

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

June 4, 1982

Gaylord Snyder
d/b/a Snyder Shell Service
Main St., P.O. Box 382
N. Bangor, NY 12966

Dear Mr. Snyder:

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
Henry Gelles
Harbor Theater Bldg., Box 590
Lake Placid, NY 12946
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GAYLORD SNYDER	:	DECISION
D/B/A SNYDER SHELL SERVICE	:	
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 June 1, 1974	:	
through February 28, 1977.	:	

Petitioner, Gaylord Snyder d/b/a Snyder Shell Service, Main Street, Box 382, North Bangor, New York 12966, 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 June 1, 1974 through February 28, 1977 (File No. 20427).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on July 23, 1980 at 9:15 A.M. Petitioner appeared by Henry Gelles, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the audit procedure employed by the Audit Division in an examination of petitioner's books and records was proper and the resultant findings of additional taxable sales were correct.

FINDINGS OF FACT

1. On July 28, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Gaylord Snyder d/b/a Snyder Shell Service for the period June 1, 1974 through February 28, 1977.

The Notice was issued as a result of a field audit which asserted additional tax due of \$5,522.25 plus penalties and interest.

2. Petitioner operated a gasoline service station and a small grocery store. In December, 1975, petitioner expanded his operation to include the sale of mobile homes.

3. The audit conducted by the Audit Division consisted of two phases. First, the Audit Division examined purchases made during March, 1976 and found that 46.49 percent of petitioner's grocery and miscellaneous purchases were taxable when resold and that 85.05 percent of his gasoline purchases were taxable. (The Audit Division excluded 8 cents per gallon state gasoline tax.) It performed a markup test based on petitioner's selling prices which were either stamped on the grocery items or stated by petitioner. The Audit Division determined a markup on taxable grocery and miscellaneous taxable purchases of 25 percent and a markup on gasoline of 13 percent. It then applied the appropriate markups to the taxable purchases for the period June 1, 1976 through February 28, 1977 and determined taxable sales of \$60,399.00. Petitioner reported taxable sales of \$44,466.00 for groceries and gasoline; therefore, the Audit Division determined a margin of error of 35.83 percent. It then applied the margin of error to the taxable grocery and gasoline sales reported for the entire audit period which resulted in additional taxable sales of \$68,589.00.

In the second phase of the audit, the Audit Division examined mobile home sales for the entire period during which they were sold. It found one sale of a mobile home in the amount of \$10,300.00 which was not reported on petitioner's sales and use tax returns filed for the period in issue. The Audit Division determined total additional taxable sales of \$78,889.00 and the tax due thereon of \$5,522.25 for the audit period.

4. It was the Audit Division's position that petitioner's sales records were insufficient for the verification of his taxable sales and that the markup test performed and the resultant margin of error disclosed the insufficiency of those records.

5. Petitioner contended that his records reflected the correct amount of sales and sales tax collected. Petitioner introduced into evidence his cash register receipts and sales summaries for the entire period in issue. The cash register receipts showed the daily totals of grocery and gasoline sales and the tax collected thereon. They did not show the individual items sold or verify that the proper amount of tax was collected thereon.

Petitioner further argued that all records were available and should have been used for a more detailed analysis than that performed by the Audit Division. Petitioner introduced his profit and loss summaries for the entire period in issue. By using the petitioner's actual purchases for the entire audit period, additional taxable sales of groceries and gasoline are \$62,832.00 as opposed to \$68,589.00. Petitioner did not introduce evidence to show that the taxable ratio of purchases as determined by the Audit Division was incorrect.

6. Petitioner contended that unrefrigerated beer was sold at reduced prices and that he often engaged in price wars with competitors to induce business. Petitioner offered no evidence to show the volume of items sold at reduced selling prices or the corresponding costs of those items sold for comparison to the markup percentages determined by the Audit Division.

