

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

David Ninos

d/b/a Park Avenue Lunch

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 3/1/72-2/28/75. :

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 13th day of March, 1981, he served the within notice of Decision by mail upon David Ninos, d/b/a Park Avenue Lunch, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Ninos  
d/b/a Park Avenue Lunch  
13 Park Ave.  
Lockport, NY 14094

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  
13th day of March, 1981.

*Ernie G. Hagelund*

*J. Vredenburg*

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

March 13, 1981

David Ninos  
d/b/a Park Avenue Lunch  
13 Park Ave.  
Lockport, NY 14094

Dear Mr. Ninos:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
DAVID NINOS	:	DECISION
D/B/A PARK AVE. LUNCH	:	
	:	
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.	:	

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Petitioner, David Ninos d/b/a Park Ave. Lunch, 13 Park Avenue, Lockport, New York 14094, 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. 11793).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on November 17, 1980 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed petitioner's reported nontaxable sales.

FINDINGS OF FACT

1. Petitioner, David Ninos d/b/a Park Ave. Lunch, operated a luncheonette located at 13 Park Avenue, Lockport, New York.
2. On November 19, 1975, 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, 1972 through February 28, 1975 for taxes due of \$5,666.10, plus penalty and interest of \$2,021.30, for a total of \$7,687.40.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the period at issue, to December 20, 1975.

4. On audit, the Audit Division reconciled gross sales recorded in petitioner's sales journal with gross sales reported on sales tax returns and Federal income tax returns. The auditor found that taxable sales reported were 28.5 percent of gross sales in a business which sales are typically all subject to tax. Petitioner did not substantiate any reported nontaxable sales. Therefore, the Audit Division applied the applicable tax rate to reported gross sales and deducted the sales tax paid from that amount which resulted in additional sales tax due of \$5,666.10.

5. On March 1, 1976, the Audit Division issued a Notice of Assessment Review which revised the tax due to \$4,590.25 based on adjustments made at a district office conference. At the conference, petitioner substantiated that the gross sales included receipts from newspapers, cigarette tax, and commission income from a juke box and pinball machine.

6. Petitioner argued the nontaxable sales represented sales of coffee and other items at .10 and thus was prohibited from collecting tax from the customer.

7. Petitioner did not issue guest checks and cash register tapes did not show the amount of sales tax collected.

8. Petitioner acted in good faith at all times and did not willfully attempt to evade the tax.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law specifically provides that it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five,...are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax. That petitioner has failed to sustain the burden of proof required by said section of the Tax Law and therefore is liable for the tax imposed on such sales pursuant to section 1133(a) of the Tax Law.

B. That petitioner is liable for tax on total receipts from the sales of taxable items, although tax bracket schedules prohibit petitioner from collecting the tax from the customer on the individual sales of such items, in accordance with the provisions of sections 1132(b) and 1133(a) of the Tax Law. Komp v. State Tax Commission, 56 Misc. 2d 824.

C. That the penalty and interest in excess of the minimum statutory rate, imposed pursuant to section 1145(a) of the Tax Law is cancelled.

D. That the petition of David Ninos d/b/a Park Ave. Lunch is granted to the extent indicated in Conclusion of Law "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 November 19, 1975, as revised in accordance with Finding of Fact "5"; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAR 13 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER