

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JUAN PENA	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 & 29	:	
of the Tax Law for the Period March 1, 1975	:	
through May 31, 1978.	:	

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Petitioner, Juan Pena, 1474 Bushwick Avenue, Brooklyn, New York 11207, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period March 1, 1975 through May 31, 1978 (File No. 25707).

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 July 23, 1981 at 10:45 A.M. Petitioner appeared by Sidney Schmukler, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether a Consent to Fixing of Tax Not Previously Determined and Assessed (AU-3) signed by petitioner finally and irrevocably fixed petitioner's tax liability for the period March 1, 1975 through May 31, 1978.

II. Whether the Audit Division properly determined additional sales taxes due from petitioner for said period.

FINDINGS OF FACT

1. Petitioner, Juan Pena, operated a grocery store located at 1474 Bushwick Avenue, Brooklyn, New York. The business was sold on May 25, 1978 to Luis Rivera for \$6,500.00.

2. On July 20, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1975 through May 31, 1978 for taxes due of \$13,524.48, plus penalty and interest of \$5,527.22, for a total of \$19,051.70. The foregoing taxes were determined due based on available information since petitioner could not produce books and records for audit.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1975 through February 28, 1978, to June 20, 1979.

4. Petitioner timely filed a petition for revision of the aforesaid determination.

5. At an informal conference held by the Brooklyn District Office, the tax was adjusted to \$6,440.76 based on additional facts presented by David Portlock, petitioner's duly authorized representative at that time.

On September 25, 1978, petitioner signed a Consent to Fixing of Tax Not Previously Determined and Assessed whereby he agreed to the adjusted tax due of \$6,440.76.

6. Petitioner argued that he does not read the English language and therefore, did not understand the purpose of the consent or that he agreed to pay \$6,440.76 in additional tax. Petitioner further stated that he signed the consent only because his representative, Mr. Portlock, instructed him to do so.

Mr. Portlock speaks Spanish as well as English.

#### CONCLUSION OF LAW

A. That section 1138(c) of the Tax Law provides that "(a) person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be

entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

That petitioner, by executing the consent referred to in Finding of Fact "5", finally and irrevocably fixed the tax shown thereon in accordance with the provisions of section 1138(c) of the Tax Law. Accordingly, the issue regarding the correctness of the taxes determined with respect thereto, is moot.

B. That the petition of Juan Pena is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 20, 1978 as revised pursuant to the consent, is sustained.

DATED: Albany, New York

AUG 13 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

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

August 13, 1982

Juan Pena  
1474 Bushwick Ave.  
Brooklyn, NY 11207

Dear Mr. Pena:

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  
Sidney Schmukler  
121 Schermerhorn St.  
Brooklyn, NY 11201  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Juan Pena

:  
:  
:

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 3/1/75-5/31/78. :

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 13th day of August, 1982, he served the within notice of Decision by certified mail upon Sidney Schmukler the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Schmukler  
121 Schermerhorn St.  
Brooklyn, NY 11201

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  
13th day of August, 1982.

*Bonnie R. Hayland*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Juan Pena	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 3/1/75-5/31/78.	:	

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 13th day of August, 1982, he served the within notice of Decision by certified mail upon Juan Pena, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Juan Pena  
1474 Bushwick Ave.  
Brooklyn, NY 11207

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  
13th day of August, 1982.

*Annice R. Blaylock*

*J. Vredenburg*

**P 230 842 751**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>Severy Schmalzer</i>	
STREET AND NO.		<i>121 Schomerhor St</i>	
P.O., STATE AND ZIP CODE		<i>Brooklyn NY 11201</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

**P 230 842 750**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>Simon Pena</i>	
STREET AND NO.		<i>1474 Besshurst Ave</i>	
P.O., STATE AND ZIP CODE		<i>Brooklyn NY 11207</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			