

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Confessor Mattei

:

:

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:  
12/1/74 - 2/28/78.

State of New York  
County of Albany

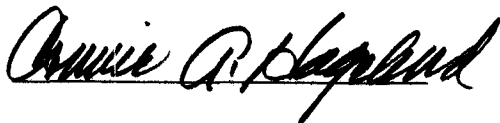
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of October, 1981, he served the within notice of Decision by certified mail upon Confessor Mattei, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

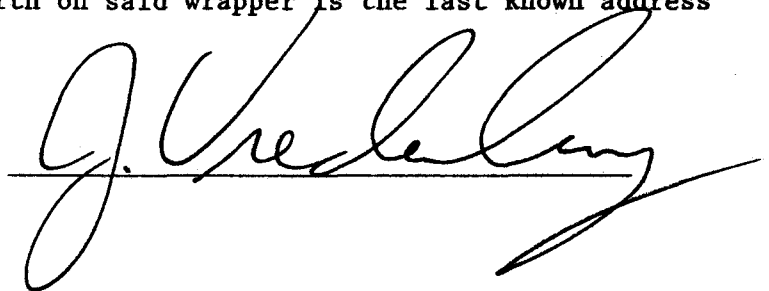
Confessor Mattei  
355 Broadway  
Brooklyn, NY 11211

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.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Confessor Mattei :

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 12/1/74 - 2/28/78.

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 Seymour H. Roth the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

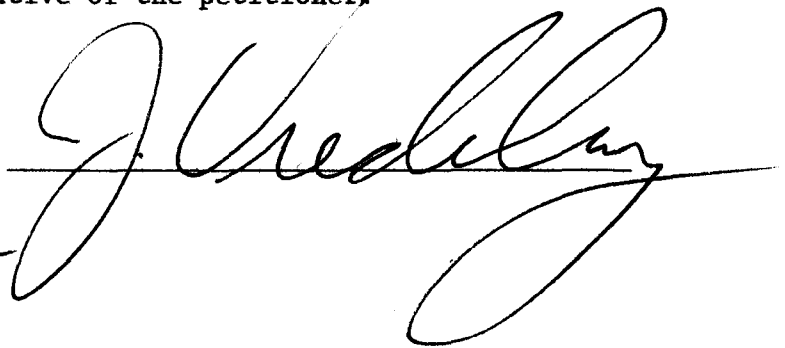
Seymour H. Roth  
33 Forestdale Rd.  
Rockville Centre, NY 11570

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.





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

October 30, 1981

Confessor Mattei  
355 Broadway  
Brooklyn, NY 11211

Dear Mr. Mattei:

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  
Seymour H. Roth  
33 Forestdale Rd.  
Rockville Centre, NY 11570  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CONFESSOR MATTEI	:	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 December 1,	:	
1974 through February 28, 1978.	:	

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Petitioner, Confessor Mattei, 355 Broadway, Brooklyn, New York 11211, 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 December 1, 1974 through February 28, 1978 (File No.25051).

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 May 1, 1981 at 10:30 A.M. Petitioner appeared by Seymour H. Roth, CPA. 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 audit of available records.

FINDINGS OF FACT

1. Petitioner, Confessor Mattei, operated a neighborhood grocery store located at 355 Broadway, Brooklyn, New York.
2. On September 11, 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 petitioner covering the period December 1, 1974 through February 28,

1978 for taxes due of \$5,860.94, plus penalty and interest of \$2,629.47, for a total of \$8,490.41.

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

4. Petitioner did not provide the Audit Division with books and records for the business operation other than an incomplete day book and some sales tax returns. Because of the lack of records, the Audit Division instructed petitioner to retain purchase invoices for the current month (May 1978). These purchases totaling \$3,591.57 were analyzed by the Audit Division and categorized as nontaxable, soda, beer, cigarettes and miscellaneous taxable. A markup test was performed for each of the foregoing taxable categories using selling prices furnished by petitioner. The resultant markups were applied to applicable purchases to determine taxable sales of \$2,146.59 for May 1978. Said amount was multiplied by 39 months in the audit period to arrive at total taxable sales of \$83,717.01 and tax due thereon of \$6,697.34. Petitioner paid sales taxes of \$836.40 for the audit period, leaving additional taxes due of \$5,860.94. (This amount reflects sales taxes due for the periods ending November 30, 1977 and February 28, 1977, periods for which no sales tax returns were filed. The Audit Division has since received a payment of \$184.00 for one of the returns not filed at the time of audit.)

5. Petitioner's books and records were not adequate for the Audit Division to determine the exact amount of petitioner's sales tax.

6. During the period at issue, petitioner suffered pilferage losses to the extent of 3 percent of purchases.

7. Petitioner argued that purchases during May 1978 were higher than the average month and that the markups determined by the Audit Division were excessive. Petitioner offered no evidence to support these arguments.

8. Petitioner has not established that reasonable cause exists for the abatement of penalty and interest in excess of the statutory rate.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain complete or sufficient books and records for the Audit Division to verify the accuracy of petitioner's taxable sales or to determine such sales with any exactness and as such, the Audit Division properly determined petitioner's taxable sales from such information as was available, pursuant to section 1138(a) of the Tax Law. However, the Audit Division did not give consideration to the pilferage losses indicated in Finding of Fact "6" and therefore, the additional taxable sales shall be reduced accordingly.

B. That the petition of Confessor Mattei is granted to the extent indicated in Conclusion of Law "A"; 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 11, 1978 and credit petitioner with the payment of \$184.00; 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