

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

July 15, 1983

Broadway Don's Corporation
c/o Steven Coren
485 Madison Ave.
New York, NY 10022

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 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
Steven Coren
485 Madison Avenue
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BROADWAY DON'S CORPORATION	:	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,	:	
1974 through August 31, 1977.	:	

Petitioner, Broadway Don's Corporation, c/o Steven M. Coren, 485 Madison Avenue, New York, New York 10022, 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, 1974 through August 31, 1977 (File No. 21989).

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 June 16, 1982 at 1:15 P.M., and continued on November 30, 1982 at 9:15 A.M., with all briefs to be submitted by December 22, 1982. Petitioner appeared by Steven M. Coren, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether a field audit performed by the Audit Division, whereby a markup was applied to the purchases made by petitioner to determine its sales, properly reflected such sales and the additional sales tax determined due thereon.

FINDINGS OF FACT

1. On February 14, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Broadway Don's Corporation for the period December 1, 1974 through August 31, 1977. The

Notice was issued as a result of a field audit and asserted additional sales tax due of \$10,737.49 plus penalty and interest of \$4,015.06 for a total of \$14,752.55.

2. Petitioner operated a fast food take-out restaurant selling chicken, ribs, fish, hot dogs, shrimp, sandwiches, salads and soda.

3. On audit, the Audit Division reviewed sales as recorded in petitioner's records and found that petitioner recorded sales totalling \$266,458.66 during the audit period. Petitioner reported gross and taxable sales of \$215,312.00 on sales and use tax returns filed for the same period.

The Audit Division requested Federal tax returns for the years 1975 and 1976; however, these were not available. The Audit Division did have available the Federal return for the fiscal year ended September, 1974 which, based on the auditor's testimony, showed petitioner's markup on cost to be 134 percent.

The Audit Division totaled cash food purchases made by petitioner during the audit period and found such purchases to be \$35,598.00. Petitioner also made food purchases by check which totalled \$119,068.00. The Audit Division then applied a markup of 126 percent to total cash and check food purchases of \$154,666.00. The Audit Division determined taxable sales to be \$349,545.00 for the audit period from which it deducted the taxable sales reported of \$215,312.00. The Audit Division thereby determined additional taxable sales of \$134,233.00 and the tax due thereon of \$10,737.49.

4. The Audit Division's auditor testified that the 126 percent markup used in the audit was the normal markup for a business of the type operated by petitioner. Her supervisor confirmed that testimony but indicated he had

arrived at the 126 percent markup by comparing petitioner's check purchases to its recorded sales.

5. Petitioner contended that the amount of food purchases marked up on audit was incorrect in that it did not take into account such factors as spoilage, pilferage and employee meals. In addition, petitioner contended that employees were allowed to take home up to \$20.00 per week in food at retail selling price. Petitioner usually had three employees and estimated such food allowances to be \$21,000.00 for the audit period. Petitioner's books and records, however, did not reflect any amount for such withdrawals.

6. Petitioner further contended that the markup applied on audit did not consider such cost factors as paper goods, condiments and supplies consumed with the food products sold. Considering these factors, petitioner estimated the markup on its purchases to be between 38 and 40 percent.

7. Although petitioner testified that he had cash register tapes from which he recorded sales in his books and records, none were made available on audit nor produced at the hearing. Petitioner offered no documentary evidence to show the actual markup on its food purchases during the audit period.

8. Petitioner offered no explanation as to why its sales reported on sales and use tax returns filed were approximately \$51,000.00 less than those recorded in its books.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due may 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 or other factors.

B. That the returns filed by petitioner were incorrect as evidenced by the discrepancies in the sales per books and tax returns. Lacking register tapes, the Audit Division could not verify the accuracy of the sales recorded in petitioner's records. The Audit Division, therefore, correctly determined petitioner's tax liability based upon the purchase markup audit technique. The markup percentage was reasonable and in line with the markup percentage reported by petitioner on its Federal tax return for the fiscal year ended September, 1974.


C. That petitioner has failed to show an error in the determination.
(Matter of Meyer v. State Tax Commission, 61 A.D.2d 223; 402 N.Y.S.2d 74.)

D. That the petition of Broadway Don's Corporation is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 14, 1978 is sustained with applicable penalties and interest thereon.

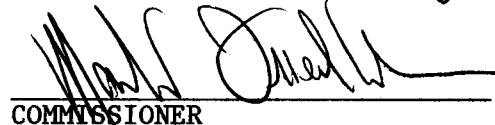
DATED: Albany, New York

JUL 15 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Broadway Don's Corporation

:

:

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 12/1/74 - 8/31/77. :

State of New York
County of Albany

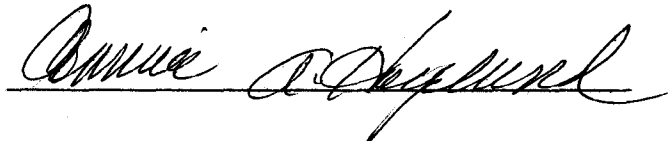
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Broadway Don's Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Broadway Don's Corporation
c/o Steven Coren
485 Madison Ave.
New York, NY 10022

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
15th day of July, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Broadway Don's Corporation :

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 :
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State of New York
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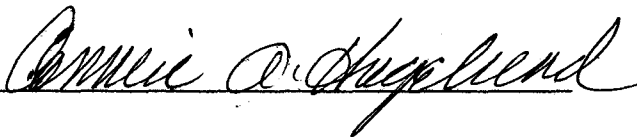
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Steven Coren the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven Coren
485 Madison Avenue
New York, NY 10022

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 481 208 084

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Stuart Cove</i>	
Street and No. <i>485 Madison Ave</i>	
P.O., State and ZIP Code <i>New York, NY 10022</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

P 481 208 083

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Bonding Dept Corp</i>	
Street and No. <i>485 Madison Ave</i>	
P.O., State and ZIP Code <i>New York, NY 10022</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