

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Thomas & Jane Fox	:	
d/b/a Jane's Variety 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	:	
Periods 6/1/74-11/30/74 & 6/1/75-11/30/77.	:	

State of New York
County of Albany

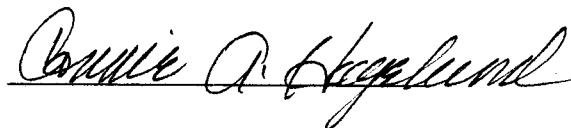
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1982, he served the within notice of Decision by certified mail upon Thomas & Jane Fox, d/b/a Jane's Variety Superette the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

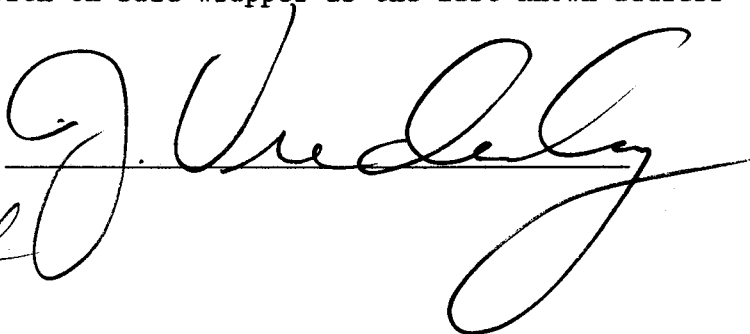
Thomas & Jane Fox
d/b/a Jane's Variety Superette
419 Elm Ave.
Selkirk, NY 12158

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
14th day of August, 1982.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Thomas & Jane Fox	:	
d/b/a Jane's Variety Superette	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Sales & Use Tax	:	
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Periods 6/1/74-11/30/74 & 6/1/75-11/30/77.	:	

State of New York
County of Albany


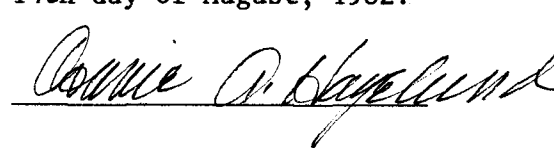
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1982, he served the within notice of Decision by certified mail upon Leslie M. Apple the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leslie M. Apple
Hinman, Straub, Pigors and Manning
90 State St.
Albany, NY 12207

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
14th day of August, 1982.

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

August 13, 1982

Thomas & Jane Fox
d/b/a Jane's Variety Superette
419 Elm Ave.
Selkirk, NY 12158

Dear Mr. & Mrs. Fox:

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
Leslie M. Apple
Hinman, Straub, Pigors and Manning
90 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS FOX AND JANE FOX	:	DECISION
d/b/a JANE'S VARIETY SUPERETTE	:	
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, 1974	:	
through November 30, 1974 and June 1, 1975	:	
through November 30, 1977.	:	

Petitioners, Thomas Fox and Jane Fox, d/b/a Jane's Variety Superette, 419 Elm Avenue, Selkirk, New York 12158, 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 periods June 1, 1974 through November 30, 1974 and June 1, 1975 through November 30, 1977 (File No. 24140).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on October 8, 1980 at 9:15 A.M. and continued on May 19, 1981 at 1:15 P.M. Petitioners appeared by Leslie M. Apple, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler and Harry Kadish, Esqs., of counsel).

ISSUES

I. Whether the Audit Division's determination of additional sales taxes due from petitioners for the periods at issue was correct.

II. Whether the consent to extend the period of limitation for assessment of sales and use taxes for the period June 1, 1974 through August 31, 1974 executed by petitioner Thomas Fox was properly procured.

FINDINGS OF FACT

1. On December 16, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Jane's Variety Superette for the period June 1, 1974 through November 30, 1974. The Notice asserted additional tax due of \$2,470.03, plus penalty and interest of \$1,546.48, for a total of \$4,016.51.

2. On or about September 15, 1977, a Donald Bryant, the auditor performing a field audit of petitioner's records for the Audit Division, informed petitioners that the period June 1, 1974 through August 31, 1974 was about to expire under the statute of limitations. Mr. Bryant advised the petitioners that unless a waiver was signed, an estimated notice of tax due would be required to be issued in order to hold the period open. Petitioner Thomas Fox, on September 15, 1977, executed a consent to extend the period of limitation for assessment for the aforesaid period to December 20, 1977.

3. On August 10, 1978, the Audit Division issued an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Jane's Variety Superette for the period June 1, 1975 through November 30, 1977. The Notice asserted additional tax due of \$12,881.26, plus penalty and interest of \$5,534.32, for a total of \$18,415.58, as a result of the field audit.

4. Petitioners did not maintain cash register tapes for the verification of their sales and sales tax collections; therefore, the Audit Division proceeded to review their total purchases for resale for the year 1976. The Audit Division found that 45 percent of petitioners' purchases were taxable when resold. The Audit Division then performed a mark-up test on taxable purchases for the month of March, 1976 using selling prices submitted by petitioners. It determined mark-up percentages for each supplier and applied those percentages

to the taxable purchases found for the year 1976. The Audit Division determined taxable sales for the year 1976 of \$114,348.00. Petitioners reported taxable sales of \$45,290.00 on sales and use tax returns filed for the same period. The Audit Division then determined an error rate of 151.9 percent and applied said rate to the tax reported by petitioners for the entire audit period thereby determining a tax deficiency of \$15,351.29.

5. Petitioners had the following records available on audit: Federal partnership returns, purchase invoices and journal, and cash receipts journal.

6. Petitioners argued that all records were available for audit and therefore should have been used to determine any additional tax due. Petitioners cited Chartair, Inc. v. State Tax Commission in support of their petition.

7. Petitioners further argued that no allowance was made in the audit for items that were broken or pilfered from the store and not sold. Petitioners claimed that they sustained losses through breakage and pilferage at the rate of 3 percent of purchases. Petitioners offered no documentary or other substantial evidence to support any losses through breakage or pilferage.

8. Petitioners contended that the mark-up percentages used by the Audit Division were not accurate in that cigarettes sold by the carton were not considered and some sales at near wholesale prices were made. Petitioners offered no evidence to substantiate the amount of such sales or to show what effect they would have on the audit results.

9. Petitioners claimed that, it was their belief that if they did not sign the waiver to extend the period of limitation for assessment for the period June 1, 1974 through August 31, 1974, they would have to pay the estimated notice without recourse. Petitioners, therefore, argued that the waiver was fraudulently obtained.

10. Petitioners did not establish reasonable cause for the abatement of penalty and interest.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law states that when a return required by this article is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as purchases. That petitioners did not have source documents (cash register tapes) available for the verification of their taxable sales. Therefore, the use of purchases to determine what items should have been taxed when resold was reasonably calculated to reflect taxes due and authorized under the provisions of section 1138(a) of the Tax Law. (Matter of Grant Co. v. Joseph, 2 N.Y. 2d 196; Matter of Meyer v. State Tax Commission, 61 A.D. 2d 233).

B. That the waiver to extend the statute of limitations for the period June 1, 1974 through August 31, 1974 was obtained in the normal course of a field audit of petitioner's records. That the petitioners failed to show that the waiver was fraudulently or otherwise not properly obtained.

C. That the petition of Thomas Fox and Jane Fox d/b/a Jane's Variety Superette is denied and the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 16, 1977 and August 10, 1978 are sustained.

DATED: Albany, New York

AUG 13 1982

ACTING

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER