

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
H & F Supermarket, 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 3/1/74-2/28/77. :

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 19th day of June, 1981, he served the within notice of Decision by mail upon H & F Supermarket, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

H & F Supermarket, Inc.
419 Myrtle Ave.
Brooklyn, NY 11205

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
19th day of June, 1981.

Anna A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
H & F Supermarket, 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 3/1/74-2/28/77. :

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 19th day of June, 1981, he served the within notice of Decision by mail upon Nicholas J. Cocchiaro the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Nicholas J. Cocchiaro
35-05 211th St.
Bayside, NY 11361

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
19th day of June, 1981.

Annie A. Gaylund

J. Vredenburg

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

June 19, 1981

H & F Supermarket, Inc.
419 Myrtle Ave.
Brooklyn, NY 11205

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
Nicholas J. Cocchiaro
35-05 211th St.
Bayside, NY 11361
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
H & F SUPERMARKET, 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 March 1, 1974 :
through February 28, 1977. :

Petitioner, H & F Supermarket, Inc., 419 Myrtle Avenue, Brooklyn, New York 11205, 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 March 1, 1974 through February 28, 1977 (File No. 21661).

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 October 20, 1980 at 1:15 P.M. Petitioner appeared by Francis Giordano, Esq. and Nicholas Cocchiaro, PA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's available records were proper and the resultant findings of additional taxable sales were correct.

FINDINGS OF FACT

1. Petitioner, H & F Supermarket, Inc., operated a grocery store located at 419 Myrtle Avenue, Brooklyn, New York.

2. On December 19, 1977, 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 for the period March 1, 1974 through February 28, 1977 for taxes due of \$20,822.21, plus penalty and interest of \$10,434.54, for a total of \$31,256.75.

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. On audit, the Audit Division analyzed purchase invoices for the months of August 1976 and January 1977 and categorized said purchases as follows: nontaxable 48.33 percent, soda 8.58 percent, beer 20.54 percent, cigarettes 10.65 percent and miscellaneous taxable 11.9 percent. In its analysis for August 1976, the Audit Division determined that petitioner made cash purchases of beer, soda and cigarettes totaling \$6,718.41 which were not recorded in petitioner's cash disbursements journal. Additionally, the auditor found no such purchases in January 1977 and, therefore, considered that petitioner purchased the same amount of beer, soda and cigarettes in January 1977 as it did in August 1976. A markup test was performed for selected items in each of the foregoing categories using costs and selling prices in effect during February 1977. Petitioner's total purchases from the general ledger of \$472,799.55 were increased \$175,266.79 or 37.07 percent to reflect the alleged unrecorded cash purchases. The above percentages were applied to adjusted purchases of \$648,066.34 to determine total purchases for each taxable category. The individual markups were applied to applicable purchases which resulted in additional taxable sales of \$263,699.78.

5. The Audit Division erroneously computed the percentage of increase for unrecorded cash purchases as follows:

	<u>January 1977</u>	<u>August 1976</u>	
Purchases per books	\$10,628.27	\$12,179.49	\$22,807.76
Unrecorded cash purchases	6,718.41	6,718.41	13,436.82
	<u>\$17,346.68</u>	<u>\$18,897.90</u>	<u>\$36,244.58</u>

$$\frac{\$13,436.82}{\$36,244.58} = 37.07\%$$

The above percentage should have been 58.9 percent (\$13,436.82 divided by 22,807.76).

6. The Audit Division erroneously included cash purchases of soda of \$677.00 made in March 1976 and July 1976 in computing the percentages referred to in Finding of Fact "4".

7. During August 1976, petitioner's store was burglarized for which petitioner filed a report with the 88th Precinct of the New York City Police Department. Petitioner suffered a loss of 40 cases of beer having a value of \$400.00.

8. Petitioner argued that it was improper for the Audit Division to estimate the same amount of beer and soda cash purchases for January 1977 as it found for August 1976, since sales of such items are in greater volume during summer months. However, petitioner's sales tax returns filed for the period at issue show no significant increase in taxable sales between summer and winter periods. Moreover, petitioner failed to show that its actual beer and soda cash purchases were less than determined by the Audit Division.

Petitioner also argued that the auditing procedures which formed the basis of the Audit Division's determination were arbitrary and capricious.

9. Petitioner did not maintain cash register tapes nor records of gross and taxable sales. Petitioner estimated said sales on its sales tax returns filed for the period at issue.

10. At the hearing, petitioner introduced a day book for cash purchases covering the period July 12, 1976 through January 4, 1978. The taxable cash purchases indicated therein for August 1976 were \$4,779.95 as compared to purchases of \$6,041.41 found by the Audit Division based on actual invoices. The day book showed no taxable cash purchases during January 1977.

11. Reasonable cause does not exist for the abatement of penalty and interest.

CONCLUSIONS OF LAW

A. That petitioner's sales and purchase records were insufficient and as such, the Audit Division could not determine the exact amount of petitioner's taxable sales. That in view of petitioner's inadequate records, 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; Matter of Markowitz v. State Tax Commission, 54 A.D. 2d 1023, affd. 44 NY 2d 684.

B. That the Audit Division, in using proper audit procedures and tests, did not give consideration to petitioner's inventory loss referred to in Finding of Fact "7" and that based on Finding of Fact "6", taxable cash purchases for August 1976 are reduced to \$6,041.41. However, because of the Audit Division's computation error indicated in Finding of Fact "5", the foregoing adjustments result in no reduction in taxes determined by the Audit Division.

C. That the petition of H & F Supermarket, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 19, 1977 is sustained.

DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER