

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| FRANK POLCER AND MADELINE POLCER | : | DECISION |
| d/b/a DELI F & M | : | |
| 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, 1974 | : | |
| through November 30, 1977. | : | |

Petitioners, Frank Polcer and Madeline Polcer d/b/a Deli F & M, 161 Montauk Highway, Blue Point, New York 11715, 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, 1974 through November 30, 1977 (File No. 25681).

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 22, 1981, at 9:15 A.M. Petitioners appeared by Jeremiah J. Doran, Jr. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether the result of a field audit performed by the Audit Division, using tests to determine taxable sales, properly reflected petitioners' additional sales tax liability.

FINDINGS OF FACT

1. On March 20, 1979, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against Frank Polcer and Madeline Polcer d/b/a Deli F & M. The notices covered the period

March 1, 1974 through November 30, 1977 and asserted additional tax due of \$3,762.07, plus minimum interest of \$959.15, for a total of \$4,721.22 as a result of a field audit.

2. Petitioners had executed consents to extend the period of limitation for assessment to March 20, 1979.

3. Petitioners were a partnership making retail sales of prepared food and grocery items. Petitioners' volume of prepared food sales increased during the audit period.

4. On audit, the Audit Division found that petitioners did not maintain cash register tapes in support of sales made; therefore, it proceeded to perform taxable purchase ratio and mark-up tests to determine petitioners' taxable sales. The Audit Division reviewed purchase invoices for May, June and July, 1977 and current shelf prices which indicated the following mark-up percentages:

| <u>PURCHASES</u> | <u>MARK-UP</u> |
|-------------------|----------------|
| Beer | 41.2% |
| Soda | 51.5% |
| Cigarettes - Pack | 44.7% |
| - Carton | 6.5% |
| Tobacco - Candy | 49.8% |
| Miscellaneous | 42.8% |

The Audit Division then categorized purchases from petitioners' cash disbursements journal and analyzed cash purchases made for the months of July and November, 1976. Petitioners conducted their own analysis of cash purchases for the months of September, 1974 and 1975. The Audit Division combined the results of the four-month analysis of cash purchases. It then applied the mark-ups to the appropriate purchases and determined taxable sales of \$233,401.08 for the audit period.

An observation test by the Audit Division was made of petitioners' taxable prepared food sales on May 3, 1977 and July 27, 1978. Petitioners

conducted an analysis of prepared food sales for the two-week period May 9 through May 22, 1978. The Audit Division combined the results of the sixteen-day analysis of prepared food sales. It further considered factors such as lower prepared food sales during weekends and the increase in prepared food sales from the prior periods in the audit. The result was a determination of a weighted taxable ratio¹ for prepared food sales of 11.7 percent of total sales. The Audit Division determined prepared food sales of \$59,715.80 for the audit period and total taxable sales of \$293,116.88. Petitioners reported taxable sales of \$239,373.00 on sales and use tax returns filed. The Audit Division thereby determined additional taxable sales of \$53,743.88 and the tax due thereon of \$3,762.07.

5. The Audit Division recognized all changes in business activities that were brought to the attention of the auditor in determining petitioners' taxable sales.

6. Petitioners contended that the test results applied on audit did not properly reflect their increased prepared food sales in later periods or a proper allocation of taxable items sold. Petitioners offered no documentary evidence to support their contentions or to show how the result arrived at by the Audit Division was in error.

7. Petitioners contended that since cash register readings of gross sales and tax collected were recorded daily, such readings were an acceptable substitute for cash register tapes in substantiating their taxable sales.

¹ The weighted taxable ratio for prepared food sales was a result of calculations using test results for the current periods and gradually decreasing same for prior periods based on taxable ratios reported on sales and use tax returns filed and corresponding increases in the gross profit margin from 1974 to 1977 on Federal partnership returns filed.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law states 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. That petitioner did not have source documents (cash register tapes) available for verification of taxable sales; therefore, their books and records were insufficient for the Audit Division to verify the exact amount of taxable sales or the proper collection of the sales taxes. That the audit procedure employed by the Audit Division was proper and in accordance with section 1138(a) of the Tax Law.

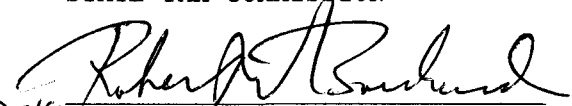
B. That the audit performed by the Audit Division encompassed all changes in petitioners' business activities and the petitioners themselves made tests, which were considered and incorporated in the audit findings. That the audit findings were proper and correct in the absence of supporting records to the contrary.

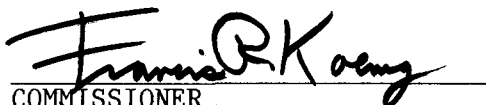
C. That the petition of Frank Polcer and Madeline Polcer, d/b/a Deli F & M is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1979 is sustained.

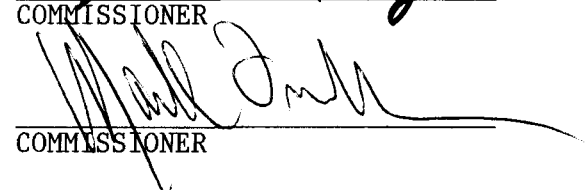
DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

P 230 844 460
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

| | | | |
|-----------------------------|------------------------|---|---|
| SENT TO | | Jeremiah J. Doran | |
| STREET AND NO. | | Michael J. Bergeron | |
| P.O., STATE AND ZIP CODE | | 1401 Church St Bohemia N.Y. 11716 | |
| 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 230 844 459
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

| | | | |
|-----------------------------|------------------------|---|---|
| SENT TO | | Frank + Madeline Polcer | |
| STREET AND NO. | | d161A Del. F+m | |
| P.O., STATE AND ZIP CODE | | 161 Montauk Hwy Blue Point N.Y. 11715 | |
| 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 | | | |

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Frank & Madeline Polcer :
d/b/a Deli F & M :
: 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 :
3/1/74-11/30/77. :

State of New York
County of Albany

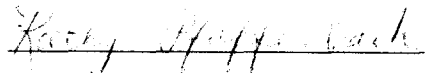
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Frank & Madeline Polcer, d/b/a Deli F &, M the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank & Madeline Polcer
d/b/a Deli F & M
161 Montauk Hwy.
Blue Point, NY 11715

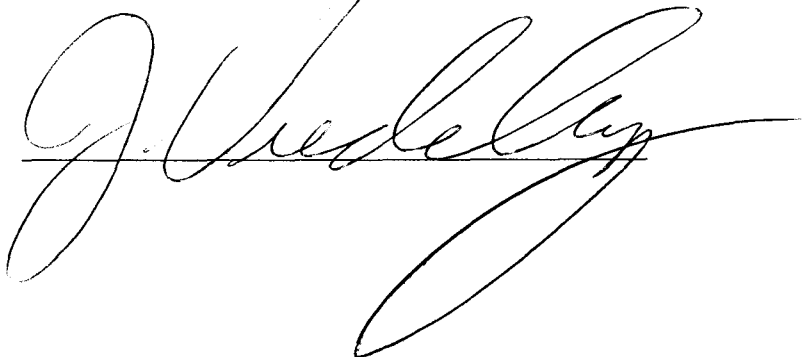
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 December, 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 :
Frank & Madeline Polcer :
d/b/a Deli F & M : 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 3/1/74-11/30/77. :

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

Jeremiah J. Doran
Michael J. Berger & Co.
1401 Church St.
Bohemia, NY 11716

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 December, 1982.

Kathy Hoffmann

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

J. Vredenburg

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

December 29, 1982

Frank & Madeline Polcer
d/b/a Deli F & M
161 Montauk Hwy.
Blue Point, NY 11715

Dear Mr. & Mrs. Polcer:

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 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
Jeremiah J. Doran
Michael J. Berger & Co.
1401 Church St.
Bohemia, NY 11716
Taxing Bureau's Representative