

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of :

Edward Morrell :

d/b/a Morrell's :

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 2/28/72-2/28/75.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Edward Morrell, d/b/a Morrell's, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Morrell
d/b/a Morrell's
806 Brown St.
Rochester, NY

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
5th day of June, 1981.

Cornelia A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Edward Morrell
d/b/a Morrell's

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AFFIDAVIT OF MAILING

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of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 2/28/72-2/28/75.

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 5th day of June, 1981, he served the within notice of Decision by mail upon John M. Regan 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. John M. Regan
888 Crossroads Bldg., 2 State St.
Rochester, NY 14614

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
5th day of June, 1981.

Annie A. Haglund

J. Vredenburg

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

June 5, 1981

Edward Morrell
d/b/a Morrell's
806 Brown St.
Rochester, NY

Dear Mr. Morrell:

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
John M. Regan
888 Crossroads Bldg., 2 State St.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDWARD MORRELL	:	DECISION
d/b/a MORRELL'S	:	
	:	
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, 1972	:	
through February 28, 1975.	:	

Petitioner, Edward Morrell, d/b/a Morrell's, 806 Brown Street, Rochester, New York, 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, 1972 through February 28, 1975 (File No. 11805).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on July 17, 1980 at 1:15 P.M. Petitioner appeared by John M. Regan, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel).

ISSUE

Whether the assessment for the period March 1, 1972 through February 28, 1975, based on the Sales Tax Bureau's test of petitioner's records for the months February, June and October 1974, was proper.

FINDINGS OF FACT

1. On May 29, 1975, Edward Morrell executed a consent extending period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1972 through August 31, 1972 to December 20, 1975.

2. On November 26, 1975, pursuant to an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Edward Morrell d/b/a Morrell's for the period March 1, 1972 through February 28, 1975 in the amount of \$8,725.40 plus penalty and interest of \$3,202.56 for a total of \$11,927.96.

3. Petitioner is a vendor operating a neighborhood store that sells cigars, cigarettes, newspapers, magazines, candy, soda, bread, cupcakes and milk. He has two employees. Gross sales average \$96,000.00 a year. He records sales and tax collected in a day book. Purchase invoices were available. All sales tax returns were filed for the periods in issue.

4. On audit, the auditor for the Audit Division examined petitioner's sales journal, purchase journal, sales tax returns, cancelled checks, purchase invoices and cash register tapes. Petitioner's gross sales as reported on its tax returns were accepted as being correct. To verify petitioner's reported taxable sales, the auditor made a taxable ratio analysis. He segregated the items applicant purchased during February 1974, June 1974, and October 1974 into the categories exempt on resale, taxable on resale. This resulted in taxable ratio for February of 61.23 percent, for June of 59.94 percent and for October of 64.43 percent. The auditor then applied the weighted average ratio of 62.12 percent to petitioner's gross sales for the period. An allowance was made for the taxable sales reported. The applicable State and Monroe County tax rate was applied. The result was additional sales tax due in the amount of \$8,725.40 which was assessed against petitioner.

5. At the hearing, the auditor conceded he had made an error in the taxable ratio analysis. The correct weighted average for the three month test period February, June, October is 58.62 percent. The tax due using the corrected weighted average is \$8,023.22.

6. Petitioner's tax liability, if any, can be determined from the books and records that it maintained.

CONCLUSIONS OF LAW

A. That although there is statutory authority for use of test periods to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair Inc. v. State Tax Commission, 65 A.D.2d 44.)

B. That petitioner Edward Morrell, d/b/a Morrell's maintained adequate books and records from which the actual tax could have been determined.

C. That the petition of Edward Morrell, d/b/a Morrell's is granted and the Notice of Determination and Demand For Payment of Sales and Use Tax Due issued on November 26, 1975 is cancelled.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER