

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

November 30, 1983

Kushner's Delicatessen, Inc.  
185 Richards St.  
Brooklyn, NY 11231

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  
Irving Cimring  
314 W. 53rd St., 2nd Fl.  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Kushner's Delicatessen, Inc. :  
AFFIDAVIT OF MAILING  
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 9/1/76 - 2/29/80. :  
\_\_\_\_\_ :

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 30th day of November, 1983, he served the within notice of Decision by certified mail upon Kushner's Delicatessen, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kushner's Delicatessen, Inc.  
185 Richards St.  
Brooklyn, NY 11231

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  
30th day of November, 1983.

David Parchuck

Neuha Grunell

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 :  
Kushner's Delicatessen, 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 9/1/76 - 2/29/80. :  
\_\_\_\_\_

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 30th day of November, 1983, he served the within notice of Decision by certified mail upon Irving Cimring, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Irving Cimring  
314 W. 53rd St., 2nd Fl.  
New York, NY 10019

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 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  
30th day of November, 1983.

David Parchuck

Martha Brunelle

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	:	
	:	
KUSHNER'S 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 September 1, 1976	:	
through February 29, 1980.	:	

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Petitioner, Kushner's Delicatessen, Inc., 185 Richards Street, Brooklyn, New York 11231, 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 September 1, 1976 through February 29, 1980 (File No. 31979).

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 May 11, 1983 at 1:15 P.M. Petitioner appeared by Irving Cimring, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether taxable prepared food sales determined by the Audit Division for the entire audit period, based on a two-day observation, properly reflected such sales made by petitioner.

FINDINGS OF FACT

1. On September 19, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Kushner's Delicatessen, Inc. covering the period September 1, 1976 through February 29, 1980. The Notice was issued as a result of a field audit and asserted additional

sales and use tax due of \$17,583.93, plus penalty and interest of \$8,170.99, for a total of \$25,754.92.

2. Petitioner executed a consent to extend the period of limitation for the issuance of an assessment for the period September 1, 1976 through August 31, 1979 to December 20, 1980.

3. On audit, the Audit Division found that petitioner did not keep records of its taxable sales separate from its total receipts. Taxable sales were estimated on sales and use tax returns filed ranging from 24 percent to 27 percent of gross sales.

In order to verify taxable sales reported, the Audit Division reviewed purchases made during February and August, 1979 and categorized the total purchases as follows:

	<u>% of Total</u>
Non-taxable on resale	40.22%
Food for sandwiches	30.66%
Beer	13.97%
Soda	4.99%
Cigarettes	10.16%

A markup test was then performed using purchase invoices and selling prices from February, 1980. The Audit Division found the following markups on petitioner's purchases:

	<u>Markup</u>
Beer	46.75%
Soda	52.13%
Cigarettes	28.94%

Using the aforesaid percentages of purchases and markups, the Audit Division determined taxable sales other than prepared food to be \$100,934.00 for the period September 1, 1976 through August 31, 1979.

An observation of prepared food sales was made on March 14 and March 17, 1980 of \$261.38 and \$200.96, respectively. The Audit Division averaged the two days' sales and multiplied \$214.00<sup>1</sup> by the number of days the business operated during the audit period. The Audit Division thereby determined prepared food sales of \$176,550.00 for the period September 1, 1976 through August 31, 1979 and total taxable sales of \$277,484.00 for that period. Petitioner reported taxable sales of \$92,566.00 for the period September 1, 1976 through August 31, 1979, an error in reporting of 199.77 percent. The Audit Division updated its audit findings to include September 1, 1979 to February 29, 1980 by applying the error rate to taxable sales reported for the entire audit period and determined additional taxable sales of \$213,183.00 and sales tax due thereon of \$17,353.53.

The Audit Division also determined use tax due of \$230.40 on fixed asset purchases which is not at issue.

4. Petitioner contended that the audit results regarding prepared food sales is not valid because these sales were computed from two days' observations outside the audit period which have no significance to the audit period itself. Petitioner argued that costs and selling prices rose during the audit period and that no consideration was given for bad weather when sales might have been less than those determined per day. Petitioner offered no evidence of increases in sales prices during the audit period or any sales records indicating a fluctuation in sales. Petitioner admitted that its prepared food sales could not be determined exactly.

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<sup>1</sup> Apparently an error was made in averaging the two days' sales.

5. Petitioner also argued that such factors as sales of meat by the pound which were not taxable and spoilage were not considered in the audit findings. The audit method employed to determine taxable prepared food sales has no relation, however, to nontaxable sales or purchases not sold.

6. Petitioner brought out the fact that if prepared food sales were deleted from the audit findings, its taxable sales estimated on sales and use tax returns filed would be nearly in agreement. Petitioner offered no evidence of reasonable cause to warrant any reduction of penalty and interest.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of external indices to determine taxable sales receipts when returns filed are insufficient or when an exact amount of tax due cannot be determined from information available. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

B. That petitioner did not maintain records sufficient to determine the exact amount of its taxable sales. The audit method employed by the Audit Division using purchases to determine the amount of taxable sales and an observation of actual taxable sales of prepared food being made was not an unreasonable calculation. Exactness is not required when it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination. (Matter of Markowitz v. State Tax Commission, 44 N.Y.2d 684; Matter of Grant Co. v. Joseph, 2 N.Y.2d 196.)

That petitioner failed to show any error in the determination.

C. That the petition of Kushner's Delicatessen, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 19, 1980 is sustained with applicable penalties and interest thereon.

DATED: Albany, New York

NOV 30 1983

STATE TAX COMMISSION

*Richard A. Allen*  
PRESIDENT

*Frank R. Koenig*  
COMMISSIONER

*Mark J. Friedman*  
COMMISSIONER



P 481 208 485

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Kusner Deludion</i>	
Street and No. <i>185 Leland St</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11231</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 481 208 486

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Young Cuming</i>	
Street and No. <i>314 W. 53rd St 2 fl</i>	
P.O., State and ZIP Code <i>New York NY 10019</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