

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

April 6, 1983

Franklin Square Liquors, Inc.
c/o Sanford Gilbert
Skyfarm Rd.
Copake, NY 12516

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
Herbert Gerstein
Gerstein & Minkow
170 Great Neck Ave.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Franklin Square Liquors, 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:
6/1/76 - 11/19/79.

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 April, 1983, he served the within notice of Decision by certified mail upon Franklin Square Liquors, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Franklin Square Liquors, Inc.
c/o Sanford Gilbert
Skyfarm Rd.
Copake, NY 12516

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 April, 1983.

David Parchuck

Emilie A. Haglund
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Franklin Square Liquors, 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 6/1/76 - 11/19/79.

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 April, 1983, he served the within notice of Decision by certified mail upon Herbert Gerstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Gerstein
Gerstein & Minkow
170 Great Neck Ave.
Great Neck, NY 11021

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 April, 1983.

David Parchuck

Rosanne A. Hyland
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRANKLIN SQUARE LIQUORS, 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 June 1, 1976	:	
through November 19, 1979.	:	

Petitioner, Franklin Square Liquors, Inc., c/o Sanford Gilbert, Skyfarm Road, Copake, New York 12516, 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 June 1, 1976 through November 19, 1979 (File No. 32818).

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 10:45 A.M. Petitioner appeared by Sanford Gilbert, Esq. and Herbert Gerstein, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether the markup percentages determined on audit and applied to petitioner's liquor and wine purchases to arrive at petitioner's sales were accurate.

II. Whether the Audit Division's method of calculating petitioner's inventory as of June 1, 1976 was proper.

III. Whether the Audit Division gave adequate consideration to sales made at a discount.

IV. Whether the books and records of petitioner were adequate for the determination of an exact amount of tax.

FINDINGS OF FACT

1. On March 20, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Franklin Square Liquors, Inc. for the period June 1, 1976 through November 30, 1979. The Notice was issued as a result of a field audit and asserted additional sales tax due of \$8,742.02, plus interest of \$1,483.49, for a total due of \$10,225.51.

2. Petitioner, by signature of its president, Sanford Gilbert, executed a consent to extend the period of limitation for the issuance of an assessment to September 20, 1980.

3. Petitioner operated a retail liquor store at 932 Hempstead Turnpike, Franklin Square, New York, until November 19, 1979 when the business was sold.

4. On audit, the Audit Division reviewed purchases made by petitioner for the period September, October and November, 1977. It determined that 22.3 percent of total purchases made by petitioner constituted wine purchases and 77.7 percent constituted liquor purchases. The Audit Division then performed a markup analysis using one invoice in the month of May, 1979 from each of petitioner's suppliers. It marked up those purchases to petitioner's shelf prices as of June 14, 1979. The Audit Division thereby determined that petitioner's markup on wine purchases was 40.36 percent and the markup on liquor purchases was 17.25 percent.

The Audit Division then determined that petitioner made purchases totaling \$1,601,603.00 during the period June 1, 1976 through November 19, 1979. Petitioner's opening inventory as of February 1, 1977 was \$136,422.00. The Audit Division approximated the inventory as of June 1, 1976 by reducing

the February 1, 1977 inventory by 21 percent to allow for inflation and thereby determined the inventory as of June 1, 1976 to be \$106,786.00. It determined the inventory as of November 19, 1979 to be \$56,786.00 from the closing statement of the sale of the business. Based on the above, the Audit Division included an additional \$50,000.00 in cost of merchandise for sale due to the decrease in inventory from June 1, 1976 to November 19, 1979. The Audit Division therefore determined that the total cost of merchandise sold during the audit period was \$1,651,603.00.

The Audit Division then estimated, based on similar businesses, that 20 percent of petitioner's purchases were sold at a discount and determined the discounted markups to be 25 percent on wine purchases and 13 percent on liquor purchases. It applied its findings to determine sales in the following manner:

Total Cost of Merchandise Sold				\$1,651,603.00
Liquor Purchases @ 77.7%				1,283,296.00
Wine Purchases @ 22.3%				368,307.00
	<u>Cost</u>	<u>Discounted Sales-20%</u> <u>Regular Sales-80%</u>	<u>Markup %</u> <u>Applied</u>	<u>Reconstructed</u> <u>Gross Sales</u>
Liquor	\$1,283,296.00	\$ 256,659.20 1,026,636.80	13% 17.25%	\$ 290,024.89 1,203,731.60
Wine	368,307.00	73,661.40 294,645.60	25% 40.36%	92,076.75 413,564.56
Totals	<u>\$1,651,603.00</u>	<u>\$1,651,603.00</u>		<u>\$1,999,397.80</u>

Upon verification of exempt sales made by petitioner during the month of October, 1977, the Audit Division accepted as reported the exempt sales as shown on its sales and use tax returns filed for the audit period of \$91,517.00. After adjustment for the exempt sales as reported, the Audit Division determined taxable sales of \$1,907,880.80. Petitioner reported taxable sales of \$1,788,312.00 on sales and use tax returns filed. The Audit Division thereby determined additional taxable sales of \$119,568.80 and the sales tax due thereon of

\$8,742.02. The Audit Division, by use of the above markup of purchases audit method, determined that petitioner's returns as filed were insufficient.