7. Petitioner sold more regular gasoline which had a lower markup than the other grades sold. For that reason, the Audit Division conceded that the average markup on gasoline purchases should be reduced to 12 percent.

8. Petitioner contended that the mobile home sale at issue was reported on a subsequent sales and use tax return filed. No evidence was submitted to show that the sale had been reported and the sales tax collected thereon was remitted.

9. The application of penalties and interest was not raised at the hearing.

CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41). That the markup test performed by the Audit Division disclosed that the petitioner's records were insufficient to determine the exact amount of tax on beer and grocery sales; therefore, the Audit Division properly used external indices to determine the amount of said sales. A review of petitioner's purchases indicates that petitioner's additional taxable sales totalled \$62,832.00.

B. That petitioner's average markup on gasoline purchases was 12 percent as noted in Finding of Fact "7".

C. That except as noted in Conclusions "A" and "B" above, the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

D. That the petition of Gaylord Snyder d/b/a Snyder Shell Service is granted to the extent indicated in Conclusions "A" and "B" 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 July 28, 1977; that, except as so granted, the petition is in all other respects denied.

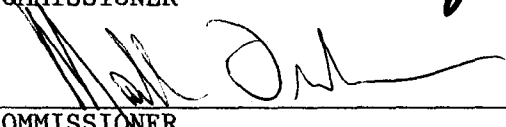
DATED: Albany, New York

JUN 04 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Gaylord Snyder
d/b/a Snyder Shell Service

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 6/1/74-2/28/77.

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 4th day of June, 1982, he served the within notice of Decision by certified mail upon Gaylord Snyder, d/b/a Snyder Shell Service the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gaylord Snyder
d/b/a Snyder Shell Service
Main St., P.O. Box 382
N. Bangor, NY 12966

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
4th day of June, 1982.

Amie R. Hagan

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gaylord Snyder :
d/b/a Snyder Shell Service :

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 6/1/74-2/28/77 :

State of New York
County of Albany

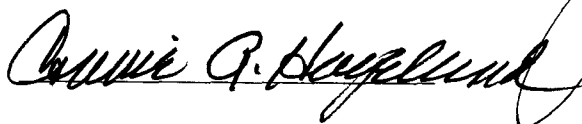
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of June, 1982, he served the within notice of Decision by certified mail upon Henry Gelles the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

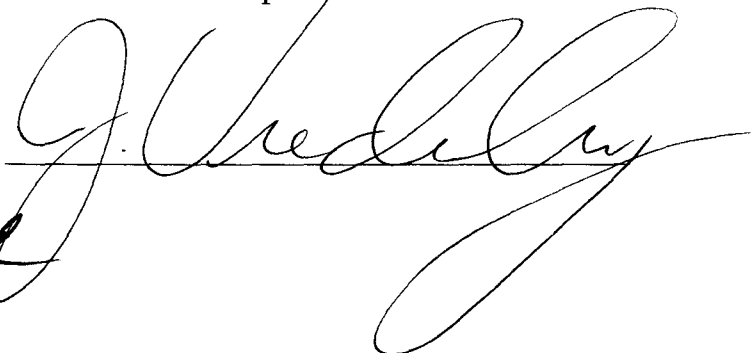
Henry Gelles
Harbor Theater Bldg., Box 590
Lake Placid, NY 12946

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
4th day of June, 1982.





P 230 840 234
RECEIPT FOR CERTIFIED MAIL

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

SENT TO		<i>Henry Helles</i>	
STREET AND NO.		<i>Harbor Theater Bldg 590</i>	
P.O., STATE AND ZIP CODE		<i>Rocky Point N.Y. 12946</i>	
POSTAGE			
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 840 233
RECEIPT FOR CERTIFIED MAIL

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

SENT TO		<i>Charles Smiley</i>	
STREET AND NO.		<i>1111 1st St. S.W.</i>	
P.O., STATE AND ZIP CODE		<i>PO Box 382 N. Kansas, N.Y. 12966</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976