

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

May 11, 1983

Donald Hunt  
45 Alabama Ave.  
Hempstead, NY 11550

Dear Mr. Hunt:

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 W. Mintz  
23 E. Carver St., P.O. Box 52  
Huntington, NY 11743  
AND  
Barry Arnold  
100 Veterans Blvd.  
Massapequa, NY 11758  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Donald Hunt :  
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 12/1/74-2/27/77. :  
:

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 11th day of May, 1983, he served the within notice of Decision by certified mail upon Donald Hunt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald Hunt  
45 Alabama Ave.  
Hempstead, NY 11550

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  
11th day of May, 1983.

David Parchuck

Donnie 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  
Donald Hunt

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 12/1/74-2/27/77. :

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 11th day of May, 1983, he served the within notice of Decision by certified mail upon Herbert W. Mintz 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 W. Mintz  
23 E. Carver St., P.O. Box 52  
Huntington, NY 11743

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  
11th day of May, 1983.

David Parchuck

Connie 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  
Donald Hunt

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 12/1/74-2/27/77. :

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 11th day of May, 1983, he served the within notice of Decision by certified mail upon Barry Arnold, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Barry Arnold  
100 Veterans Blvd.  
Massapequa, NY 11758

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  
11th day of May, 1983.

David Parchuck

Conrad A. 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 :  
of :  
DONALD HUNT : 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, 1974 :  
through February 28, 1977.

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Petitioner, Donald Hunt, 45 Alabama Avenue, Hempstead, New York 11550 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, 1974 through February 28, 1977 (File No. 25758).

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 17, 1982 at 1:15 P.M. Petitioner appeared by Barry Arnold, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether the Audit Division, in determining sales and sales tax collections, properly disallowed adjustments for overrings made on petitioner's corporate books.

II. Whether penalty and interest in excess of the minimum statutory rate should be abated.

FINDINGS OF FACT

1. On December 19, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Donald Hunt for the

period December 1, 1974 through February 27, 1977 [sic]. The Notice asserted additional sales tax due of \$1,043.53 plus penalty and interest of \$696.78 for a total due of \$1,740.31.

2. The aforesaid Notice was issued as a result of a field audit of the books and records of Q.N.W. Restaurant #1 Corp. and represented petitioner's personal liability as officer under sections 1131(1) and 1133 of the Tax Law for the sales tax determined due.

3. On audit, the Audit Division reconciled gross sales on the corporate books with Federal corporation tax returns and with New York State Sales and Use Tax Returns filed. It found that an adjusting journal entry had been made during the sales tax filing period December 1, 1974 through February 28, 1975 reducing gross sales by \$12,192.14 and reducing accrued sales tax by \$853.45. The Audit Division disallowed the adjustment on the corporate books and determined the \$853.45 to be additional tax due.

The Audit Division also determined additional sales tax due as a result of arithmetic errors in reporting sales tax accruals amounting to \$190.08. The Audit Division thereby determined the total sales tax deficiency of \$1,043.53.

4. It was the Audit Division's position that under the provisions of section 1137 of the Tax Law all moneys collected purportedly as tax imposed by Articles 28 and 29 are due the state.

5. Petitioner conceded to his personal liability and the sales tax determined due as a result of the arithmetic errors in the amount of \$190.08.

6. Petitioner operated a fast food franchise (McDonald's) during the period October 23, 1974 through February 28, 1977. During the initial period

of operation, employees received little training regarding the operation of cash registers, concentration having been centered around public relations such as speed of service and pleasing customers.

Petitioner hired the services of a certified public accounting firm experienced in preparing financial statements for other fast food restaurants in petitioner's area. Financial statements were submitted monthly to the franchisor along with royalties under the franchise agreement. Sales were significant both for New York State sales tax purposes and for purposes of the franchisor.

In auditing the books and records of petitioner, the accounting firm found that certain receipts were allegedly taken in but were not deposited at petitioner's bank. Through a cost of sales analysis, the firm determined that petitioner's cost of sales percentage was excessively low compared to other McDonald's operations in the area. The firm increased the cost of sales percentage to a figure more representative of similar businesses and reduced sales based on inventory and purchases. It concluded that the excess of sales in the corporate books over bank deposits was due to overrings made by the inexperienced employees during the initial period of operation. An adjusting entry to sales was therefore made during the period of December 1, 1974 through February 28, 1975 along with a corresponding adjustment to the sales tax accrual.

7. Petitioner argued that the adjusting journal entries in his corporate books were the result of the overrings made by employees which were not actually sales. Overrings as defined by petitioner were sales erroneously rung as an amount higher than the selling price, i.e. a 50¢ sale rung as \$5.00. Petitioner

offered no source documents of sales or other evidence to show that its original sales entries made on the corporate books included overrings or other errors made by employees.

8. Petitioner acted in good faith in the reliance of the services of his accountant.

#### CONCLUSIONS OF LAW

A. That section 1137 of the Tax Law provides that every person required to file a return under Articles 28 and 29 shall at the time of filing such return pay to the Tax Commission the total percentage constituting sales tax on all receipts subject to tax and all moneys collected by such person, purportedly as tax, and collections in excess of the amount stated in a schedule as the amount to be collected.

B. That petitioner's corporate books showed entries of certain sales and sales tax collections thereon. That the adjusting entries made to the corporate records were not substantiated by any source documents. Petitioner failed to show that the sales as originally recorded on the corporate books were in error.

C. That petitioner, Donald Hunt, is personally liable under the provisions of sections 1131(1) and 1133 of the Tax Law for the sales tax determined due from Q.N.W. Restaurant #1 Corp. as a result of the field audit.

D. That petitioner acted in good faith; therefore, penalty and interest in excess of the minimum statutory rate are cancelled.

E. That the petition of Donald Hunt is granted to the extent indicated in Conclusion of Law "D" 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 December 19, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 11 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 207 754

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Donald Hunt</b>	
Street and No. <b>45 Alabama Ave.</b>	
P.O., State and ZIP Code <b>Hempstead, NY 11550</b>	
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 481 207 755

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Herbert W. Mintz</b>	
Street and No. <b>23 E. Carver St. P.O. Box 52</b>	
P.O., State and ZIP Code <b>Huntington, NY 11743</b>	
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	

800, Feb. 1982

P 481 207 756

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Barry Arnold</b>	
Street and No. <b>100 Veterans Blvd.</b>	
P.O., State and ZIP Code <b>Massapequa, NY 11758</b>	
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	\$
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PS Form 3800, Feb. 1982