5. Petitioner contended that the markups determined on audit were inaccurate in that certain brands of liquor bearing a higher markup did not have as rapid a rate of turnover as the lower-priced brands. Also, numerous selling price changes occurred from the time stock was purchased to the time it was sold. Petitioner offered no evidence to show that the selling prices used in the markup computations made by the Audit Division were incorrect.

Further, in regard to the markups determined by the Audit Division, petitioner argued that discounts taken on purchases during the month of May, 1979 were not reflective of other periods. Petitioner submitted a random sampling of purchases made from July, 1976 through November, 1978 which showed that only .08 percent of its purchases were discounted. The evidence submitted was sufficient to show that the markup on liquor purchases was 16.71 percent and the markup on wine purchases was 39.97 percent for periods prior to December, 1978.

6. Although petitioner contested the Audit Division's valuation of merchandise inventory as of June 1, 1976, it was unable to submit any documentation to establish the actual inventory as of that date since physical inventories are taken only at the end of the fiscal year on January 31.

7. Petitioner argued that the Audit Division did not give proper consideration to discount sales in that the discounts were given on the selling price as opposed to a reduction in the markup percent as computed on audit. Petitioner submitted an analysis of discount sales previously requested by the Audit Division for the period August 24, 1979 through September 24, 1979. The analysis showed that 26 percent of total sales were discounted. Of the discounted

sales, 17 percent of total sales constituted liquor sales at an average discount of 9 percent, and 9 percent constituted wine sales at a discount of 20 percent.

8. The Audit Division's reconstruction of sales did not allow for the fact that petitioner sustained losses through pilferage. Petitioner sustained losses at the rate of 2 percent of its purchases which were consequently not sold.

9. Petitioner maintained that all sales records were available for audit and therefore should have been used to determine any tax liability. Petitioner submitted its cash register tapes and supporting cash register receipts for the period May, June, September and October, 1979, to support its contention of the availability of the sales records. The records submitted, although complete, were not conclusive, for audit purposes, of the fact that all sales were properly recorded.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides in part that when a return 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 stock on hand, purchases...or other factors.

That the Audit Division performed a markup analysis of petitioner's purchases in order to verify the accuracy of the sales reported. Through that analysis, it determined that the returns as filed were insufficient. The Audit Division, therefore, was not required to accept petitioner's records as presented.

The Supreme Court in Holland v. United States, 348 U.S. 121, 132; 99 L ed 150, 162 (1954), in discussing the use of an indirect audit method when adequate books and records were available, held "[T]he Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history."

B. That in the performance of its markup analysis of petitioner's purchases, the Audit Division failed to give proper consideration to the fact that petitioner's markups were lower for the period prior to December 1, 1978 due to the fact that fewer discounts were taken on its purchases (Finding of Fact "5").

C. That petitioner failed to show that the merchandise inventory as determined by the Audit Division for June 1, 1976 was incorrect.

D. That the Audit Division's allowance for discount sales did not accurately reflect such sales as evidenced by petitioner's analysis made for the period August 24 through September 24, 1979 (Finding of Fact "7"). The audit results are adjusted to reflect the appropriate discounts taken on the selling prices.

E. That petitioner sustained a loss of 2 percent of its inventory through pilferage of stock which was consequently not sold. That the audit results are to be adjusted to reflect such loss.

F. That except as noted in Conclusions of Law "B", "D" and "E" above, the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.


G. That the petition of Franklin Square Liquors, Inc. is granted to the extent indicated in Conclusions of Law "B", "D" and "E" 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 on March 20, 1980; and that, except as so granted, the petition is in all other respects denied.

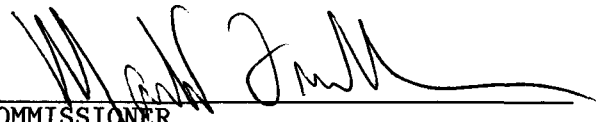
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 389 758 764
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Herbert Gertson</i>	
Street and No. <i>170 Pearl Neck Ave</i>	
P.O., State and ZIP Code <i>170 Pearl Neck Ave</i>	
Postage	<i>Copake NY 12516</i>
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 389 758 765
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Herbert Gertson</i>	
Street and No. <i>170 Pearl Neck Ave</i>	
P.O., State and ZIP Code <i>170 Pearl Neck Ave</i>	
Postage	<i>Copake NY 12516</i>
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