

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

October 12, 1982

K. Tanaka & Co., Inc.
Eisuke Murakami, Individually and as Officer
326 Amsterdam Ave.
New York, NY 10023

Gentlemen:

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
Charles Becker
150 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

K. TANAKA & CO., INC.
AND EISUKE MURAKAMI, INDIVIDUALLY AND AS OFFICER:

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, 1972
through February 29, 1976.

Petitioners, K. Tanaka & Co., Inc. and Eisuke Murakami, Individually and as Officer, 326 Amsterdam Avenue, New York, New York 10023, 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, 1972 through February 29, 1976 (File No. 17419).

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 January 19, 1981 at 1:15 P.M. Petitioners appeared by Charles Becker, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly determined the additional taxable sales of petitioner K. Tanaka & Co., Inc.
- II. Whether the Audit Division properly included shopping bag purchases in the determination of taxable sales of K. Tanaka & Co., Inc..
- III. Whether the Audit Division properly determined tax due on expense purchases of K. Tanaka & Co., Inc.

IV. Whether the Audit Division properly determined tax due on purchases of fixed assets by K. Tanaka & Co., Inc..

FINDINGS OF FACT

1. On October 8, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against K. Tanaka & Co., Inc. ("Tanaka") and Eisuke Murakami, Individually and as Officer, for the period December 1, 1972 through February 29, 1976. The Notice was issued as a result of a field audit and asserted tax due of \$11,503.69, plus penalties and interest of \$4,758.17, for a total of \$16,261.86.

2. Tanaka executed a consent to extend the period of limitation for assessment to December 19, 1976. Petitioner Eisuke Murakami was the president of Tanaka.

3. Tanaka operated two wholesale and retail grocery stores importing and selling oriental products.

4. On audit, the Audit Division found that Tanaka's books and records were insufficient for determining taxable sales. Tanaka maintained a day book, cash receipts book, cash disbursements book and charge sales book. Tanaka's day book used in recording cash sales was unsupported by any source documents. Sales were recorded in the cash receipts book and charge sales book. Tanaka did not include charge sales on sales and use tax returns filed.

The Audit Division reviewed purchases made by Tanaka for the period September 1 through November 30, 1975 and found that 13.436 percent of Tanaka's purchases were taxable when resold. It performed a markup test for the same period and found the markup on taxable items was 61.11 percent. The Division then applied the markup to 13.436 percent of purchases in the audit period and determined taxable sales of \$168,488.00. Tanaka reported taxable sales of

\$33,573.00 on sales and use tax returns. The Audit Division therefore determined additional taxable sales of \$134,915.00 and tax due thereon of \$10,247.90.

Expense purchases were reviewed for the same test period of September 1 through November 30, 1975. The Audit Division found that tax was not paid on \$392.57 or .802 percent of the purchases reviewed. The Division applied .802 percent to the total purchases in the audit period and determined purchases subject to use tax of \$6,242.39 and tax due thereon of \$463.28.

The Audit Division reviewed fixed assets purchased in the audit period and held use tax due of \$792.51 on the purchases for which no substantiation of tax paid was provided. The Audit Division thereby determined the total tax deficiency of \$11,503.69.

5. Tanaka argued that sufficient sales records were available for the entire audit period and that the Audit Division should have examined all of the records. Tanaka further argued that no allowance was made on audit for breakage of pottery on display or inventory on hand which was not sold. No records of breakage or inventory were submitted by petitioners to show what effect if any they would have on the audit results.

6. Tanaka purchased shopping bags for use in consolidating purchases made by their customers. The taxable ratio and markup test performed by the Audit Division in determining taxable sales erroneously included \$979.00 in shopping bag purchases.

7. Tanaka contended that the test period of expense purchases used on audit was not indicative of purchases recurring throughout the audit period. Tanaka argued that since all records were available at the time of audit, they should have been reviewed.

8. Tanaka's expense purchase records were adequate to determine the proper tax for the entire audit period.

9. Fixed assets held subject to tax on audit included the purchase of a Telex from Western Union Telegraph Co. for \$1,460.00 which was made by a related corporation. The Telex was located on the premises of the related corporation. Tanaka offered no evidence to show that tax was paid on any of the other fixed assets held subject to tax on audit.

10. Tanaka relied on the services of its accountant in filing sales and use tax returns.

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 recordkeeping 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.)

B. That the records of K. Tanaka & Co., Inc. were insufficient for determining the exact amount of its sales tax liability in that no source documents were available to verify its taxable sales. That the use of a taxable ratio and markup test performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law. The additional sales tax due, however, is to be recomputed to give effect to the shopping bags erroneously included in purchases pursuant to Finding of Fact "6".

C. That, since adequate expense purchase records were maintained, the use tax determined due by the Audit Division on expense purchases is limited to the amount found due in the test period.

D. That petitioner K. Tanaka & Co., Inc. was not the purchaser of the Telex from Western Union Telegraph Co. as found in Finding of Fact "8"; therefore, it is not liable for the use tax on such purchase.

E. That the petition of K. Tanaka & Co., Inc. and Eisuke Murakami, Individually and as Officer, is granted to the extent indicated in Conclusions of Law "B", "C" and "D" 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 October 8, 1976 with minimum statutory interest thereon; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

K. Tanaka & Co., Inc.

Eisuke Murakami, Individually and as Officer : 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:
12/1/72-2/29/76.

State of New York
County of Albany

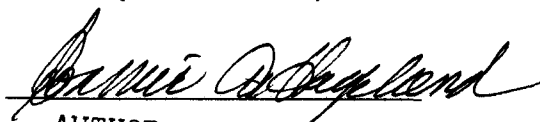
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon K. Tanaka & Co., Inc., Eisuke Murakami, Individually and as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

K. Tanaka & Co., Inc.
Eisuke Murakami, Individually and as Officer
326 Amsterdam Ave.
New York, NY 10023

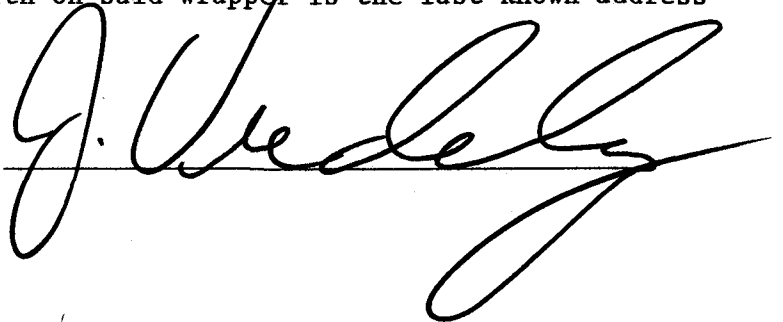
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
12th day of October, 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 :
K. Tanaka & Co., Inc. :
Eisuke Murakami, Individually and as Officer :
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 12/1/72-2/29/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

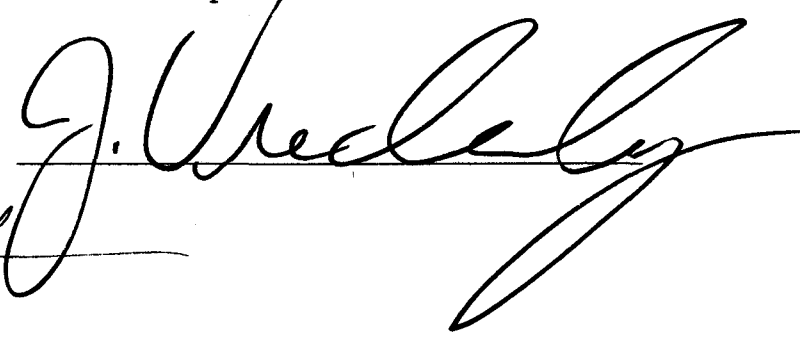

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Charles Becker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles Becker
150 Broadway
New York, NY 10038

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 230 844 110
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Charles Becker	
STREET AND NO.		150 Broadway	
P.O., STATE AND ZIP CODE		New York N.Y. 10038	
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	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

P 230 844 109
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		K. Taveke + Co Inc	
STREET AND NO.		Eisake Munkhami	
P.O., STATE AND ZIP CODE		Inch + as office 326 Amsterdam Ave New York N.Y. 10023	
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	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			