

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

December 12, 1983

Hillside Grocery Store, Inc.  
c/o Wilfredo Collazo  
160-10 Hillside Ave.  
Jamaica, NY 11432

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Hector A. Martinez  
37-38 73rd Street  
Jackson Heights, NY 11372  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Hillside Grocery Store, Inc. :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 6/1/78 - 8/31/81. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 12th day of December, 1983, he served the within notice of Decision by certified mail upon Hillside Grocery Store, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hillside Grocery Store, Inc.  
c/o Wilfredo Collazo  
160-10 Hillside Ave.  
Jamaica, NY 11432

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
12th day of December, 1983.

David Parchuck

James A. Haggard  
pursuant to Tax Law section 174

Authorized to administer oaths

## STATE TAX COMMISSION

Barbara A. Haglund 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	:	
HILLSIDE GROCERY STORE, 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 August 31, 1981.	:	

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Petitioner, Hillside Grocery Store, Inc. c/o Wilfredo Collazo, 89-37 198th Street, Hollis, New York 11432, 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 August 31, 1981 (File No. 34982).

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 9, 1983 at 1:15 P.M. with all evidence to be submitted by March 11, 1983. Petitioner appeared by Hector A. Martinez, Jr., Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the taxable sales originally estimated by the Audit Division due to petitioner's lack of records properly reflected those sales made by petitioner.

FINDINGS OF FACT

1. On August 12, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Hillside Grocery Store, Inc. covering the period June 1, 1978 through August 31, 1981. The

Notice asserted additional tax due of \$12,324.56 plus penalty and interest of \$3,676.63 for a total of \$16,001.19.

2. On audit, the Audit Division found that petitioner did not have any records available for perusal in the determination of an exact amount of taxable sales or sales tax collections thereon. The business had been sold, and it was contended that all the books and records had been given to the buyer's accountant. Upon attempt to confirm, the buyer's accountant denied having such records with the exception of blank sales invoices.

The Audit Division then conducted a survey of the store to determine its potential for making taxable sales. It noted a large display for beer and soda. Based on this, the auditor estimated that 50 percent of the sales made were taxable. Petitioner had reported approximately 12 percent of its sales made as taxable sales. The Audit Division thereby determined that the sales as reported on sales and use tax returns filed were insufficient.

Petitioner reported gross sales of \$349,742.00 on sales and use tax returns filed for the period June 1, 1978 through February 28, 1981. Petitioner did not file sales and use tax returns for the period March 1, 1981 through June 15, 1981, the date the business was sold. The Audit Division estimated gross sales for the periods not filed based on the average sales of the prior periods and determined gross sales of \$37,094.00. The Audit Division then determined that 50 percent of the gross sales or \$193,421.00 were taxable sales and determined sales tax due thereon of \$15,473.68. Petitioner remitted sales tax of \$3,229.12 during the audit period; therefore, additional sales tax due was determined of \$12,244.56. The Audit Division also held fixed assets sold valued at \$1,000.00 subject to sales tax in the amount of \$80.00.

3. As a result of a conference held on February 24, 1982, petitioner submitted purchase invoices for the period January through September, 1980. Also submitted were Federal tax returns filed for the fiscal years ended April, 1979 and 1980. Based on a review of the information submitted, the Audit Division concluded the following:

a. Sales reported on the Federal return for the fiscal year ended May, 1979 were approximately \$40,000.00 higher than the gross sales reported on the sales and use tax returns filed during the same period.

b. Purchases reviewed for the period January through September, 1980 (9 months) totaled \$164,883.00. Purchases reported on the Federal returns filed were \$90,044.00 and \$92,459.00 for the fiscal years ended April 1979 and 1980 respectively.

c. Purchase invoices reviewed during the period January, February, March, June, July and August, 1980 disclosed that 58.85 percent of petitioner's purchases were taxable when resold. The majority of the taxable sales were beer and soda.

The Audit Division therefore made no adjustment to its original audit findings.

4. Petitioner contended that its sales and use tax returns filed accurately reflected the receipts of the business operation. Petitioner argued that a daybook was maintained breaking down its sales between taxable and nontaxable sales, and that these records were prepared from inventories taken on a daily basis. Petitioner offered no additional evidence of its sales receipts other than the Federal tax returns and purchase invoices previously submitted.

#### 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 stock on hand or other factors.

That the Audit Division, lacking any records to verify sales receipts on its audit, properly estimated taxable sales receipts based on a survey of the business premises, albeit subsequent to the sale of the business.

B. That based upon submission of Federal tax returns filed by petitioner and purchases made during nine months in 1980, the Audit Division's estimate was not unreasonable.

C. 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 Audit Division's determination should be overturned. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.) Petitioner has failed to meet that burden with respect to showing that its taxable sales receipts were less than those determined by the Audit Division.

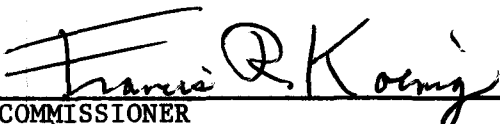
D. That the petition of Hillside Grocery Store, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 12, 1981 is sustained.


DATED: Albany, New York

DEC 12 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 470 315 154  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Hillside Grocery Store</i>	
Street and No. <i>160-10 Hillside Ave.</i>	
P.O., State and ZIP Code <i>Jamaica, NY 11432</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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 315 155  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Rector A. Martinez</i>	
Street and No. <i>37-38 73<sup>RD</sup> St</i>	
P.O., State and ZIP Code <i>Jackson Heights, NY 11372</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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982