

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Nick Argese (deceased)
d/b/a Model Market

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
12/1/73 - 2/28/77.

State of New York
County of Albany

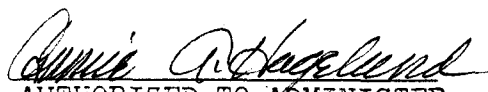
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Nick Argese (deceased), d/b/a Model Market, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

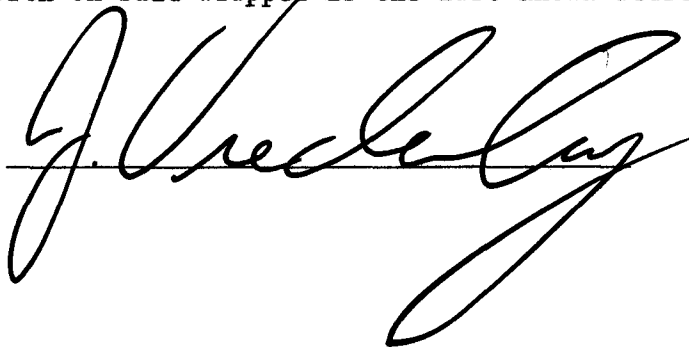
Nick Argese (deceased)
d/b/a Model Market
c/o Joseph Siracusa
208-10 Loew Bldg.
Syracuse, NY 13202

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
6th day of October, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 6, 1982

Nick Argese (deceased)
d/b/a Model Market
c/o Joseph Siracusa
208-10 Loew Bldg.
Syracuse, NY 13202

To the Executor:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

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 Petition	:	
	:	
of	:	
	:	
NICK ARGESE (DECEASED)	:	DECISION
D/B/A MODEL MARKET	:	
	:	
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 December 1, 1973	:	
through February 28, 1977.	:	

Petitioner, Nick Argeese (deceased) d/b/a Model Market, c/o Joseph Siracusa, Executor, 208-10 Loew Building, Syracuse, New York 13202, 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 December 1, 1973 through February 28, 1977 (File No. 20601).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 26, 1981 at 1:15 P.M. Petitioner appeared by Joseph Siracusa, Executor. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division to determine additional sales taxes due from petitioner were proper.

FINDINGS OF FACT

1. Petitioner, Nick Argeese (deceased) d/b/a Model Market, operated a grocery store located at 3263 Howlett Hill Road, Camillus, New York.

2. On July 29, 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 December 1, 1973 through February 28, 1977 for taxes due of \$6,467.65, plus penalty and interest of \$3,484.84, for a total of \$9,952.49.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1973 through May 31, 1974, to September 20, 1977.

4. The books and records provided by petitioner to the Audit Division were incomplete in that cash register tapes and purchase invoices were not available for 1974 and also the cash register tapes were incomplete for 1975 and 1976. The Division compared the cash register tapes to entries in the sales journal for certain months in 1975 and found that for the period March 1, 1975 through May 31, 1975 (a period for which cash register tapes were complete) the sales tax collected was greater than sales tax reported for that period.

Because of the inadequate books and records, the Audit Division analyzed purchase invoices for the months of February, 1975, October, 1975 and May, 1976 and determined that 42.13 percent of said purchases would result in a taxable sale. A markup test was performed for all purchases of taxable items in May, 1976 resulting in a weighted markup of 22.83 percent. The test considered sale items known as "loss leaders". The taxable ratio was applied to total purchases to arrive at taxable purchases of \$370,789.44 to which the weighted markup was applied to determine taxable sales of \$445,441.03 and taxes due thereon of \$31,880.87. Petitioner paid sales taxes of \$25,413.22, leaving additional taxes due of \$6,467.65.

5. Petitioner suffered pilferage losses to the extent of 1 percent of purchases for the audit period.

6. Petitioner argued that the Audit Division was arbitrary in using the results of a test period as a basis for determining the tax liability for the entire period under audit.

7. Petitioner contended that markups would be lower in 1974 and 1975 because of inflation. However, no evidence was adduced to support this contention.

8. The books and records maintained by petitioner were inadequate for the Audit Division to verify taxable sales reported or to determine petitioner's sales tax liability with any exactness.

9. Petitioner failed to establish that reasonable cause exists for the abatement of penalty and interest in excess of the minimum statutory rate.

CONCLUSIONS OF LAW

A. That in view of the insufficiency of petitioner's recordkeeping, the audit procedures and tests adopted by the Audit Division to determine petitioner's taxable sales and taxes due were proper in accordance with section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, Matter of Sakran v. State Tax Commission, 73 A.D.2d 989) and that petitioner has failed to sustain the burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

B. That in accordance with Finding of Fact "5", the additional taxable sales are reduced to reflect a 1 percent allowance for pilferage.

C. That the petition of Nick Argese (deceased) d/b/a Model Market is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand

for Payment of Sales and Use Taxes Due issued July 29, 1977; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York


OCT 06 1982


STATE TAX COMMISSION

ACTING

PRESIDENT




COMMISSIONER


COMMISSIONER