

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Mario's Discount, 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:  
6/1/75 - 5/31/76.

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Mario's Discount, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mario's Discount, Inc.  
c/o Mario Fernandez, 79 Baltic Place  
Amberlands #20  
Croton-on-Hudson, NY 10520

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.

*Arnie R. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
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Mario's Discount, Inc. :

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Period 6/1/75 - 5/31/76.

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

Stephen E. Zimmerman  
1083 St. Nicholas Ave.  
New York, NY 10032

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.

*Daniel A. Haglund*

*J. Vredenburg*

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

October 30, 1981

Mario's Discount, Inc.  
c/o Mario Fernandez, 79 Baltic Place  
Amberlands #20  
Croton-on-Hudson, NY 10520

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  
Stephen E. Zimmerman  
1083 St. Nicholas Ave.  
New York, NY 10032  
Taxing Bureau's Representative

## STATE TAX COMMISSION

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 June 1, 1975  
through May 31, 1976. :

Petitioner, Mario's Discount, Inc., c/o Mario Fernandez, 79 Baltic Place, Amberlands #20, Croton-on-Hudson, New York 10520, 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 June 1, 1975 through May 31, 1976 (File No. 20774).

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 November 26, 1979 at 2:45 P.M. and continued on January 20, 1981 at 1:15 P.M. Petitioner appeared by Stephen E. Zimmerman. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

## ISSUES

- I. Whether the Audit Division correctly valued petitioner's ending inventory.
- II. Whether the ratio of petitioner's taxable purchases to total purchases determined by the Audit Division was correct.
- III. Whether the total amount of petitioner's purchases for the audit period determined by the Audit Division was correct.
- IV. Whether the value placed on petitioner's furniture and fixtures by the Audit Division upon acquisition and subsequent sale was correct.

FINDINGS OF FACT

1. Petitioner, Mario's Discounts, Inc., operated a retail variety store located at 1445 St. Nicholas Avenue, New York, New York. The business was sold on or about June 1, 1976. The notification of sale received by the Audit Division indicated that the total sales price of the business was \$26,000.00 and the sale price of the furniture and fixtures was \$2,000.00 with a bulk sales tax of \$160.00 paid thereon.

2. On August 24, 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 June 1, 1975 through May 31, 1976 for taxes due of \$3,543.12, plus penalty and interest of \$1,404.54, for a total of \$4,947.66.

3. On audit, the Audit Division examined purchase invoices for the period June 1, 1975 through August 31, 1975 and determined that 97 percent of such purchases would result in a taxable sale when sold. Total purchases for the test period were \$7,410.00, of which \$2,083.00 represented cigarettes. The Audit Division determined that total purchases for the audit period were \$70,880.00 (This amount is incorrect and should properly be \$70,790.00). This amount was obtained from a bulk sale questionnaire completed by petitioner, which indicated cigarette purchases of \$19,124.70 and purchases of other merchandise of \$44,256.04 for the period September 1, 1975 through May 31, 1976, plus the purchases of \$7,410.00 found for the test period. The total purchases were reduced by \$6,000.00 for ending inventory (estimated by auditor) and cigarette purchases of \$2,083.00 to arrive at adjusted purchases of \$62,797.00. The taxable ratio of 97 percent was applied to said amount and the resulting taxable purchases of \$60,913.00 were marked up 37 percent to determine taxable

sales (excluding partial cigarette sales) of \$83,451.00. Taxable cigarette sales of \$1,805.00 computed for the test period were combined with other taxable sales to arrive at total taxable sales of \$85,256.00 for the audit period. This calculation overstated taxable sales in that the adjustment for cigarette purchases reflects only those purchases for the test rather than total cigarette purchases. Petitioner reported taxable sales of \$68,423.00, leaving additional taxable sales of \$16,833.00. (It should be noted that petitioner reported taxable sales of \$10,457.00 on its return filed for the period ending May 31, 1976; however, the sales tax due thereon of \$856.36 was not remitted.)

Petitioner's U.S. Corporation Income Tax Return filed for the fiscal year ending May 31, 1976 indicated that furniture and fixtures were acquired June 17, 1975 for \$10,000.00. Petitioner failed to show that sales tax was paid on these assets at the time of acquisition and therefore, the Audit Division asserted a use tax thereon of \$800.00. The Division also held petitioner liable for an additional bulk sales tax of \$560.00 on the transfer of such assets to the purchaser based on the difference between the depreciated value of the assets and the reported selling price.

4. On or about June 1, 1976 the petitioner's business was sold for \$26,000.00. The furniture and fixtures were sold for \$2,000.00 and the remaining balance (\$24,000.00) represented the cost value of the inventory in the store.

5. Petitioner contended that the \$10,000.00 listed on its corporate tax return for furniture and fixtures included the labor performed by its president for constructing such furniture and fixtures. Petitioner offered no substantial evidence to support this contention.

6. The books and records provided to the Audit Division were insufficient to determine the exact amount of petitioner's sales and use tax liability.

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

#### CONCLUSIONS OF LAW

A. That since petitioner's books and records were inadequate, the Audit Division properly determined petitioner's taxable sales from available information as authorized in section 1138(a) of the Tax Law; however, the Audit Division understated petitioner's ending inventory and thereby overstated taxable sales. That giving consideration to the actual ending inventory results in no unreported taxable sales. Therefore, issues II and III are moot. Petitioner, however, is liable for the unpaid sales taxes of \$856.36 reported on its sales tax return filed for the period March 1, 1976 through May 31, 1976.

B. That \$2,000.00 was the selling price of the furniture and fixtures transferred in the bulk sale and; therefore, the additional bulk sales tax of \$560.00 referred to in Finding of Fact "3" is cancelled.

C. That petitioner failed to sustain the burden of proving that furniture and fixtures valued at \$10,000.00 on its corporation tax return were not subject to tax or that sales tax was paid at the time of acquisition.

D. That the penalty and interest in excess of the minimum statutory are cancelled.

E. That the petition of Mario's Discount, Inc. is granted to the extent that the additional taxes due are reduced to \$1,656.36 so as to conform with Conclusions of Law "A", "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 August 24, 1977, together with interest computed at the minimum statutory rate; and that, except as so granted, the petition is in all other respects denied.

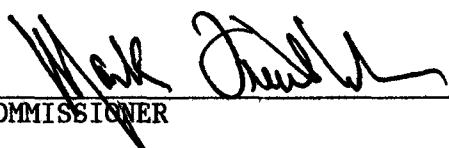
DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER