

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Simon Gutherc	: : : : : :	: : : : : :
		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 3/1/75-2/28/78.		

State of New York
County of Albany

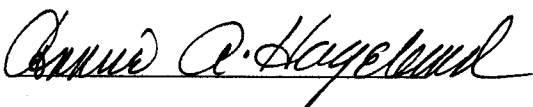
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by certified mail upon Simon Gutherc, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Simon Gutherc
8017 20th Ave.
Brooklyn, NY 11214

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
26th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

November 26, 1982

Simon Gutherc
8017 20th Ave.
Brooklyn, NY 11214

Dear Mr. Gutherc:

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	:	
SIMON GUTHERC	:	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, 1975	:	
through February 28, 1978.	:	

Petitioner, Simon Gutherc, 8017 20th Avenue, Brooklyn, New York 11214, 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, 1975 through February 28, 1978 (File No. 25525).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 2, 1982 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the results of a field audit performed by the Audit Division properly reflected petitioner's tax liability.

FINDINGS OF FACT

1. On January 2, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Simon Gutherc covering the period March 1, 1975 through February 28, 1978. The Notice was issued as a result of a field audit and asserted additional tax due of \$2,970.80 plus penalty and interest of \$1,439.10 for a total of \$4,409.90.

2. On March 15, 1978, petitioner executed a consent to extend the period of limitation for assessment of the entire audit period to June 20, 1979.

3. Petitioner operated a retail grocery store which sold both taxable and nontaxable items. Petitioner estimated his taxable sales reported on sales and use tax returns filed at 15 percent of gross sales pursuant to advice from his accountant.

4. On audit, the Audit Division found that petitioner did not have source documents in support of sales made. Therefore, it proceeded to analyze petitioner's taxable purchases and apply markup percentages to convert the purchases to retail sales and thus verify the taxable sales reported. The Audit Division reviewed purchases made during the months of August, 1976 and February, 1977. It found that petitioner made the following purchases which were taxable when resold (stated as percentages based upon total purchases for the above two months):

Soda	8.2%
Beer	4.3%
Miscellaneous	21.8%
Cigarettes	.5%
Total	<u>34.8%</u>

Upon comparison of a day book kept by petitioner to worksheets prepared by petitioner's accountant, the Audit Division found that the purchases listed in the day book exceeded purchases listed on the accountant's worksheets for the two-month period reviewed (August, 1976 and February, 1977) by \$411.00, or 5.6 percent. The Audit Division applied 5.6 percent to total purchases listed on the accountant's worksheets of \$133,628.00 and increased petitioner's purchases by \$7,483.00 to \$141,111.00 in order to expand the error found in August, 1976 and February, 1977 to the entire audit period. The Audit Division then performed

a markup test using current purchase invoices and selling prices and determined the following markups:

Soda	27%
Beer	18%
Miscellaneous	27%
Cigarettes	19%

The Audit Division applied the markup percentages shown above to the appropriate purchases for the entire audit period to determine taxable sales of \$61,637.00 for the entire audit period. Petitioner reported taxable sales of \$26,062.00 on sales and use tax returns filed. The Audit Division thereby determined additional taxable sales of \$35,575.00 and tax due thereon of \$2,846.00 by applying the 8 percent state and local tax rate. The Audit Division also held additional tax due of \$124.80 for rubbish removal services purchased on which no sales tax was paid. The Audit Division thereby determined the total tax deficiency of \$2,970.80 for the audit period.

5. Petitioner argued that his taxable sales were nearer to 10 percent of his gross sales in that taxable items sold did not have as rapid a rate of turnover that nontaxable food items had. Further, petitioner contended that his purchases of rubbish removal services included sales tax. Petitioner did not submit any substantial evidence to document the frequency of his purchases that were taxable or nontaxable when resold or to show that tax was charged and paid on services of rubbish removal.

6. Petitioner prepared sales invoices from phone orders taken which were delivered to his customers. In support of his petition, he submitted the following available current sales invoices prepared for deliveries to substantiate his ratio of taxable vs. nontaxable sales made:

<u>Date</u>	<u>Inv. No.</u>
2/1/82	2883, 2884, 2886
2/2/82	2887, 2889, 2890
2/4/82	2900, 2901
2/5/82	2903, 2908, 2909, 2910, 2912, 2915
2/8/82	2920, 2922, 2923
2/9/82	2927, 2929

Petitioner offered no explanation of the 28 numerically missing invoices in the above series.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases.

B. That petitioner did not have any source documents available on audit to verify his sales and the proper collection of sales tax thereon. That the use of purchases to determine petitioner's sales was proper and in accordance with the provisions of section 1138(a) of the Tax Law. Moreover, the purchases marked up on audit disclosed the insufficiency of taxable sales reported.

C. That the Audit Division did not show the necessity of increasing the total amount of petitioner's purchases by 5.6 percent for the entire audit period. That said purchases are therefore reduced to \$133,628.00 shown on the accountant's worksheets plus the additional purchases found in petitioner's day book of \$411.00 in the two-month period reviewed (Finding of Fact "4").

D. That except as noted in Conclusion "C" above, the audit performed by the Audit Division was proper. Petitioner failed to show that his sales as otherwise determined by the Audit Division were incorrect. The sales invoices submitted by petitioner were not conclusive nor sufficient to warrant any further reduction of the audit findings.

E. That petitioner relied on the advice of his accountant in reporting taxable sales on sales and use tax returns filed; therefore, the penalty and interest in excess of the minimum statutory rate are cancelled.

F. That the petition of Simon Gutherc is granted to the extent indicated in Conclusions "C" and "E" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 2, 1979; and that, except as so granted, the petition is in all other respects denied.

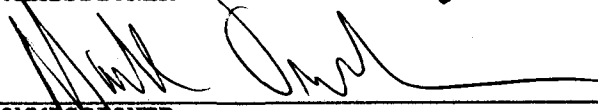
DATED: Albany, New York

NOV 26 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER