, 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 Edison Super Market, Inc. and Sol Basher, individually and as

officer, covering the period September 1, 1974 through November 30, 1977 for taxes due of \$7,788.38, plus penalty and interest of \$3,744.75, for a total of \$11,533.13.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to January 20, 1979.

4. On audit, the Audit Division analyzed petitioner's purchases made by check for the periods December 1, 1976 through February 28, 1977 and June 1, 1977 through August 31, 1977 and categorized said purchases as taxable sundry and soda. Said purchases of taxable items amounted to \$19,274.77 as compared to taxable sales reported of \$16,754.00 for the same periods. Petitioner also purchased taxable items (beer, candy, soda, cigarettes) by cash, however, these purchase invoices were not available. Therefore, the Audit Division requested petitioner to retain invoices for cash purchases for the period December 1, 1977 through February 28, 1978. Cash purchases of taxable items for said period totalled \$1,900.27. This amount was adjusted to \$5,271.36 to encompass a six-month test period including the summer period ending August 31. In the absence of other invoices for cash purchases, the Division considered that petitioner made similar purchases of candy and cigarettes during the summer period as it did in the period ending February 28, 1978. However, beer and soda purchases were increased 100 percent to reflect higher volume sales of such items during the summer months. Based on the foregoing tests, the Audit Division computed the percentage that each category of taxable purchases was to total purchases for the audit period. A markup test was performed for items within each category using current costs and selling prices. The resultant markups were applied to applicable purchases to determine taxable sales of

\$197,173.00. Petitioner reported taxable sales of \$99,900.00, leaving additional taxable sales of \$97,273.00, and tax due thereon of \$7,788.38.

5. Petitioner argued that the additional taxable sales were erroneous for the following reasons:

a) consideration was not given to the deteriorated neighborhood in which the store was located and the competitive nature of this type of retail business which caused low profit margins.

b) the markups were applied to cost of purchases which included a 4 percent charge for cartage.

c) the selling prices utilized by the Audit Division to compute markups included the sales tax.

d) the test period used as a basis for projecting cash purchases was not within the audit period.

e) credit was not allowed for bad debts and unpaid receivables which it estimated is between 15 and 20 percent of sales.

f) pilferage losses were 5 to 7 percent rather than the 1 percent allowed on audit.

g) no consideration was given to burglary losses.

6. In support of its claim for bad debts, petitioner submitted copies of checks returned for insufficient funds and a listing of customers for which credit was advanced. However, said documentation is insufficient to allow any credit in that there is no indication as to when the sale took place, or that taxable items were part of said sales. Moreover, petitioner failed to establish that such sales were actually uncollectible.

Petitioner also offered police reports to substantiate losses due to burglaries. These reports show that currency was stolen and as such, does not affect the Audit Division's determination of taxable sales.

Petitioner adduced no substantial evidence regarding its arguments set forth in Finding of Fact "5" to show that the Audit Division's determination was incorrect.

7. The auditor testified at the hearing that a 3 percent allowance for pilferage was more reasonable than the 1 percent allowed at the time of the audit.

8. Petitioner maintained incomplete books and records and thereby prevented the Audit Division from determining the tax liability with any exactness.

9. Petitioner acted in good faith at all times and did not willfully attempt to evade the taxes at issue.

CONCLUSIONS OF LAW

A. That in view of petitioner's insufficient record keeping, the audit procedures and tests adopted by the Audit Division to determine petitioner's taxable sales and taxes due were proper pursuant to section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44 411 N.Y.S. 2d 41), and that petitioner has failed to sustain the burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

B. That in accordance with Finding of Fact "7", the additional taxable sales are reduced to reflect a 3 percent allowance for pilferage.

C. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

D. That the petition of Edison Super Market, Inc. is granted to the extent indicated in Conclusions of Law "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 September 18, 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