

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

May 6, 1983

Michael Cafiero & Louis Coppola
Individually & as Partners of Neptune Marine
2023 Neptune Ave.
Brooklyn, NY 11224

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
John M. Shall
1540 Hylan Blvd.
Staten Island, NY 10305
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MICHAEL CAFIERO and LOUIS COPPOLA	:	DECISION
Individually and as Partners of	:	
Neptune Marine	:	
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 March 1, 1973	:	
through November 30, 1976.	:	

Petitioners, Michael Cafiero and Louis Coppola, individually and as partners of Neptune Marine, 2023 Neptune Avenue, Brooklyn, New York 11224, 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 March 1, 1973 through November 30, 1976 (File No. 20447).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 28, 1981 at 9:00 A.M. Petitioner appeared by Michael Cafiero. The Audit Division appeared by Paul B. Coburn, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioners for the period March 1, 1973 through November 30, 1976.

FINDINGS OF FACT

1. Petitioners, Michael Cafiero and Louis Coppola, were partners operating as Neptune Marine, and were engaged in the sale of boats and boat parts. In addition, petitioners provided dry dock and wet dock storage services.

2. On August 18, 1977, 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 Michael Cafiero and Louis Coppola individually and as co-partners of Neptune Marine, covering the period March 1, 1973 through November 30, 1976 for taxes due of \$40,817.89, plus penalty and interest of \$19,431.04, for a total of \$60,248.93.

3. Petitioners executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1973 through May 31, 1976, to June 20, 1978.

4. On audit, the Audit Division compared petitioners' bank deposits for the period March 1, 1973 through November 30, 1976 with gross sales reported for the same period on sales tax returns and found that bank deposits exceeded gross sales by \$408,706.00 (this amount reflects petitioners failure to file sales tax returns for the period June 1, 1976 through November 30, 1976). Petitioners were unable to account for this discrepancy and therefore, the Audit Division considered the excess bank deposits as additional taxable sales.

A test on nontaxable sales was performed for the period March 1, 1976 through May 31, 1976. Petitioners reported nontaxable sales of \$50,123.00 for said period; however, the invoices provided totaled \$46,819.00 of which the sum of \$42,246.00 was allowed. The balance, \$4,573.00, plus the sales of \$3,304.00 for which no invoices were provided was disallowed resulting in an error factor of 15.72 percent. This percentage was applied to nontaxable sales reported for the audit period to determine additional taxable sales of \$126,353.00. The additional taxable sales of \$408,706.00 and \$126,353.00 as determined above were combined to arrive at the total tax deficiency of \$40,817.89.

5. Subsequent to the audit, petitioners furnished the Audit Division with sales tax returns for periods June 1, 1976 through August 31, 1976 and September 1, 1976 through November 30, 1976; with substantiation that \$20,000.00 of the excess bank deposits resulted from boats returned to the supplier; and with a resale certificate covering one of the sales disallowed on audit. Based on said documents, the Audit Division conceded that the additional taxes due be adjusted to \$30,296.20.

6. The books and records maintained by petitioners were inadequate for the Audit Division to verify taxable sales or to determine such sales with any exactness.

7. Petitioners submitted resale certificates from Restaurant Associates, Inc. and Shoreway Marine, Inc. covering sales of \$1,198.00 and \$1,880.00 respectively, which were disallowed in the Audit Division's test of nontaxable sales.

8. Petitioner adduced insufficient evidence to establish that the discrepancy between bank deposits and gross sales (\$276,000.00 after the adjustments referred to in Finding of Fact "5") was from sources not subject to tax.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax. That petitioners are not liable for tax on the sales set forth in Finding of Fact "7" for which a resale certificate was furnished by the customer. Accordingly, the error factor on disallowed nontaxable sales is reduced to 9.6 percent.

That in all other respects, petitioners failed to sustain the burden of proof required by section 1132(c) of the Tax Law.

B. That since petitioners maintained inadequate books and records, the audit procedures and test adopted by the Audit Division to determine additional sales taxes due were proper pursuant to section 1138(a) of the Tax Law (Matter of Chartair, Inc. V. State Tax Commission, 65 A.D.2d 44; and that petitioners failed to sustain the burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That in accordance with finding of Fact "5", the additional taxes due are reduced to \$30,296.20.


D. Petitioners failed to establish there is reasonable cause for the cancellation of penalty and interest in excess of the minimum statutory rate.

E. That the petition of Michael Cafiero and Louis Coppola, individually and as partners of Neptune Marine is granted to the extent indicated in Conclusions of Law "A" and "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 18, 1977; and that, except as so granted, the petition is in all other respects denied.

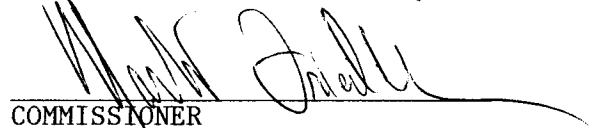
DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Michael Cafiero & Louis Coppola	:	
Individually & as Partners of Neptune Marine	:	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	:	
3/1/73 - 11/30/76.	:	

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Michael Cafiero & Louis Coppola, Individually & as Partners of Neptune Marine, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Cafiero & Louis Coppola
Individually & as Partners of Neptune Marine
2023 Neptune Ave.
Brooklyn, NY 11224

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
6th day of May, 1983.

David Parchuck

Annice A. Heyland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Michael Cafiero & Louis Coppola	:	
Individually & as Partners of Neptune Marine	:	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 3/1/73 - 11/30/76.	:	

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon John M. Shall the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John M. Shall
1540 Hylan Blvd.
Staten Island, NY 10305

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
6th day of May, 1983.

David Parchuck

James C. Angelino

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 389 758 888

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE (FIRST CLASS)
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Michael Caffery & Louis
Partners of Neptune Marine
Street and No. 2023 Neptune Ave.
P.O., State and Zip Code Brooklyn, NY 11224

Postage \$

Certified Fee

Special Delivery Fee

Restricted Delivery Fee

Return Receipt for Merchandise
To Whom Sent (Print Name)
Registered Mail (Print Name)
Date and Address of Return

TOTAL Postage and Fees \$

Postmark or Date

PS Form 3800, Feb. 1963

P 389 758 889

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE (FIRST CLASS)
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to John M. Shall
Street and No. 1540 Hylan Blvd.
P.O., State and Zip Code Staten Island, NY 10305

Postage \$

Certified Fee

Special Delivery Fee

Restricted Delivery Fee

Return Receipt for Merchandise
To Whom Sent (Print Name)
Registered Mail (Print Name)
Date and Address of Return

TOTAL Postage and Fees \$

Postmark or Date

PS Form 3800, Feb. 1963