

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Angelo Imbriano
d/b/a Angelo's Pizza

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
12/1/74-6/21/77.

State of New York
County of Albany

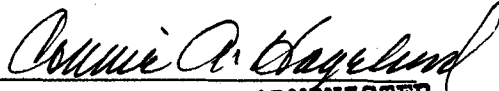
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of September, 1982, he served the within notice of Decision by certified mail upon Angelo Imbriano, d/b/a Angelo's Pizza the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

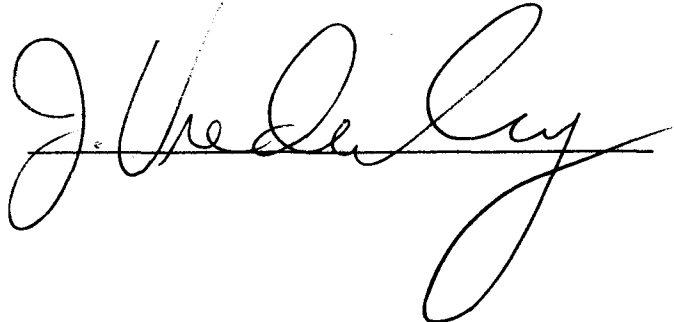
Angelo Imbriano
d/b/a Angelo's Pizza
1070 Tulip Ave.
Franklin Square, NY 11010

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
17th day of September, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

Angelo Imbriano :

d/b/a Angelo's Pizza :

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 12/1/74-6/21/77. :

State of New York
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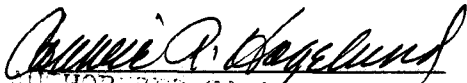
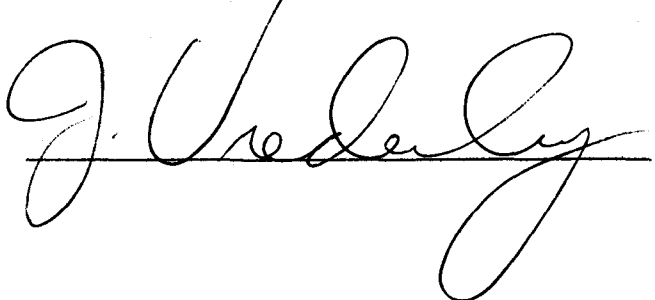
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of September, 1982, he served the within notice of Decision by certified mail upon Frank Niola the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank Niola
991 Hempstead Tpke.
Franklin Square, NY 11010

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
17th day of September, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 17, 1982

Angelo Imbriano
d/b/a Angelo's Pizza
1070 Tulip Ave.
Franklin Square, NY 11010

Dear Mr. Imbriano:

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
Frank Niola
991 Hempstead Tpke.
Franklin Square, NY 11010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ANGELO IMBRIANO	:	DECISION
D/B/A ANGELO'S PIZZA	:	
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, 1974	:	
through June 21, 1977.	:	

Petitioner, Angelo Imbriano d/b/a Angelo's Pizza, 1070 Tulip Avenue, Franklin Square, New York 11010, 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, 1974 through June 21, 1977 (File No. 24027).

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 September 24, 1981 at 10:45 A.M. Petitioner appeared by Frank Niola, Accountant. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Notice issued by the Audit Division upon petitioner's failure to submit information requested properly reflected petitioner's additional sales tax liability.

FINDINGS OF FACT

1. Petitioner operated a pizzeria until June 21, 1977, at which time the business operation was sold. The purchaser filed a Notification of Sale stating the selling price of the business at \$23,000.00, of which \$3,000.00 was for furniture and fixtures.

2. On January 16, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Angelo Imbriano d/b/a Angelo's Pizza covering the period December 1, 1974 through June 21, 1977. The Notice asserted additional tax due of \$4,914.14, plus penalties and interest of \$1,982.94, for a total of \$6,897.08.

3. The above Notice was issued as a result of petitioner's failure to submit information requested. The Audit Division determined taxable sales of \$10,000.00 per quarter for the period December 1, 1974 through May 31, 1977 and computed tax due thereon of \$8,000.00. It then deducted sales tax reported by petitioner for the same period of \$3,405.86 on taxable sales of \$46,551.00 and determined additional tax due of \$4,594.14. Petitioner did not file a New York State and Local Sales and Use Tax Return for the period June 1 through June 21, 1977; therefore, the Audit Division estimated tax due of \$320.00 for that period. The total sales tax deficiency of \$4,914.14 was thereby determined.

4. Upon petitioner's protest to the Notice, a field audit was performed at which time petitioner made available Federal tax returns for the years 1974, 1975 and 1976 which disclosed the following:

	(7½ mos.) <u>1974</u>	<u>1975</u>	<u>1976</u>
Rent Expense	\$3,200.	\$5,244.	\$6,800.
Inventory (End.)	7,100.	7,100.	6,300.

Petitioner did not have cash register tapes, guest checks or purchase invoices to substantiate sales or purchases.

It was the Audit Division's position that based on the amount paid for rent during the periods in issue, the sales reported by petitioner were insufficient. The Audit Division based its position on a cost of doing business analysis compiled by Dun & Bradstreet, Inc. which was derived from representative

samples of Federal income tax returns filed for the year 1972 by proprietorships and partnerships. This showed that the average rent expense for similar establishments was 4.05 percent of sales. Application of said percentage to the rent petitioner paid resulted in sales in excess of \$376,000.00. The Audit Division therefore made no adjustment to the Notice issued.

5. At the hearing, the Audit Division argued that with the exception of one modification, the Notice should be sustained as issued. It was conceded that the tax due for the period December 1, 1974 through August 31, 1976 was computed at 8 percent rather than 7 percent. This caused an overstatement in said Notice of \$700.00.

6. Petitioner denied having received a request for any information prior to the issuance of the Notice. Petitioner introduced his daily income and cash disbursement summaries for the years 1975 and 1976. Petitioner conducted most of his business on a cash basis. Petitioner recorded sales based on cash on hand at the end of each day since his cash register did not produce a total or a record of the transactions.

7. Petitioner argued that his sales and use tax returns as filed were correct; however, he could not offer any source documents of his sales or purchases. Petitioner offered no evidence to show that a return was filed for the period June 1 through June 21, 1977.

8. Petitioner did not argue the application of penalties and interest.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law states that if a return is not filed or 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid...or other factors.

B. That the Audit Division used no external indices in the estimate of the tax assessed by the Notice of Determination. It, however, is clear from the evidence produced at the hearing that a greater deficiency would have been asserted had information from petitioner's federal tax returns and information printed in the Dun & Bradstreet, Inc. publication been utilized. Petitioner has provided no evidence to refute said showing.

That exactness is not required where it is the petitioner's own failure to maintain proper records which prevents exactness in the determination of sales tax liability. (Markowitz v. State Tax Commission, 54 A.D.2d 1023, 44 N.Y.2d 684).

C. That in accordance with Finding of Fact "5", the tax assessed by the Notice of Determination is reduced by \$700.00 to reflect the error made in the application of the tax rate.

D. That the petition of Angelo Imbriano d/b/a Angelo's Pizza is granted to the extent indicated in Conclusion of Law "C" 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 16, 1978 with applicable penalties and interest thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 17 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER