

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Givan & Rombout's Food Corp.

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
9/1/72-8/31/76.

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 13th day of November, 1981, he served the within notice of Decision by certified mail upon Givan & Rombout's Food Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Givan & Rombout's Food Corp.
755 Co-Op City Blvd.
Bronx, NY 10475

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
13th day of November, 1981.

Carrie R. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Givan & Rombout's Food Corp. :

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 9/1/72-8/31/76 :

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 13th day of November, 1981, he served the within notice of Decision by certified mail upon Alvin Silverman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alvin Silverman
D'urso Supermarkets Inc.
755 Co-op City Blvd.
Bronx, NY 10475

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
13th day of November, 1981.

Connie A. Haglund

J. Vredenburg

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

November 13, 1981

Givan & Rombout's Food Corp.
755 Co-Op City Blvd.
Bronx, NY 10475

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) 1139 & 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
Alvin Silverman
D'urso Supermarkets Inc.
755 Co-op City Blvd.
Bronx, NY 10475
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GIVAN & ROMBOUTS FOOD CORP.

DECISION

for Revision of a Determination or for Refund
of Sales & Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1972
through August 31, 1976.

Petitioner, Givan & Rombouts Food Corp., 755 Co-op City Boulevard, Bronx, New York 10475, 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, 1972 through August 31, 1976 (File No. 22395).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 24, 1979, at 10:45 A.M. The hearing was continued before Stanley Buchsbaum, Hearing Officer, at the same offices on February 19, 1980, at 1:50 P.M.; on April 22, 1980, at 9:15 A.M.; and on January 27, 1981, at 9:30 A.M. Petitioner appeared by Alvin Silverman, CPA. The Audit Division appeared by Peter Crotty, Esq. and Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner Givan & Rombouts Food Corp. is entitled to a refund of the sales tax it paid pursuant to a signed Consent to Fixing of Tax Not Previously Determined and Assessed.

FINDINGS OF FACT

1. Petitioner, Givan & Rombouts Food Corp., operates a supermarket at 755 Co-op City Boulevard, Bronx, New York 10475.
2. On March 23, 1977, petitioner signed a Consent to Fixing of Tax Not Previously Determined and Assessed and paid therewith \$128,428.50. The consent showed a tax due of \$108,060.25, and penalty and/or interest of \$20,368.25, for a total of \$128,428.50 for the period September 1, 1972 through August 31, 1976.
3. The aforementioned consent resulted from the Audit Division's examination of petitioner's books and records. The Division reviewed petitioner's purchases for February and August, 1976. The purchases were categorized in accordance with petitioner's method of record keeping into seven groups: groceries, health and beauty aids, non-foods, drugs, appetizers, produce, and meats. Taxable ratios of 24.35 percent for groceries; 76.83 percent for health and beauty aids; 100 percent for non-foods; and 3.22 percent for drugs were established. These ratios were applied to the respective sales for the audit period to determine the audited taxable sales. After allowance for the taxable sales reported, additional taxable sales of \$1,431,279.00 and additional sales tax of \$108,060.25 were found due.
4. On May 20, 1977, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax requesting a refund of penalty and interest above the minimum statutory rate remitted with the signed consent.
5. On June 12, 1978, the Audit Division, by letter, informed petitioner that its application was denied and that unless petitioner applied for a hearing within 90 days the denial would become final.

6. On July 26, 1978, petitioner petitioned for a hearing. Said petition requested a refund of the full \$128,428.50 paid with the signed consent.

7. At the first hearing, on April 24, 1979, the accountant for petitioner testified but he was not cross-examined. He argued that the audit was supposed to be based on the computer records of the purchases journal but the schedules prepared by the Audit Division for the test months showed purchases greater than those shown on the computer records. He argued that beer and soda purchases for the months tested were higher than the average monthly purchases for the year. He argued that purchases of film and film developing had been improperly scheduled with grocery purchases and that, if these were eliminated, the taxable ratio for groceries would drop (e.g., test for August would drop from 26.3 percent to 20.643 percent). He further argued that many items had been incorrectly scheduled as taxable when in fact they would be exempt when sold. On the basis of his arguments, for which he submitted schedules, he concluded that the tax liability should be \$67,572.00 in contrast to the \$108,060.25 found due by the Audit Division.

8. At the hearing on April 22, 1980, the hearing officer was informed that, when petitioner's representative left the hearing office after one of his appearances there, many of his papers, which were in a carton, were blown away and that despite his best efforts, he had not been able to secure replacements for all of them. To solve this problem, the parties had agreed to the substitution of July, 1976, for the month of August, 1976, in the test period. The hearing was adjourned for completion of a revised audit.

9. On reaudit, the Audit Division calculated revised taxable ratios. The ratio for groceries was 23.39 percent, for health and beauty aids it was 77.53 percent and for drugs it was 3.7 percent. The ratio of non-foods remained at

100 percent. The Division then applied the ratios to the respective sales for the audit period. Allowance was made for the taxable sales reported by petitioner on its sales and use tax returns. This resulted in revised additional taxable sales of \$1,220,020.00.

10. At the hearing of January 27, 1981, the parties agreed that as a result of the reaudit which produced \$211,050.00 less in taxable sales than found on the original audit, petitioner was due a refund of \$15,936.49. This was in tax. Penalty and interest above the minimum prescribed by the Tax Law was not charged against petitioner.

CONCLUSIONS OF LAW

A. That section 1139(c) of the Tax Law provides that if a person files with the Tax Commission a consent to the fixing of tax before a Notice of Determination and Demand for Payment of Sales and Use Taxes Due is issued, he shall be entitled to apply for a refund within two years of the date of payment of the amount assessed in accordance with the consent filed.

B. That petitioner Givan & Rombouts Food Corp. timely applied for a refund within the purview of section 1139(c) of the Tax Law.

C. That in accordance with Findings of Fact "9" and "10" petitioner Givan & Rombouts Food Corp. overpaid the tax with its filing of the Consent to Fixing of Tax Not Previously Determined and Assessed.

D. That the petition of Givan & Rombouts Food Corp. is granted to the extent that the Audit Division is hereby directed to refund \$15,936.49; and that, except as so granted, is in all other respects denied.

DATED: Albany, New York

NOV 13 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER