

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Madelina Mark :  
d/b/a Cup-N-Saucer : 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 :  
12/1/74-6/14/77. :

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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 29th day of October, 1982, he served the within notice of Decision by certified mail upon Madelina Mark, d/b/a Cup-N-Saucer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

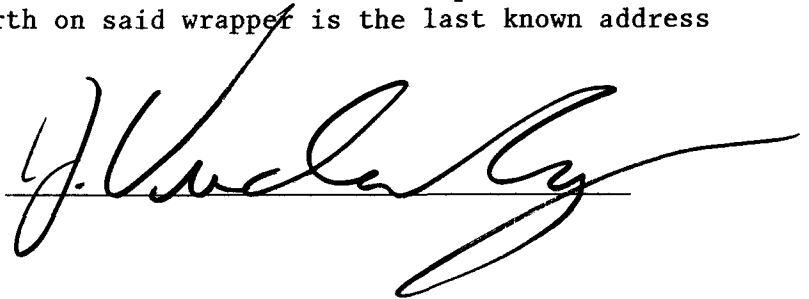
Madelina Mark  
d/b/a Cup-N-Saucer  
27 Maple Ave.  
Hastings-on-Hudson, NY 10706

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  
29th day of October, 1982.

  
ADMINISTRATOR  
CRIME PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
Madelina Mark	:	
d/b/a Cup-N-Saucer	:	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 12/1/74-6/14/77.	:	

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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 29th day of October, 1982, he served the within notice of Decision by certified mail upon Joseph L. Grabowski the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

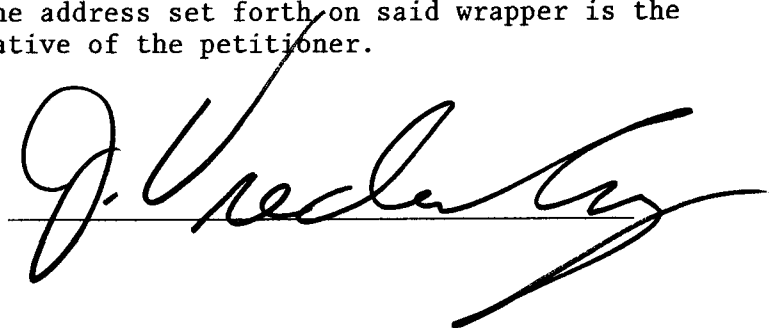
Joseph L. Grabowski  
17 Stanley Ave.  
Hastings-on-Hudson, NY 10706

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  
29th 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 29, 1982

Madelina Mark  
d/b/a Cup-N-Saucer  
27 Maple Ave.  
Hastings-on-Hudson, NY 10706

Dear Mrs. Mark:

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) 1183 & 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  
Joseph L. Grabowski  
17 Stanley Ave.  
Hastings-on-Hudson, NY 10706  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
Madelina Mark	:	
d/b/a CUP-N-Saucer	:	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 December 1,	:	
1974 through June 14, 1977.	:	

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Petitioner, Madelina Mark d/b/a Cup-N-Saucer, 27 Maple Avenue, Hastings-on-Hudson, New York 10706, 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 14, 1977 (File No. 25767).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 19, 1981, at 9:15 A.M. Petitioner appeared by Joseph L. Grabowski. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of additional sales taxes due from petitioner for the period December 1, 1974 through June 14, 1977 was correct.

FINDINGS OF FACT

1. Petitioner, Madelina Mark d/b/a Cup-N-Saucer, operated a luncheonette located at 583 Warburton Avenue, Hastings-on-Hudson, New York. The business was sold on June 14, 1977.

2. On November 4, 1977, the Audit Division sent petitioner a questionnaire requesting information on the sale of the business as well as purchases and sales for certain periods. Petitioner completed and returned the questionnaire.

3. On March 7, 1978, 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, 1974 through June 14, 1977 for taxes due of \$3,366.33, plus penalty and interest of \$1,461.09, for a total of \$4,827.42. The Audit Division accepted the accuracy of gross sales reported; however, it held that 90 percent of petitioner's gross sales were taxable based on a review of sales tax returns filed and the above questionnaire. Petitioner's sales tax returns showed that 46.9 percent of gross sales were taxable.

4. Thirty (30) percent of petitioner's total sales were nontaxable sales of newspapers and magazines.

5. Petitioner argued that other nontaxable items such as baked goods, pretzels and potato chips represented an additional 10 percent of total sales. Petitioner offered no evidence to establish sales of these items or the extent of such sales.

6. Petitioner failed to establish that reasonable cause existed for the underpayment of sales taxes.

#### CONCLUSIONS OF LAW

A. That the Audit Division's determination of additional taxable sales based on a taxable sales ratio of 90 percent was erroneous; that the Audit Division did not give adequate consideration to nontaxable sales of newspapers and magazines as indicated in Finding of Fact "4". Accordingly, the additional taxable sales determined on audit are reduced to 70 percent of gross sales reported.

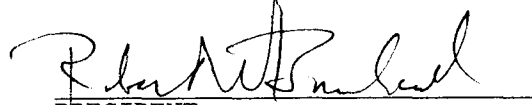
B. That petitioner failed to sustain the burden of proof required by section 1132(c) of the Tax Law that its sales, other than of newspapers and magazines, were not taxable.

C. That the petition of Madelina Mark d/b/a Cup-N-Saucer is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 7, 1978; and that, except as so granted, the petition is in all other respects denied.

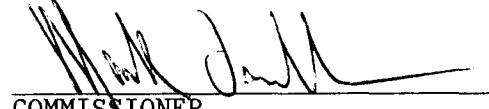
DATED: Albany, New York

OCT 23 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER