

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Taverly, 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:  
3/1/74 - 2/28/77.

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Taverly, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Taverly, Inc.  
101 W. 21st St.  
New York, NY 10011

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  
30th day of October, 1981.

*Annie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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of :  
Taverly, Inc. :

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under Article 28 & 29 of the Tax Law for the :  
Period 3/1/74 - 2/28/77.

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Robert Semel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Semel  
Patrusky, Mintz & Semel  
299 Broadway  
New York, NY 10007

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  
30th day of October, 1981.

*Ann A. Duplant*

*J. Vredenburg*

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

October 30, 1981

Taverly, Inc.  
101 W. 21st St.  
New York, NY 10011

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  
Robert Semel  
Patrusky, Mintz & Semel  
299 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
TAVERLY, 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 March 1, 1974	:	
through February 28, 1977.	:	

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Petitioner, Taverly, Inc., 101 West 21st Street, New York, New York 10011, 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, 1974 through February 28, 1977 (File No. 20638).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1981 at 2:45 P.M. Petitioner appeared by Robert Semel, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly determined petitioner's sales and use tax liability for the period March 1, 1974 through February 28, 1977 based on its findings from certain test periods.
- II. Whether petitioner understated its taxable sales reported on sales tax returns filed for the period March 1, 1974 through February 28, 1977.
- III. Whether the Audit Division properly estimated the percentage of petitioner's utility purchases used for nonproduction purposes.

FINDINGS OF FACT

1. Petitioner, Taverly, Inc., is engaged in the manufacture and sale of men's sportswear.

2. On September 21, 1977, 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 covering the period March 1, 1974 through February 28, 1977 for taxes due of \$5,014.35, plus penalty and interest of \$2,166.10, for a total of \$7,180.45.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to June 20, 1978.

4. On audit, the Audit Division examined sales invoices for the month of September, 1976 and determined that 0.00447 percent of petitioner's nontaxable sales were not substantiated by exemption certificates and thus were disallowed. This percentage was applied to gross sales of \$9,408,827.00 reported for the audit period to arrive at additional taxable sales of \$42,097.00 and tax due thereon of \$3,315.47. The Division also analyzed cash sales and found that petitioner considered sales tax an element of the total sales price to the customer and was extracted from cash receipts in computing taxable sales. Petitioner did not separately charge sales tax on cash sales invoices and therefore, the Audit Division deemed the entire receipt was subject to tax and asserted tax of \$1,116.06 on the difference between cash sales per books and taxable sales reported.

A review of expense purchases for the period December 1, 1975 through November 30, 1976 disclosed that petitioner failed to pay tax to one supplier on purchases of \$914.00. Said amount was related to gross sales for the same period to determine an error factor of 0.000292 percent which was applied to

gross sales and resulted in taxable expense purchases of \$2,748.00 and tax due of \$216.42. The review of expense purchases also revealed that petitioner did not pay New York State sales tax on utility purchases. The Audit Division estimated 20 percent of such purchases were used for nonproduction purposes based on a tour of the operations. This resulted in additional taxes due of \$366.40.

5. Petitioner's selling price for goods sold at retail (cash sales) was increased 8 percent to reflect the collection of sales tax; however, the amount was not shown separately.

6. Petitioner contended that the Audit Division's findings in the test periods were not an accurate basis for determining its liability for the entire period at issue.

7. Petitioner maintained and provided the Audit Division complete and adequate books and records.

8. Petitioner argued that its nonproduction use of utilities was 10 percent.

9. Petitioner acted in good faith at all times.

#### 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 recordkeeping which makes it virtually impossible to verify such liability and conduct a complete audit Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44.

That since petitioner maintained complete and adequate books and records from which the Audit Division could have conducted a complete audit of nontaxable sales and expense purchases to determine the exact amount of taxes

due, the Division's use of a test period was not proper. Accordingly, the taxes due on disallowed nontaxable sales and expense purchases are reduced to the actual amounts found due for the periods examined of \$116.72 and \$73.12, respectively.

B. That based on Finding of Fact "5", petitioner collected sales tax from customers on cash sales; that petitioner's total cash receipts included both the sales price of the merchandise sold and the sales tax applicable thereon in accordance with section 1132(a) of the Tax Law. Therefore, the taxable sales reported by petitioner on its sales tax returns filed for the period March 1, 1974 through February 28, 1977 were correct and additional taxes of \$1,116.06 determined by the Audit Division on understated taxable sales are cancelled.

C. That petitioner failed to establish through documentary evidence the actual allocation of its utility usage to production and nonproduction areas. That in the absence of such evidence, the Audit Division's estimate of 20 percent was reasonable and proper.

D. That the penalty is cancelled and interest is reduced to the minimum statutory rate.

E. That the petition of Taverly, Inc. is granted to the extent indicated in Conclusions of Law "A", "B" and "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 21, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
OCT 30 1981

STATE TAX COMMISSION

*James G. Teller*  
RESIDENT

*Frank R. Kosmij*  
COMMISSIONER

*Mark J. Teller*  
COMMISSIONER