

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

Olga & Pola Weiss :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales & Use Tax :  
under Article 28 of the Tax Law for the Periods :  
6/71-8/71, 12/71-2/72, 6/72-5/75.

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 2nd day of October, 1981, he served the within notice of Determination by certified mail upon Olga & Pola Weiss, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Olga & Pola Weiss  
409 Brighton Beach Ave.  
Brooklyn, NY 11235

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  
2nd day of October, 1981.

*Annie R. Hagedorn*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :

of

Olga & Pola Weiss :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales & Use Tax :  
under Article 28 of the Tax Law for the Periods :  
6/71-8/71, 12/71-2/72, 6/72-5/75

---

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 2nd day of October, 1981, he served the within notice of Determination by certified mail upon Morris From the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris From  
505 Fifth Ave.  
New York, 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 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  
2nd day of October, 1981.

*Carrie P. Haglund*

*J. Vredenburg*

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

October 2, 1981

Olga & Pola Weiss  
409 Brighton Beach Ave.  
Brooklyn, NY 11235

Dear Mr. & Mrs. Weiss:

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,  
*Kathy Pfaffenbach*

STATE TAX COMMISSION

cc: Petitioner's Representative  
Morris From  
505 Fifth Ave.  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application :  
of :  
OLGA WEISS and POLA WEISS : DETERMINATION  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and :  
29 of the Tax Law for the Periods June 1, 1971 :  
through August 31, 1971, December 1, 1971 :  
through February 29, 1972 and June 1, 1972 :  
through May 31, 1975.

---

Applicants, Olga Weiss and Pola Weiss, 409 Brighton Beach Avenue, Brooklyn, New York 11235, 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 periods June 1, 1971 through August 31, 1971, December 1, 1971 through February 29, 1972 and June 1, 1972 through May 31, 1975 (File No. 16546).

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 October 30, 1979, at 1:15 P.M. Applicants appeared by Morris From, PA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether the sale of pre-cooked chickens for off-premise consumption is subject to sales tax.

FINDINGS OF FACT

1. During the period at issue, applicants, Olga Weiss and Pola Weiss, operated a take-out food store which sold such items as chicken, meat loaf, hamburger, fried fish, salads, cakes and puddings.

2. On May 14, 1976, 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 applicants for the periods June 1, 1971 through August 31, 1971, December 1, 1971 through February 29, 1972 and June 1, 1972 through May 31, 1975 for taxes due of \$7,076.89, plus penalty and interest of \$3,357.04, for a total of \$10,433.93.

3. Applicants executed a consent extending the period for assessment of sales and use taxes for the period June 1, 1972 through May 31, 1975, to July 20, 1976.

4. On audit, the Audit Division took the position that applicants' sales of roasted chickens in a heated state were subject to tax and determined that such sales represented 90 percent of the chickens sold which resulted in additional sales taxes due of \$7,015.79. The Audit Division also found use taxes due of \$61.10 on the purchase of fixed assets which are not contested by applicants.

5. The Audit Division stipulated that the taxes assessed for the periods June 1, 1971 through August 31, 1971 and December 1, 1971 through February 29, 1972 were barred by the statute of limitations and thereby should be deleted from the notice.

6. Applicants did not collect sales tax from their customers; however, they estimated that 10 percent of the chickens were sold heated and therefore reported and paid sales tax on 10 percent of gross receipts.

7. At the hearing, the Audit Division argued that all the chickens sold were subject to tax irregardless of whether they were heated or unheated, since the chickens were not sold in the same form, condition, quantity and packaging as in food stores.

8. Chickens were placed in a display unit or remained in the kitchen on trays after they were fully cooked. Applicants did not have any warming devices or in any way attempt to maintain the chickens at a temperature higher than the surrounding

air temperature. The only time that a chicken was sold in a heated state, was when a customer coincidentally made a purchase when the chickens were just removed from the oven.

9. Applicants' selling price of chickens was determined by the weight.

10. Applicants did not have any facilities for on-premise consumption.

11. Cooked chickens, similar to those sold by the applicant, are available in grocery stores and other similar establishments.

CONCLUSIONS OF LAW

A. That the additional taxes assessed for the periods June 1, 1971 through August 31, 1971 and December 1, 1971 through February 29, 1972 are cancelled based on Finding of Fact "5".

B. That applicants' sales of pre-cooked chickens sold in an unheated state and for off-premise consumption are not subject to tax within the meaning and intent of section 1105(d) (i) (3) of the Tax Law; therefore, the additional sales taxes determined to be due for the period June 1, 1972 through May 31, 1975 are cancelled.

