

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

September 30, 1983

James Eaton and Sons, Inc.  
187-07 Linden Blvd.  
St. Albans, NY 11412

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  
Arthur Gelber  
Laventhol & Horwath  
919 Third Avenue  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
James Eaton and Sons, 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 12/1/75 - 2/28/79. :

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon James Eaton and Sons, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Eaton and Sons, Inc.  
187-07 Linden Blvd.  
St. Albans, NY 11412

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  
30th day of September, 1983.

Susan Powell

Connie Hagelund

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 :  
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James Eaton and Sons, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales & Use Tax :  
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Period 12/1/75 - 2/28/79.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon Arthur Gelber the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur Gelber  
Laventhol & Horwath  
919 Third 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  
30th day of September, 1983.





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	:	
JAMES EATON & SONS, INC.	:	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, 1975	:	
through February 28, 1979.	:	

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Petitioner, James Eaton & Sons, Inc., 187-07 Linden Boulevard, St. Albans, New York 11412, 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, 1975 through February 28, 1979 (File No. 28885).

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 1, 1982 at 10:45 A.M. and continued to its conclusion at Building 9, State Campus, Albany, New York, on March 7, 1983 at 1:00 P.M. Petitioner appeared by Arthur Gelber, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. and John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether the result of a field audit, whereby the percentage of petitioner's purchases which were taxable upon resale was applied to petitioner's gross sales, properly reflected the taxable sales made.

II. Whether penalties and interest in excess of the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. On November 20, 1979, as a result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Eaton James & Sons, Inc. [sic] covering the period December 1, 1975 through February 28, 1979. The Notice asserted additional sales tax due of \$12,062.80, plus penalty and interest of \$5,479.47, for a total of \$17,542.27.

A Notice was also issued against James Eaton for his personal liability as an officer under sections 1131(1) and 1133 of the Tax Law; however, his personal liability is not at issue herein.

2. Petitioner operated a retail grocery store. On audit, the Audit Division requested purchase invoices for the months of August, 1977 and February, 1978 in order to determine the percentage of petitioner's purchases which were taxable when resold and for perusal in the determination of petitioner's markup. Upon review of these purchases, the Audit Division found that beer and cigarette purchases were not available, although petitioner's books showed such purchases being made. Petitioner also did not have cash register tapes showing the selling prices or the amount of its taxable sales. The Audit Division therefore proceeded, with the approval of petitioner and its accountant, to review the entire purchases as recorded in its books. Petitioner made total purchases of merchandise for resale, other than beer and cigarettes, of \$255,978.00 during the audit period. Based on the purchase invoices submitted for August, 1977 and February, 1978, 24.56 percent of petitioner's purchases, other than beer and cigarettes, constituted soda purchases. Other purchases taxable on resale were found to be 13.99 percent. The Audit Division determined that petitioner's purchases of soda were \$62,868.20 and other purchases taxable when resold were \$35,811.32 for the audit period.

The Audit Division accepted the amount of beer purchases of \$59,045.00 and cigarette purchases of \$14,919.00 as recorded in petitioner's books. The auditor excluded 40 percent of cigarette purchases constituting excise taxes, leaving \$8,951.00 remaining in the taxable analysis. The Audit Division thereby determined that a total of \$166,675.00 in purchases made during the audit period were taxable upon resale, or 51 percent of the total purchases.

3. Petitioner did not file sales and use tax returns for the period September 1, 1977 through February 28, 1979. The Audit Division accepted the gross sales as recorded in petitioner's books of \$378,208.00 during the audit period. It applied thereon the 51 percent found to be the rate of purchases taxable upon resale and determined petitioner's taxable sales to be \$192,897.00<sup>1</sup> and sales tax thereon of \$15,431.76. Petitioner reported sales tax of \$3,368.96 on sales and use tax returns filed for the period December 1, 1975 through August 31, 1977. The Audit Division thereby determined additional tax due of \$12,062.80.

4. In its perfected petition, petitioner alleged that the test period was incorrect, that many robberies occurred which were not considered, and that no sales tax was collected other than what was submitted to the state. No evidence was submitted in support of these allegations.

5. Petitioner requested the abatement of penalties and interest in excess of the minimum statutory rate. Petitioner contended that it relied on the services of a prior accountant in preparing its sales and use tax returns and that attempts were made to locate the accountant without success.

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<sup>1</sup> Based on the purchases determined to be taxable on resale of \$166,675.00 (Finding of Fact "2"), the markup on petitioner's purchases was effectively 15.7 percent.

6. Petitioner had undergone at least one field audit prior to the one in issue.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return required to be filed is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall 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.

That further authority exists for use of test periods to determine tax due when sufficient records are not available for the determination of an exact amount of tax due. (Chartair Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

B. That the Audit Division properly determined petitioner's sales tax liability from information that was available. Sufficient records were not maintained from which an exact amount of tax due could be determined. That the Audit Division's determination of taxable sales of \$192,897.00, generated from purchases made by petitioner of \$166,675.00, effectively a markup of 15.7 percent, was not an unreasonable determination. Petitioner has failed to sustain the burden of showing error. (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, 402 N.Y.S.2d 74.)

C. That 20 NYCRR 536.1 provides for the remission of penalties and interest exceeding the minimum interest set by statute when reasonable cause is shown for failure to file a return. That considering petitioner's non-filing history and the fact that a prior field audit was made, reasonable cause cannot be shown for not remitting sales tax. That there is no statutory authority requiring a reduction on the grounds that a taxpayer relied in good faith on

legal counsel or other representative. (C. H. Heist Corp. v. State Tax Commission,  
66 A.D.2d 499.)


D. That the petition of James Eaton & Sons, Inc. is denied, and the Notice  
of Determination and Demand for Payment of Sales and Use Taxes Due issued  
November 20, 1979 is sustained.

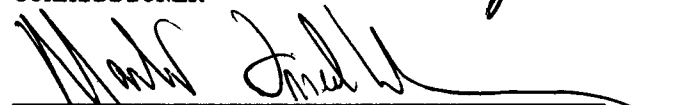
DATED: Albany, New York

STATE TAX COMMISSION

SEP 30 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 470 316 043

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
James Eaton and Sons, Inc.	
Street and No.	
188-07 Linden Blvd.	
P.O., State and ZIP Code	
St. Albans, NY 11412	
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 470 316 044

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Arthur Gelber	
Laventhol & Horwath	
Street and No.	
919 Third Avenue	
P.O., State and ZIP Code	
New York, NY 10022	
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