

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Medford Fruit Basket, 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:
6/1/73-7/29/74.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Medford Fruit Basket, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Medford Fruit Basket, Inc.
c/o Milton Shaiman
1 Rural Place
Commack, NY 11725

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
6th day of November, 1981.

Carrie G. Highland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Medford Fruit Basket, Inc.

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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 6/1/73-7/29/74

:

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Milton Shaiman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton Shaiman
1 Rural Place
Commack, NY 11725

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
6th day of November, 1981.

Annie A. Hageland

J. Vredenburg

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

November 6, 1981

Medford Fruit Basket, Inc.
c/o Milton Shaiman
1 Rural Place
Commack, NY 11725

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
Milton Shaiman
1 Rural Place
Commack, NY 11725
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MEDFORD FRUIT BASKET, 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 June 1, 1973	:	
through July 29, 1974.	:	

Petitioner, Medford Fruit Basket, Inc., c/o Milton Shaiman, One Rural Place, Commack, New York 11725, 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, 1973 through July 29, 1974 (File No. 21439).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 19, 1980 at 9:15 A.M. Petitioner appeared by Milton Shaiman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales tax due under section 1138 of the Tax Law upon petitioner's failure to submit information requested.

FINDINGS OF FACT

1. On July 29, 1974, petitioner, Medford Fruit Basket, Inc., sold its business operation. On the notification of bulk sale filed by the purchaser, the type of business or property sold was listed as "Fruit and Vegetable Store and Delicatessen".

2. On December 30, 1974, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Medford Fruit Basket, Inc. for the period June 1, 1973 through July 29, 1974. The Notice, which asserted tax due of \$4,957.33 plus penalties and interest, was issued on the grounds that the petitioner failed to submit certain information requested by the Audit Division.

3. The Audit Division used as a basis for its determination the sales tax return for the period June 1, 1973 through August 31, 1973 on which petitioner reported gross sales of \$61,420.00 and taxable sales of \$20,400.00. The Audit Division compared the gross and taxable sales on this return with the gross sales of \$49,623.00 and taxable sales of \$7,478.00 for the remaining eleven months in the audit period and thereby estimated taxable sales of \$7,000.00 a month for the period September, 1973 through July, 1974.

4. On March 17, 1975, petitioner submitted the following information in the form of a bulk sale questionnaire regarding its purchases:

<u>Quarter Ended</u>	<u>7/29/74</u>	<u>5/31/74</u>	<u>2/28/74</u>	<u>11/30/73</u>
Meat, fish, dairy, bakery, fruit & produce	\$12,290	\$10,540	\$ 8,109	\$7,684
Beer	820	480	600	210
Soft drinks	1,190	740	681	290
Cigarettes	640	720	720	387
TOTALS	<u>\$14,940</u>	<u>\$12,480</u>	<u>\$10,110</u>	<u>\$8,571</u>

The following information as reported on its Federal tax return was supplied for the fiscal year ended May 31, 1974.

Gross sales	\$45,982
Beginning inventory	0
Merchandise purchased	30,649
Ending inventory	3,500

Petitioner reported the following sales on its sales and use tax returns filed:

	<u>7/29/74</u>	<u>5/31/74</u>	<u>2/28/74</u>	<u>11/30/73</u>
Gross Sales	\$14,940	\$12,480	\$13,632	\$8,571
Taxable Sales	2,650	1,940	2,001	887

The Audit Division forwarded the above information along with the Notice to the Suffolk Office for an informal conference.

5. Petitioner submitted the following books and records to the Audit Division (Suffolk Office): contract of sale, closing statement, Federal income tax returns for 1973 and 1974, sales journal covering the period May 1973 through August 1974 and purchase invoices for April, May and June 1974. On review of the information made available, the Audit Division found that purchase invoices submitted for May and June 1974 exceeded sales for the same period. No purchase journal or other record was submitted by petitioner; therefore, the Audit Division contacted several suppliers to verify the accuracy of the records submitted. It found instances where purchases made from suppliers exceeded those submitted and purchases made by petitioner which did not appear in petitioner's records. The Audit Division then requested complete books and records including all purchases invoices for the audit period.

Two additional conferences were held at which no additional records were submitted. The Audit Division therefore made no adjustment to the Notice as originally issued.

6. Petitioner argued that the Audit Division has performed audits in the past on books and records of other businesses where records were incomplete. Therefore, it contended that a complete audit could and should have been performed.

7. Petitioner contended that the business was originally started as a deli operation; but after the first month or two of operation the business sold

only fruit. The bulk sale questionnaire submitted by petitioner indicated purchases of beer, soda and cigarettes for all periods in issue. Petitioner reported taxable sales for all periods in issue.

8. Petitioner introduced copies of its disbursements journal for April 1973 through September 1974. These records however were not conclusive as to the total amount of its purchases or the nature of these purchases. Petitioner offered no evidence of any amount of cash purchases made.

9. Petitioner submitted copies of entries from its cash receipts book for the period May 30, 1973 through December 30, 1973. These entries showed no breakdown of taxable sales, nontaxable sales or the amount of tax collected, if any. No cash register tapes or other source documents were submitted to substantiate the amount of its sales. Entries in the cash receipts book totaled \$99,731.41 for the period submitted.

10. Petitioner has not shown that reasonable cause exists for failing to remit the taxes due.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law states that if a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices... That the Notice issued by the Audit Division was properly determined from the only information available.

B. That the records submitted by petitioner were insufficient for the determination of an exact amount of tax due in that no source documents of its sales were available, the exact amount of its taxable sales was not available and the amount of sales tax collected was not available as required by section

1135 of the Tax Law. Moreover, the inconsistencies in petitioner's records and unsupported contentions preclude any redetermination of the tax deficiency.

C. That the petition of Medford Fruit Basket, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 30, 1974 is sustained.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

James W. Tully
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Tully
COMMISSIONER