

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

November 30, 1983

Ivan Andrews  
240 Ashdale Ave.  
Syracuse, NY 13206

Dear Mr. Andrews:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Michael R. Canestrano  
1011 State Tower Bldg.  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
IVAN ANDREWS	:	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 September 1, 1975	:	
through May 31, 1978.	:	

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Petitioner, Ivan Andrews, 240 Ashdale Avenue, Syracuse, New York 13206, 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 September 1, 1975 through May 31, 1978 (File No. 25577).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on March 10, 1983 at 9:15 A.M., with all briefs to be submitted by April 30, 1983. Petitioner appeared by Michael R. Canestrano, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner is personally liable for sales taxes due from Marcellus Red & White 110 Fayette, Inc. for the period September 1, 1975 through May 31, 1978.

II. Whether the audit procedures and tests used by the Audit Division to determine additional sales tax due from 110 Fayette, Inc. were proper.

FINDINGS OF FACT

1. 110 Fayette, Inc. ("110") operated a grocery store known as Marcellus Red & White located at 19 South Street, Marcellus, New York. The business ceased operations as of July, 1978.

2. On December 6, 1978, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against 110 covering the period September 1, 1975 through May 31, 1978 for taxes due of \$11,317.67, plus interest of \$1,716.05, for a total of \$13,033.72.

On December 12, 1978, a Notice for the same amount was issued against petitioner, Ivan Andrews. Said Notice was predicated on petitioner being an officer of 110 and personally liable for the taxes determined due from that corporation.

3. On audit, the Audit Division analyzed purchase invoices for the period March 1, 1978 through May 31, 1978 and determined that 30 percent of the purchases were items that would result in a taxable sale when resold. Markup percentages were computed for the taxable purchases based on cost and selling prices in effect for March, 1978. (The invoices from S. M. Flickinger Co., Inc., 110's primary supplier, showed retail selling prices.) The weighted average markup for all taxable items was 21 percent.

The Audit Division applied 30 percent to total purchases for the audit period after adjusting for freight, an inventory increase and pilferage to arrive at taxable purchases of \$544,092.00. The weighted markup was applied to taxable purchases to determine taxable sales of \$658,350.00. 110 reported taxable sales of \$496,669.00, leaving additional taxable sales of \$161,681.00 and tax due thereon of \$11,317.67.

4. The cash register tapes retained by petitioner did not show individual transactions, but rather showed category totals only. The Audit Division maintained that the tapes were inadequate for verifying taxable sales receipts and thus necessitated the use of the above audit procedures to reconstruct taxable sales.

5. S. M. Flickinger Co., Inc. maintained the accounting records of 110. It also prepared the financial reports, sales tax returns and corporation tax returns. Petitioner maintained daily sales reports which were furnished to Flickinger.

6. Petitioner signed the sales tax returns filed by 110 as president for the periods ending May 31, 1976, November 30, 1976, February 28, 1977, May 31, 1977, November 30, 1977 and February 28, 1978. He also signed the New York State corporation tax returns for the fiscal years ended October 31, 1973 through 1978 as president and secretary. These returns listed petitioner as the sole officer and stockholder.

For the years 1975, 1976, 1977 and 1978, petitioner received wages from 110 of \$2,600.00, \$2,702.00, \$2,959.00 and \$2,521.00, respectively.

7. Petitioner suffers from cervical myelopathy and was not able to appear at the hearing. However, petitioner submitted an affidavit which stated that he was only a part-time employee during the period at issue; he never owned any stock in 110; the business was operated and financed by S. M. Flickinger Co., Inc.; he was told by Richard McKelvie, general manager of S. M. Flickinger Co., Inc., that he was to act as president of 110, but would have no obligations or liabilities for the business; he signed checks, tax returns and other documents as requested by Mr. McKelvie without his review; he made no determination or recommendation as to what bills were to be paid.

8. Petitioner offered no substantial evidence to show that the audit results were incorrect.

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law provides:

"'Persons required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;... Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

B. That the resolution of whether petitioner Ivan Andrews is a person required to collect tax turns upon a factual determination in each case.

Vogel v. N.Y. State Dept. of Taxation and Finance, 98 Misc.2d 222, 413 N.Y.S.2d 862; Chevlowe v. Koerner, 95 Misc.2d 388, 407 N.Y.S.2d 427.

That relevant factors in such a determination include, but are not limited to, the following: the day-to-day responsibilities in the corporation, involvement in and knowledge of the financial affairs of the corporation; the identity of who prepared and signed tax returns; authority to sign checks.

C. That petitioner signed the sales tax returns and corporation tax returns as president of 110 Fayette, Inc.; he was listed thereon as the sole officer and stockholder of said corporation.

Petitioner has failed to establish by substantial evidence that he was not an officer or employee under a duty to act for 110 Fayette, Inc. Accordingly, petitioner was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and therefore has personal liability for the sales tax due from 110 Fayette, Inc. pursuant to section 1133(a) of the Tax Law.

D. That the books and records of 110 Fayette, Inc. were inadequate for verifying taxable sales receipts and, as such, the audit procedures and tests

performed by the Audit Division to determine such sales were proper in accordance with section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

E. That the Audit Division reasonably calculated the tax liability of 110 Fayette, Inc. and that petitioner has failed to overcome his burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858).

F. That the petition of Ivan Andrews is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 12, 1978 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 30 1983

*Robert A. Clev*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. Trindle*  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Ivan Andrews :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 9/1/75-5/31/78. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 30th day of November, 1983, he served the within notice of Decision by certified mail upon Ivan Andrews, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ivan Andrews  
240 Ashdale Ave.  
Syracuse, NY 13206

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
30th day of November, 1983.

David Parchuck

Maucha J. Susselle

Authorized to administer oaths pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Ivan Andrews :  
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State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 30th day of November, 1983, he served the within notice of Decision by certified mail upon Michael R. Canestrano, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael R. Canestrano  
1011 State Tower Bldg.  
Syracuse, NY 13202

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
30th day of November, 1983.

David Parchuck

Maucha J. Linnelle

Authorized to administer oaths pursuant to Tax Law section 174



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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Michael K. Carver</i>	
Street and No. <i>101 State Tower Bldg</i>	
P.O., State and ZIP Code <i>Spencer NY 13302</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Gwen Andrews</i>	
Street and No. <i>240 Cuddale Ave</i>	
P.O., State and ZIP Code <i>Spencer NY 13306</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982