

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

November 10, 1983

Gem Delicatessen, Inc.
c/o Raymond Smith
186 Connetquot Ave.
E. Islip, NY 11730

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
David Klein
Klein & Klein
333 Jericho Tpke.
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gem Delicatessen, Inc. :
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 6/1/78-5/31/81. :
_____ :

AFFIDAVIT OF MAILING

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 10th day of November, 1983, she served the within notice of Decision by certified mail upon Gem Delicatessen, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gem Delicatessen, Inc.
c/o Raymond Smith
186 Connetquot Ave.
E. Islip, NY 11730

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
10th day of November, 1983.

Martha L. Smalley

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gem Delicatessen, 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 6/1/78-5/31/81. :
_____ :

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 10th day of November, 1983, she served the within notice of Decision by certified mail upon David Klein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Klein
Klein & Klein
333 Jericho Tpke.
Jericho, NY 11753

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
10th day of November, 1983.

Martha L. Grunelle

Connie D. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GEM DELICATESSEN, 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, 1978	:	
through May 31, 1981.	:	

Petitioner, Gem Delicatessen, Inc., c/o Raymond Smith, 186 Connetquot Avenue, East Islip, New York 11730, 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, 1978 through May 31, 1981 (File No. 35130).

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 February 8, 1983 at 1:15 P.M. with all briefs to be submitted by March 21, 1983. Petitioner appeared by David Klein, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the markup applied by the Audit Division to petitioner's purchases which were taxable when resold properly reflected the taxable sales made.

II. Whether the result of an observation made of the new owner's business operation properly reflected the taxable prepared food sales made by petitioner.

III. Whether petitioner is responsible for the sales tax collected and the additional tax determined due for the period subsequent to January 19, 1981.

FINDINGS OF FACT

1. On June 12, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Gem Delicatessen, Inc. for the period June 1, 1978 through May 31, 1981. The Notice was issued as a result of a field audit and asserted additional sales tax due of \$22,747.34 plus interest of \$2,617.77 for a total of \$25,365.11.

2. Petitioner's business operation had been sold on April 3, 1981. The purchaser notified the State Tax Commission of the impending sale on March 24, 1981. A field audit was then conducted on the books and records of petitioner to determine if any additional sales taxes were due.

3. On audit, in order to verify taxable sales reported, the Audit Division reviewed purchases made by petitioner for the months of April and May, 1980. It found that 37.72 percent of the total purchases made during these months were taxable when resold. The Audit Division then applied 37.72 percent to the total purchases made during the audit period up to January 15, 1981 and determined that \$192,906.00 in purchases were made which were taxable upon resale.

Petitioner kept no records of individual selling prices; therefore, the Audit Division was unable to perform a markup analysis since the business had already been sold at the time of audit. The Audit Division estimated petitioner's markup to be 50 percent on taxable items sold and determined taxable sales of \$289,359.00.

In addition, an observation was made of prepared take-out food sold by the new owner. Based on this observation, the Audit Division found taxable prepared food sales to be 41.92 percent of the total sales made. The Audit Division therefore applied 41.92 percent to the gross sales as recorded in petitioner's books and records and determined taxable prepared food sales of

\$274,587.00. Total taxable sales of \$563,946.00 were determined for the period June 1, 1978 through January 15, 1981. Petitioner reported taxable sales of \$287,005.00 on sales and use tax returns filed for the same period. The Audit Division therefore determined additional taxable sales of \$276,941.00.

Purchases and sales did not appear on the books of petitioner after January 15, 1981; therefore, the Audit Division estimated the taxable sales for the period January 16 through April 3, 1981 based on the monthly average taxable sales determined above. The additional taxable sales were increased to \$324,962.00 to include this period and the total additional sales tax due was determined of \$22,747.34.

4. Petitioner argued that the 50 percent markup applied to its purchases on audit lacked any basis and was therefore arbitrary. Petitioner submitted a markup analysis of beer, soda and cigarette sales which showed an average markup of 26 percent. This analysis was prepared from recollection of the selling prices in the business operation. No source documents were submitted to support this calculation nor were other taxable sales analyzed such as paper goods and candy.

Petitioner stated its overall markup on Federal tax returns filed was 37 percent. Petitioner did submit a copy of its U.S. Small Business Corporation Income Tax Return filed for the fiscal year ended February 29, 1980. Based on this return, petitioner's overall markup on cost of goods sold was 32 percent.

Petitioner's average markup on purchases which were taxable on resale was 34.5 percent.

5. The gross sales on petitioner's books of \$700,877.00 were accepted by the Audit Division as recorded. Petitioner argued that the total taxable sales

as determined by the Audit Division of \$563,946.00, or 80 percent of gross sales, was not indicative of its business operation.

Petitioner contended that the purchasers remodeled the business to accommodate more prepared food. Petitioner sold more grocery items than the new owners and submitted photographs of the store as it existed prior to and subsequent to the sale. Also submitted was an affidavit of Thomas Lambertsen, a former employee of petitioner who also was employed by the new owners until stricken ill. Mr. Lambertsen attested to the vast increase in prepared food sales by the new owners.

In support of its petition, petitioner submitted surveys conducted during the audit period of its prepared food sales. These surveys were made at the accountant's request from time to time in order to facilitate the estimate of petitioner's taxable sales on returns filed. The surveys submitted are summarized as follows:

<u>DATE</u>	<u>DAY</u>	<u>TAXABLE SALES</u>	<u>GROSS SALES</u>	<u>TAXABLE PERCENTAGE</u>
3/08/77	Tuesday	\$ 64.50	\$611.70	10.6%
3/17/77	Thursday	53.60	594.64	9.1%
2/21/80	Thursday	125.90	640.51	19.7%
2/23/80	Saturday	34.50	588.86	5.9%
2/24/80	Sunday	10.10	568.56	1.8%
6/19/80	Thursday	112.45	753.07	14.9%
6/21/80	Saturday	31.55	896.26	3.6%
6/22/80	Sunday	13.00	944.47	1.4%

Based on the above, the weekday average of taxable prepared food sales was 13.7 percent and the weekend average was 3 percent. Given weight to the number of days in a week, petitioner's taxable prepared food sales averaged 10.6 percent of gross sales.

The Audit Division's analysis of the new owner's prepared food sales for 1 weekday revealed such sales to be \$585.72 and gross sales to be \$1,111.87.

6. Petitioner reported 40.9 percent of its gross sales as taxable on sales and use tax returns filed.

7. Petitioner contended that the new owners took over the business operation as of January 19, 1981. Petitioner argued that it is not uncommon for new owners to take over an operation prior to the closing date of sale. It submitted a copy of the new owner's application for a Certificate of Authority to collect sales tax which was dated March 20, 1981. The date business began was designated as January 19, 1981. Also submitted was a copy of a sales and use tax return purportedly filed by the new owner for the period ended February 28, 1981. No evidence, however, was submitted to show the validation of the application or the receipt of the sales and use tax return by the department.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of external indices such as purchases and other factors to verify sales receipts when sales records are not available for the determination of an exact amount of such sales.

That petitioner did not maintain records for the determination of an exact amount of taxable sales; therefore, the audit method used by the Audit Division to determine its taxable sales was proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

B. That once it is established that the Audit Division's independent determination was permissible, the burden of proof is upon petitioner to show that the determination should be overturned. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.)

That petitioner has shown by a fair preponderance of evidence that the markup on its cost of taxable sales was 34.5 percent (Finding of Fact "4")

and that its prepared food sales were 10.6 percent of the gross sales (Finding of Fact "5").


C. That petitioner failed to sustain the burden of proof that any sales tax had been paid from January 16, 1981 to April 3, 1981, the date on which the business operation had been sold.

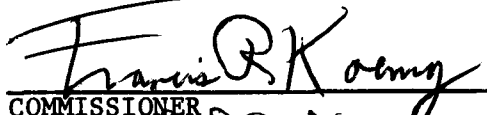
D. That the petition of Gem Delicatessen, Inc. is granted to the extent indicated in Conclusion of Law "B" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 12, 1981; and that, except as so granted, the petition is in all other respects denied.

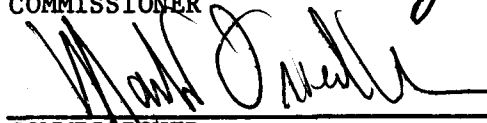
DATED: Albany, New York

NOV 10 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 233

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Gemma Delacorte Inc</i>	
Street and No. <i>146 Bennett St</i>	
P.O., State and ZIP Code <i>2 Ship NY 11730</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 470 316 234

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>David Klum</i>	
Street and No. <i>333 Genesee Tpke</i>	
P.O., State and ZIP Code <i>Genesee NY 11753</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