C. That the application of Olga Weiss and Pola Weiss is granted to the extent indicated in Conclusions of Law "A" and "B" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 14, 1976; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

00702 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227

*10-1-78  
L.S.  
[Signature]*



REASON CHECKED

Unclaimed

Addressed

Insufficient Address

No such street

No such office in state

Do not re-mail in this envelope

Morris From  
505 Fifth Ave.  
New York, NY

TAX APPEALS BUREAU  
OCT 28 1981

RECEIVED

REP Copy

FORWARDED

S30 GRANT 510-5  
10052

SEP 11 1981  
No. 111047

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

October 2, 1981

Olga & Pola Weiss  
409 Brighton Beach Ave.  
Brooklyn, NY 11235

Dear Mr. & Mrs. Weiss:

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,  
*Kathy Pfaffenbach*

STATE TAX COMMISSION

cc: Petitioner's Representative  
Morris From  
505 Fifth Ave.  
New York, NY  
Taxing Bureau's Representative



STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application :

of :

OLGA WEISS and POLA WEISS : DETERMINATION

for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and  
29 of the Tax Law for the Periods June 1, 1971:  
through August 31, 1971, December 1, 1971  
through February 29, 1972 and June 1, 1972 :  
through May 31, 1975.

---

Applicants, Olga Weiss and Pola Weiss, 409 Brighton Beach Avenue, Brooklyn, New York 11235, 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 periods June 1, 1971 through August 31, 1971, December 1, 1971 through February 29, 1972 and June 1, 1972 through May 31, 1975 (File No. 16546).

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 October 30, 1979, at 1:15 P.M. Applicants appeared by Morris From, PA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether the sale of pre-cooked chickens for off-premise consumption is subject to sales tax.

FINDINGS OF FACT

1. During the period at issue, applicants, Olga Weiss and Pola Weiss, operated a take-out food store which sold such items as chicken, meat loaf, hamburger, fried fish, salads, cakes and puddings.

2. On May 14, 1976, 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 applicants for the periods June 1, 1971 through August 31, 1971, December 1, 1971 through February 29, 1972 and June 1, 1972 through May 31, 1975 for taxes due of \$7,076.89, plus penalty and interest of \$3,357.04, for a total of \$10,433.93.

3. Applicants executed a consent extending the period for assessment of sales and use taxes for the period June 1, 1972 through May 31, 1975, to July 20, 1976.

4. On audit, the Audit Division took the position that applicants' sales of roasted chickens in a heated state were subject to tax and determined that such sales represented 90 percent of the chickens sold which resulted in additional sales taxes due of \$7,015.79. The Audit Division also found use taxes due of \$61.10 on the purchase of fixed assets which are not contested by applicants.

5. The Audit Division stipulated that the taxes assessed for the periods June 1, 1971 through August 31, 1971 and December 1, 1971 through February 29, 1972 were barred by the statute of limitations and thereby should be deleted from the notice.

6. Applicants did not collect sales tax from their customers; however, they estimated that 10 percent of the chickens were sold heated and therefore reported and paid sales tax on 10 percent of gross receipts.

7. At the hearing, the Audit Division argued that all the chickens sold were subject to tax irregardless of whether they were heated or unheated, since the chickens were not sold in the same form, condition, quantity and packaging as in food stores.

8. Chickens were placed in a display unit or remained in the kitchen on trays after they were fully cooked. Applicants did not have any warming devices or in any way attempt to maintain the chickens at a temperature higher than the surrounding

air temperature. The only time that a chicken was sold in a heated state, was when a customer coincidentally made a purchase when the chickens were just removed from the oven.

9. Applicants' selling price of chickens was determined by the weight.
10. Applicants did not have any facilities for on-premise consumption.
11. Cooked chickens, similar to those sold by the applicant, are available in grocery stores and other similar establishments.

CONCLUSIONS OF LAW

A. That the additional taxes assessed for the periods June 1, 1971 through August 31, 1971 and December 1, 1971 through February 29, 1972 are cancelled based on Finding of Fact "5".

B. That applicants' sales of pre-cooked chickens sold in an unheated state and for off-premise consumption are not subject to tax within the meaning and intent of section 1105(d) (i) (3) of the Tax Law; therefore, the additional sales taxes determined to be due for the period June 1, 1972 through May 31, 1975 are cancelled.

C. That the application of Olga Weiss and Pola Weiss is granted to the extent indicated in Conclusions of Law "A" and "B" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 14, 1976; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER