

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

December 29, 1982

Valley Supreme Supermarket, Inc.
Route 52
Pine Bush, NY 12566

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 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
Paul R. Gaynes
Berkal & Gaynes
88 Sunnyside Blvd.
Plainview, NY 11803
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
VALLEY SUPREME SUPERMARKET, INC.
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 May 31, 1977.

DECISION

Petitioner, Valley Supreme Supermarket, Inc., Route 52, Pine Bush, New York 12566, 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 May 31, 1977 (File No. 20885).

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 December 11, 1980 at 9:15 A.M. Petitioner appeared by Paul A. Gaynes, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the result of a field audit performed by the Audit Division properly reflected petitioner's additional sales and use tax liability.

FINDINGS OF FACT

1. On September 26, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Valley Supreme Supermarket, Inc. for the period December 1, 1972 through May 31, 1977. The Notice was issued as a result of a field audit and asserted tax due of \$14,970.70, plus penalties and interest of \$6,735.03, for a total of \$21,705.73.

2. Petitioner executed a consent to extend the period of limitation for assessment to December 20, 1977.

3. On audit, the Audit Division analyzed purchases in February and August, 1976 and found that 39.1836 percent of petitioner's grocery purchases were taxable when resold. It then applied 39.1836 percent to grocery purchases for December 1, 1972 through August 31, 1976 and determined taxable purchases were \$1,815,991.20 for the period. A markup test was performed on purchases made in the first week of December, 1976 from petitioner's major supplier of grocery items. Three purchase invoices were used for the markup test with one being for purchases of weekly specials offered by petitioner. The overall markup determined by the Audit Division on taxable items was 22.78 percent. The Audit Division then applied the markup to the taxable purchases for December 1, 1972 through August 31, 1976 and made an adjustment for cigarette tax included in the sales. The Audit Division determined taxable sales of \$2,126,158.43. Petitioner reported taxable sales of \$1,839,562.00 for the same period. The Audit Division determined additional taxable sales of \$286,596.43, a ratio of 15.5796 percent of reported taxable sales. It then applied 15.5796 percent to the taxable sales reported in the audit period so as to include the period July 1, 1976 through May 31, 1977. The Audit Division determined additional taxable sales for the audit period of \$358,891.04.

The Audit Division reviewed store expense purchases for the months of February and August, 1976 and found purchases made without payment of tax of \$416.56 or .10525 percent of gross sales. The Audit Division applied .10525 percent to gross sales made in the audit period and determined purchases subject to use tax of \$9,872.23. Fixed assets purchased by petitioner without payment of sales tax were found to be \$5,500.00 for the audit period. The

Audit Division thereby determined a total sales and use tax deficiency of \$14,970.70.

4. As a result of a conference, the Audit Division expanded its taxable ratio analysis of purchases to include April and November, 1976. It also considered annual outdoor sales made during August which were made at a lower markup. The Audit Division adjusted the taxable ratio of purchases to 35.96995 percent and reduced the total sales and use tax deficiency to \$6,181.35.

5. Petitioner maintained daily summaries of its sales along with cash register totals for verification of those sales. Petitioner reported the actual tax collected on its sales and use tax returns filed. The cash register totals, however, were not conclusive as to whether the tax was charged on all taxable items sold. Therefore, petitioner's records were insufficient for use in determining an exact amount of tax due.

6. Petitioner was in agreement with the taxable ratio as redetermined by the Audit Division; however, it contended that the overall markup on grocery items computed by the Audit Division was too high. Petitioner offered no documentation that the overall markup as determined by the Audit Division was incorrect.

7. The Audit Division did not establish an insufficiency in recordkeeping for determining petitioner's use tax liability on a test period basis for store expenses.

8. Petitioner did not argue the application of penalties.

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 this method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually

impossible to verify taxable sales receipts and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

B. That petitioner kept daily summaries of its sales transactions; however, they could not be used to verify that the proper tax collections were made by the petitioner on its individual transactions; therefore, the records were insufficient for the Audit Division to determine the exact amount of petitioner's sales tax. That the method used by the Audit Division in determining petitioner's taxable sales was proper and in accordance with the provisions of section 1138(a) of the Tax Law. That the taxable ratio of purchases is reduced to 35.96995 percent pursuant to Finding of Fact "4".

C. That since there was no basis for use of a test period in determining the use tax due on store expenses, the purchases subject to use tax are limited to those found in the test period.

D. That the petition of Valley Supreme Supermarket, Inc. is granted to the extent indicated in Conclusions of Law "B" and "C" 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 September 26, 1977 with the applicable penalties and interest; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Valley Supreme Supermarket, Inc. :
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 12/1/72-5/31/77. :
_____ :

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

Valley Supreme Supermarket, Inc.
Route 52
Pine Bush, NY 12566

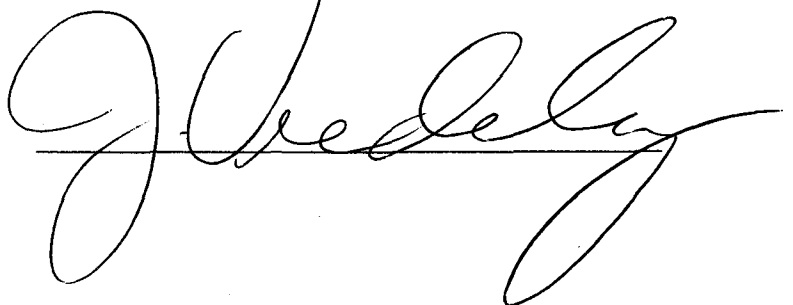
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Valley Supreme Supermarket, Inc. :
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 12/1/72-5/31/77. :
_____ :

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 Paul R. Gaynes the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

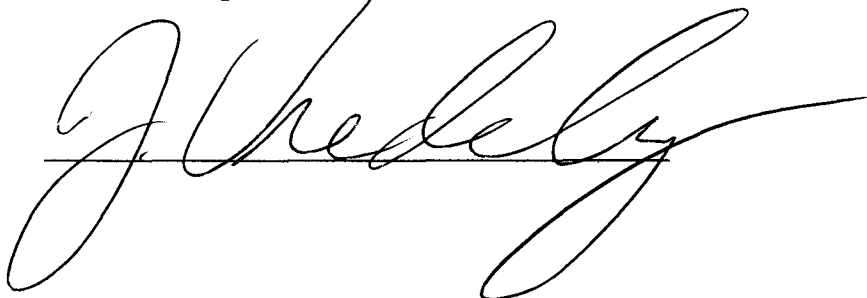
Paul R. Gaynes
Berkal & Gaynes
88 Sunnyside Blvd.
Plainview, NY 11803

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 Pfaffenbach
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 844 340
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Paul R Gaynes	
STREET AND NO.		Berkeley + Gaynes	
P.O., STATE AND ZIP CODE		89 Sunny Side Blvd Plainville N.Y. 11903	
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 230 844 339
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Valley Supreme Supply	
STREET AND NO.		Rt. 52	
P.O., STATE AND ZIP CODE		Pine Bush N.Y. 12566	
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			