

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Franklin Bruno
d/b/a Frank's Superette

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
6/1/72-2/28/77.

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 31st day of March, 1982, he served the within notice of Decision by certified mail upon Franklin Bruno, d/b/a Frank's Superette the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Franklin Bruno
d/b/a Frank's Superette
84 West St.
Spring Valley, NY 10977

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.

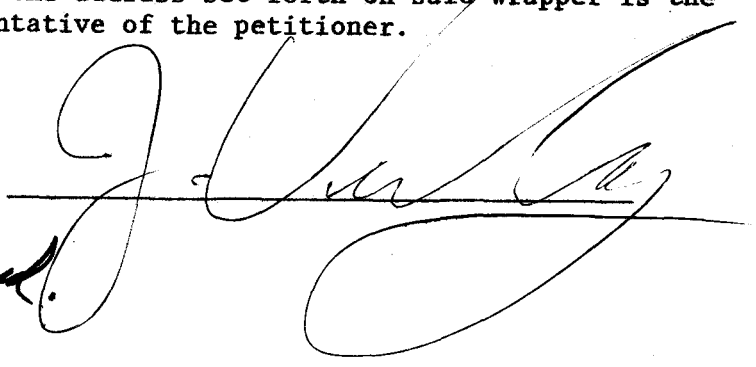
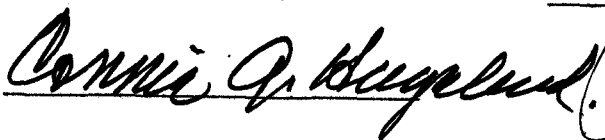
Sworn to before me this
31st day of March, 1982.




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
31st day of March, 1982.

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

March 31, 1982

Franklin Bruno
d/b/a Frank's Superette
84 West St.
Spring Valley, NY 10977

Dear Mr. Bruno:

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
Arthur A. Batterman
20 Karnell St.
Spring Valley, NY 10977
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
FRANKLIN BRUNO
d/b/a FRANK'S SUPERETTE
for Revision of a Determination or for Refund
of Sales and Use Taxes due under Articles 28
and 29 of the Tax Law for the period June 1,
1972 through February 28, 1977.

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DECISION

Petitioner, Franklin Bruno d/b/a Frank's Superette, 84 West Street, Spring Valley, New York 10977, filed a petition for revision of a determination or for refund of sales and use tax due under Articles 28 and 29 of the Tax Law for the period June 1, 1972 through February 28, 1977 (File No. 20349).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 21, 1981 at 1:15 P.M. Petitioner appeared by Arthur A. Batterman, P.A. The Audit Division appeared by Ralph Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether an audit of petitioner's books and records and the mark-up test performed thereon by the Audit Division properly reflected petitioner's additional sales tax liability for the period June 1, 1972 through February 28, 1977.

FINDINGS OF FACT

1. Petitioner executed consents extending the time within which to issue assessment for sales and use taxes for the period in issue to June 20, 1978.
2. On August 18, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the

period June 1, 1972 through February 28, 1977 in the amount of \$47,496.58 plus penalty and interest of \$20,945.93 for a total of \$68,442.51. The Audit Division in its field audit failed to apply the taxable ratio prior to applying the computed mark-ups, therefore the amount of tax due was reduced to \$31,286.73 plus penalty and interest.

3. Petitioner operates a deli-grocery store known as Frank's Superette, in Spring Valley, New York. The Audit Division received complaints from customers that they were paying sales tax on food products not subject to tax. An examiner on a visit to the store ascertained that the complaints were valid. Upon observing sales to customers, it was noted that sales tax was charged on nontaxable items such as potato chips and sales tax was not charged on taxable items such as sandwiches, hot coffee and paperback books.

4. Petitioner failed to file sales tax returns for the periods ending May 31, 1975, August 31, 1975 and November 30, 1975. He submitted copies of returns for periods December 1, 1972 to February 28, 1975, and sales tax warrants for a number of these periods but could not prove the warrants were satisfied. He claimed that returns were prepared by marking up 25 percent what he considered purchases of taxable items and applying the statutory rate to arrive at sales tax due. His gross sales were computed by adding daily register tapes for the quarter.

5. On January 2, 1976 an auditor inquired of petitioner's books and records. He was informed that they were at petitioner's home and would be available when an audit was scheduled. An audit was scheduled on March 31, 1976. The auditor was then notified that all records were destroyed in a flood in petitioner's basement.

6. The following records were available for audit: business bank statements, check book stubs and a day book for the period September 1, 1975 to June 30, 1976, some purchase invoices, loan statements and some cash register tapes. Petitioner had not filed personal or business income tax returns since 1968. He had no formal records available. His day book had some cash expenditures. It was found not to be reliable.

7. Petitioner had some records from September 1, 1975 through June 30, 1976 from which an analysis was made as to taxable and nontaxable items. A mark-up test was then performed on each of the different categories. The most current purchase invoices and current sales prices were used for the mark-ups.

8. Based on test periods petitioner's gross receipts were approximately \$350,000.00 per year. Taxable items were computed to be 53 percent of the gross sales. (The 53 percent is the percentage generally acceptable by the Audit Division for the type of grocery-general store operated by petitioner.) At a four percent tax rate times four and a third years, the total sales tax due for the periods in issue would be approximately \$31,000.00.

9. The Audit Division contended that the mark-up percentages used gave consideration to all factors in order to arrive at petitioner's gross sales and percentage of taxable sales.

10. Petitioner failed to present any evidence to show that the basis upon which the sales tax due was determined was improper, unreasonable or that the results were incorrect.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, inter alia, that if a return, when filed, is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available

and, if necessary, the tax may be estimated on the basis of external indices; that in the absence of petitioners' books and records, the audit procedures used by the Audit Division to determine petitioner's taxable sales were proper as authorized in said section of the Tax Law. Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, mot for lv. to app. den. 44 N.Y.2d 645.

Accordingly, additional sales tax is due in the amount of \$31,286.73.


B. That the petition of Franklin Bruno d/b/a Frank's Superette is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 18, 1977, as corrected, is sustained.

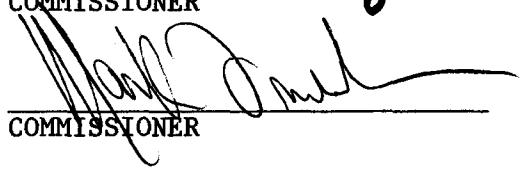
DATED: Albany, New York

MAR 31 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER