

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Smilers Food Stores, 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 9/1/73 - 5/31/77.

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Smilers Food Stores, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Smilers Food Stores, Inc.  
250 W. 57th St.  
New York, NY 10019

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  
25th day of September, 1981.

*Carrie R. Dayclund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Smilers Food Stores, 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 9/1/73 - 5/31/77. :

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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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Ralph Glickman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ralph Glickman  
Glickman, Fierro, Meyrowitz & Rosen, CPA's  
One Penn Plaza  
New York, NY 10001

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  
25th day of September, 1981.

*Bernice J. Haglund*

*J. Vredenburg*

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

September 25, 1981

Smilers Food Stores, Inc.  
250 W. 57th St.  
New York, NY 10019

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  
Ralph Glickman  
Glickman, Fierro, Meyrowitz & Rosen, CPA's  
One Penn Plaza  
New York, NY 10001  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
SMILERS FOOD STORES, INC.  
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 September 1, 1973 through May 31,  
1977.

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DECISION

Petitioner, Smilers Food Stores, Inc., 250 West 57th Street, New York, New York, filed a petition for a revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1973 through May 31, 1977 (File No. 23581).

A formal hearing was held before Nigel Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1980. The petitioner appeared by Glickman, Fierro, Meyrowitz & Rosen, CPA's (Ralph Glickman and Leonard Blum, CPA's, of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether the audit performed by the Audit Division properly reflected applicant's sales tax liability.

FINDINGS OF FACT

1. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on September 5, 1978 against petitioner for the period September 1, 1973 through February 28, 1977 in the amount of \$118,125.42, plus interest of \$30,006.64, for a total due of \$148,132.06.

A second Notice of Determination was issued on the same date for the period March 1, 1977 through May 31, 1977 in the amount of \$10,020.32, plus interest of \$1,028.59, for a total due of \$11,048.91.

The two Notices total \$128,145.74 which is comprised of the taxes due on: additional taxable sales - \$121,220.58, equipment rentals - \$2,604.00, expense items - \$3,980.60, and fixed assets - \$340.56.

The tax determined due on additional taxable sales is the only item at issue.

2. Petitioner executed a consent to extend the period within which to issue an assessment for the period at issue to December 19, 1978.

3. Petitioner operated several stores located in New York City which sold general grocery items and hot and/or cold delicatessen foods and sandwiches.

4. Petitioner's records were not adequate for the Audit Division to determine the correct sales tax due. Petitioner did not maintain any records which separated nontaxable sales from taxable grocery and taxable prepared food and sandwich sales other than a listing of catering sales in the cash receipts book. In the preparation of the sales tax returns the petitioner used various estimates to arrive at taxable sales.

5. The cash registers used by petitioner during the audit period did not have any separate tax key and the register tapes did not show the amount of sales tax due. Also any sales slip given to the customer did not show the amount of sales tax due. Such sales slip only showed one total amount.

6. Petitioner maintained a price list for beer and soda at its cash register for use by its employees. While petitioner also asserts it had such a list posted near its shelves of beer and soda, no such list was in evidence at the time the Audit Division conducted its audit.

7. The tax determined to be due of \$121,220.58 by the Audit Division is the tax due on the difference between the audited taxable sales of \$10,795,206.00 and the reported taxable sales of \$9,232,495.00. The audited taxable sales is comprised of \$6,243,573.00 for taxable grocery sales, \$4,405,939.00 for prepared food sales and \$145,694.00 for catering sales. The amount of tax due from catering sales is not in dispute.

8. The audited taxable grocery sales determined to be due by the Audit Division was arrived at by an examination of the petitioner's purchases for the months of January, 1976 and July, 1976 which determined a markup percentage that was applied to each category of taxable purchases. A shrinkage allowance of one-half of one percent for stolen and damaged merchandise was factored into the markup percentages computed.

9. Petitioner disagreed with the taxable grocery markup percentage asserting the percentages should be lower. Additionally, petitioner disagreed with the shrinkage allowance of one-half of one percent claiming the correct allowance should be 5 percent. Petitioner failed to support its contentions with any documentary or other evidence.

10. The audited prepared food sales was determined by the Audit Division by observation tests performed on various days at various store locations. Petitioner disagreed with the results of the observation tests but failed to produce any documentary or other substantial evidence to support its argument.

#### CONCLUSIONS OF LAW

A. That since petitioner did not maintain adequate books and records as required by section 1135 of the Tax Law the methods used by the Audit Division to arrive at additional sales tax due is authorized by and in accordance with section 1138(a) of the Tax Law.

B. That the petition of Smilers Food Stores, Inc. is denied and the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued September 5, 1978 are sustained.

DATED: Albany, New York

SEP 25 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER