

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Michael R. Paolucci & Anthony J. Paolucci :
d/b/a Courtesy Mart :
: 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 - 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 5th day of June, 1981, he served the within notice of Determination by mail upon Michael R. Paolucci & Anthony J. Paolucci, d/b/a Courtesy Mart, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael R. Paolucci & Anthony J. Paolucci
d/b/a Courtesy Mart
190 N. Allen St.
Albany, NY 12206

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.

Carmie A. Hagelund

J. Vredenburg

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

June 5, 1981

Michael R. Paolucci & Anthony J. Paolucci
d/b/a Courtesy Mart
190 N. Allen St.
Albany, NY 12206

Gentlemen:

Please take notice of the Determination 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

In the Matter of the Application :
of :
MICHAEL R. PAOLUCCI and ANTHONY J. PAOLUCCI : DETERMINATION
D/B/A COURTESY MART :
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 May 31, 1976. :
:

Applicants, Michael R. Paolucci and Anthony J. Paolucci d/b/a Courtesy Mart, 190 North Allen Street, Albany, New York 12206, filed an application 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 May 31, 1976 (File No. 16484).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on July 18, 1978 at 9:00 A.M. Applicant appeared by Charles W. Ryan, Jr., Esq. The Audit Division appeared by Peter Crotty, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the determination by the Audit Division of additional taxes due for the periods June 1, 1973 through May 31, 1976, based on an audit of applicants' records, was correct.

FINDINGS OF FACT

1. On August 25, 1976 as a result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants, Michael R. Paolucci and Anthony J. Paolucci d/b/a Courtesy

Mart. Said Notice was issued for the periods June 1, 1973 to May 31, 1976 in the amount of \$18,941.93, plus penalty and interest of \$7,191.07, for a total due of \$26,133.00.

2. Applicants, Michael R. Paolucci and Anthony J. Paolucci d/b/a Courtesy Mart, conducted a supermarket business engaged in the sale of meat, pastry, bread, beer and cigarettes. The audit by the Audit Division using applicants' records for the test periods of March, April and May of 1974, as well as June, July and August of 1975 and February of 1976, found the weighted taxable ratio to be 48.8 percent. Also for these months, the dollar markup divided by the total taxable purchases resulted in a 10.3 percent overall markup. Further computation by the Audit Division was as follows:

Gross Purchases	\$1,274,155.50
Taxable Ratio	48.8%
Taxable Purchases	621,787.88
Markup	10.3%
	<u>\$ 685,832.03</u>
Allowance for Beer	
Donation to Church	1,800.00
Net Taxable Sales	<u>\$ 684,032.03</u>
State Tax at 7%	47,883.24
Taxes Paid	28,940.30
Additional Tax Due	<u>\$ 18,941.94</u>

3. The Audit Division had access to all books and records of all purchases made by applicant. Records available were the sales tax returns, cash receipts journal, cash payments journal, check register, daily cash worksheets, daily cash read out tapes, purchase invoices and federal income tax return. The corrected gross sales information agrees with the federal income tax return. Sales tax recorded in the cash receipts journal, from daily register readings, was paid with the sales tax returns. The daily register read out tapes and daily cash worksheets were compared to postings in the cash receipts journal

and no discrepancies were noted by the auditor. The proper tax was paid on all purchases of taxable items for store use.

4. Applicant admits that the average markup was between 10 percent and 14 percent and estimates that the taxable ratio to be between 30 percent and 35 percent. There was no differentiation as to the taxable items whenever a credit customer would pay on his accounts only the total amount was rung up on the register without regard to sales tax.

5. In the comparison of the cash journal receipts with the "ST100's" (New York State Sales Tax Returns) the auditor noted discrepancies for the periods ending February 28, 1975, May 31, 1975, August 31, 1975 and November 30, 1975 and cash receipts information was not complete for the periods ending August 31, 1974 and November 30, 1974. Thus the records of the applicants were inadequate.

6. Applicants offered no documentary or other substantial evidence to show the recomputed additional taxes due did not reflect applicants' additional sales tax liability.

CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period 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 the exact amount of taxable sales could not be determined due to discrepancies found as per Finding of Fact "5".

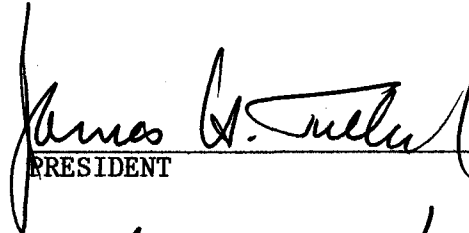
C. That with applicants' own estimate of the markup percentage (between 10 percent and 14 percent) and taxable ratio (between 30 percent and 35 percent) additional sales tax would be due.


- D. That applicants failed to show that auditors procedures were erroneous.
- E. That the penalties and interest are sustained.
- F. That the application of Michael R. Paolucci and Anthony J. Paolucci d/b/a Courtesy Mart is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 25, 1976 is sustained.

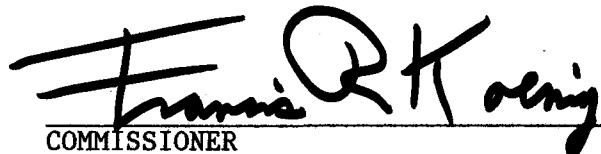
DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER