

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

October 7, 1983

Dieter Klein & Juergen Klein
d/b/a Lakeview Delicatessen
678 Woodfield Ave.
West Hempstead, NY 11552

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
Harold W. Seidman
2 Stuart Dr. W.
Glen Cove, NY 11542
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Dieter Klein & Juergen Klein
d/b/a Lakeview Delicatessen

:

:

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:
3/1/78-8/31/79.

State of New York
County of Albany

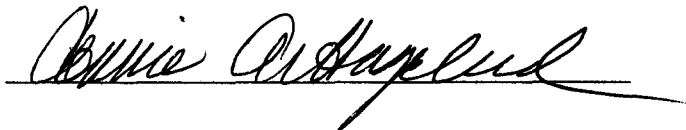
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Dieter Klein & Juergen Klein, d/b/a Lakeview Delicatessen the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dieter Klein & Juergen Klein
d/b/a Lakeview Delicatessen
678 Woodfield Ave.
West Hempstead, NY 11552

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
7th day of October, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dieter Klein & Juergen Klein :
d/b/a Lakeview Delicatessen :

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 :
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State of New York
County of Albany

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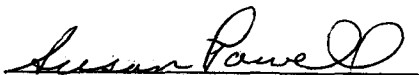
Harold W. Seidman
2 Stuart Dr. W.
Glen Cove, NY 11542

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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
7th day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Juergen Klein & Joseph Gagliano :
d/b/a Lakeview Delicatessen : 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:
9/1/79 - 11/30/80.

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Juergen Klein & Joseph Gagliano, d/b/a Lakeview Delicatessen the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Juergen Klein & Joseph Gagliano
d/b/a Lakeview Delicatessen
678 Woodfield Road
West Hempstead, NY 11552

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Sworn to before me this
7th day of October, 1983.

Susan Powell

Connie Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Juergen Klein & Joseph Gagliano :
d/b/a Lakeview Delicatessen :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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State of New York
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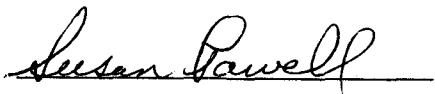
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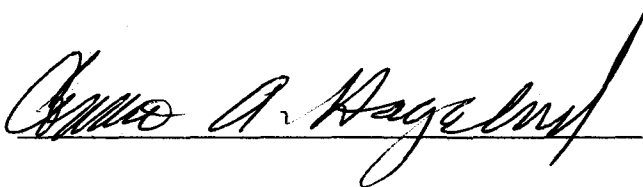
Harold W. Seidman
2 Stuart Dr. W.
Glen Cove, NY 11542

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Sworn to before me this
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OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Juergen Klein & Joseph Gagliano
d/b/a Lakeview Delicatessen
678 Woodfield Road
West Hempstead, NY 11552

Gentlemen:

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Harold W. Seidman
2 Stuart Dr. W.
Glen Cove, NY 11542
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DIETER KLEIN AND JUERGEN KLEIN :
d/b/a Lakeview Delicatessen :
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 March 1, 1978 :
through August 31, 1979. :

DECISION

In the Matter of the Petition :
of :
JUERGEN KLEIN AND JOSEPH GAGLIANO :
d/b/a Lakeview Delicatessen :
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 September 1, :
1979 through November 30, 1980. :

Petitioners, Dieter Klein and Juergen Klein, d/b/a Lakeview Delicatessen and Juergen Klein and Joseph Gagliano, d/b/a Lakeview Delicatessen, 678 Woodfield Road, West Hempstead, New York 11552, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1978 through August 31, 1979 and September 1, 1979 through November 30, 1980 (File Nos. 34528 & 34999).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 1, 1983 at 9:30 A.M. Petitioners appeared by Harold W.

Seidman, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether penalty and that portion of interest exceeding the minimum amount prescribed by law asserted against petitioners on additional sales taxes determined due on audit should be cancelled.

FINDINGS OF FACT

1. Petitioners Dieter Klein and Juergen Klein, d/b/a Lakeview Delicatessen, operated a grocery store and delicatessen located at 678 Woodfield Road, West Hempstead, New York for the period March 1, 1978 through August 31, 1979. Petitioners Juergen Klein and Joseph Gagliano operated the same business for the period September 1, 1979 through November 30, 1980.

2. On June 20, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners Dieter Klein and Juergen Klein covering the period March 1, 1978 through August 31, 1979 for taxes due of \$11,602.98, plus penalty and interest of \$6,139.82, for a total of \$17,742.80. On the same date, a notice was issued to Juergen Klein and Joseph Gagliano covering the period September 1, 1979 through November 30, 1980 for taxes due of \$10,072.80, plus penalty and interest of \$2,784.78, for a total of \$12,857.58.

3. Following a pre-hearing conference, petitioners Dieter Klein and Juergen Klein agreed to a revised tax liability of \$9,459.29. Petitioners Juergen Klein and Joseph Gagliano also agreed to a revised liability amounting to \$8,259.91. Petitioners executed withdrawals of petition and paid the revised figures. The penalty and interest assessed by the Audit Division was sustained.

4. An audit performed on petitioners Dieter Klein's and Juergen Klein's books and records for the period March 1, 1973 through May 31, 1976 disclosed that taxable sales were underreported by 75.6 percent and resulted in a deficiency of \$13,464.43. Petitioners filed a protest on December 6, 1977. A small claims hearing was held on April 23, 1979. The Tax Commission rendered its decision on June 18, 1980. Said decision, except for granting a pilferage allowance, sustained the assessment. It did however, cancel the penalty and reduced the interest to the minimum statutory rate.

5. The additional taxes due as agreed to in Finding of Fact "3" above, represent an 83.6 percent underreporting of taxable sales.

6. Petitioners estimated the taxable sales reported on returns filed rather than maintaining the books and records required by section 1135 of the Tax Law.

7. The Audit Division took the position that penalty and maximum interest are appropriate since petitioners made no effort to change its sales tax reporting procedures after the first audit showed such a significant underreporting.

Petitioners argued that they were awaiting the outcome of the Tax Commission's decision on the first audit before making any changes and referred specifically to 20 NYCRR 536.1(b)(5) which states as grounds for reasonable cause "pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year, quarter, month or other period of delinquency."

CONCLUSIONS OF LAW

A. That section 1145(a)(1) of the Tax Law authorizes the imposition of penalty and interest for failure to file a return or pay over any tax when due. Said section also provides for the Tax Commission's remission of penalty and

that portion of interest exceeding the statutory minimum in the event that such failure was due to reasonable cause and not due to willful neglect.

B. That under the circumstances herein, petitioners' reliance on 20 NYCRR 536.1(b)(5) as grounds for reasonable cause is misplaced.

That after an audit of petitioners' books and records disclosed a gross understatement of taxable sales, petitioners made no effort to correct this situation as evidenced by the results of the second audit. Petitioners had such an obligation regardless of a pending petition. Accordingly, the Audit Division properly imposed penalty and interest on the additional taxes found due for the period March 1, 1978 through November 30, 1980.

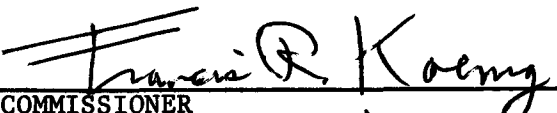
C. That the petitions of Dieter Klein and Juergen Klein, d/b/a Lakeview Delicatessen, and Juergen Klein and Joseph Gagliano, d/b/a Lakeview Delicatessen, are denied and the penalties and interest asserted by the Audit Division are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 124
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Dustin Klein & Joseph Klein</i> <i>1100 Lakeview Delicateron</i>	
Street and No. <i>675 Woodfield Ave</i>	
P.O., State and ZIP Code <i>West Hempstead NY 11552</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 470 316 120
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Juergen Klein & Joseph Klein</i> <i>1100 Lakeview Delicateron</i>	
Street and No. <i>675 Woodfield Rd</i>	
P.O., State and ZIP Code <i>West Hempstead NY 11552</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
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0, Feb. 1982

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Sent to <i>Harold W Seidman</i>	
Street and No. <i>2 Stuart Dr. W.</i>	
P.O., State and ZIP Code <i>Culen Cove NY 11542</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
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