

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

July 13, 1983

Carl J. Licata, Et Al
d/b/a Jiffy Mart
255 Walnut St.
Lockport, NY 14094

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
Vincent J. Sanchez
Magavern, Magavern, Lowe, Beilewech, Dopkins & Fadale
20 Cathedral Park
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Carl J. Licata, Et Al :
d/b/a Jiffy Mart :
: 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 :
9/1/76-8/31/79. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of July, 1983, she served the within notice of Decision by certified mail upon Carl J. Licata, Et Al, d/b/a Jiffy Mart, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Carl J. Licata, Et Al
d/b/a Jiffy Mart
255 Walnut St.
Lockport, NY 14094

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
13th day of July, 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	:	
Carl J. Licata, Et Al	:	
d/b/a Jiffy Mart	:	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 9/1/76-8/31/79.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of July, 1983, she served the within notice of Decision by certified mail upon Vincent J. Sanchez the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

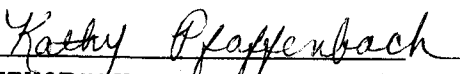
Vincent J. Sanchez
Magavern, Magavern, Lowe, Beilewech, Dopkins & Fadale
20 Cathedral Park
Buffalo, NY 14202

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
13th day of July, 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	:	
CARL J. LICATA, JOSEPH S. LICATA,	:	DECISION
THOMAS J. LICATA and SALVATORE W. LICATA	:	
d/b/a JIFFY MART	:	
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 August 31, 1979.	:	

Petitioners, Carl J. Licata, 26 Eisenhower Drive, Lockport, New York 14094, Joseph S. Licata, 5728 Leete Road, Lockport, New York 14094, Thomas J. Licata, 384 East Avenue, Lockport, New York 14094 and Salvatore W. Licata, 55 Grasmere Road, Lockport, New York 14094, d/b/a Jiffy Mart, 255 Walnut Street, Lockport, New York 14094, 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 August 31, 1979 (File No. 31531).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission 65 Court Street, Buffalo, New York, on September 16, 1982 at 1:15 P.M., with all briefs to be submitted by November 30, 1982. Petitioners appeared by Vincent J. Sanchez, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division was authorized to use a "test period" and markup audit as a basis for determining additional sales taxes due when petitioner maintained complete books and records.

FINDINGS OF FACT

1. Petitioners, Carl J. Licata, Joseph Licata, Thomas J. Licata and Salvatore W. Licata, d/b/a Jiffy Mart, operated two grocery stores and a Hallmark card store in Lockport, New York. One of the grocery stores was closed in November 1978. Petitioner reported the sales from the three businesses on a consolidated sales tax return.

2. Petitioners executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to December 20, 1980.

3. On July 21, 1980, 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 covering the period September 1, 1976 through August 31, 1979 for taxes due of \$32,048.07, plus minimum statutory interest of \$6,699.82, for a total of \$38,747.89.

4. Petitioners maintained the following books and records for audit: cash receipts and disbursement journals, cash register tapes, daily and monthly sales summaries, purchase invoices, sales and income tax returns.

The Audit Division reconciled gross sales and sales tax collected for each store from the cash receipts journal with sales tax returns filed. Cash register tapes were compared to daily sales summaries and to the cash receipts journal with no discrepancies noted.

A markup test was performed for selected items sold in the card store. The test revealed an average markup of 71.2 percent. Petitioners books and records reflected a markup of 68.1 percent and therefore, the auditor accepted the accuracy of the sales reported for the card store.

For the grocery store operations, the auditor analyzed purchase invoices for the months of September 1977, April 1979 and July 1979 to determine purchases of items that would result in taxable sales when resold. The purchases were categorized as follows: cigarettes - \$27,929.05, beer - \$24,206.82, soft drinks - \$15,938.00, greeting cards - \$492.81, paperbacks - \$2,130.29, candy - \$6,804.20 and miscellaneous - \$8,717.04. Said purchases of taxable items represented 51 percent of total purchases for the sample months. Markup percentages were computed for each category of purchases based on costs and selling prices in effect at the time of the audit. The resultant markups were applied to the above categories of purchases to determine a weighted average markup of 35.6 percent.

The Audit Division applied 51 percent to total purchases from the disbursements journal to arrive at taxable purchases of \$1,108,914.97. The weighted markup of 35.6 percent was applied to taxable purchases to determine taxable sales of \$1,479,647.71 (allowances were made for employee discounts and pilferage). Petitioners reported taxable sales of \$1,021,817.96, leaving additional taxable sales of \$457,829.75 and tax due thereon of \$32,048.07.

5. Petitioners argued that the books and records maintained were complete and adequate and that, from such records it was possible to verify taxable sales receipts without resorting to test period audit procedures. Therefore, the audit procedures lacked a rational basis for application and were improperly applied.

The Audit Division took the position that the cash register tapes did not identify the specific item sold and therefore the auditor was unable to verify that sales tax was properly charged on taxable items. The Audit Division

maintained that such an omission from the tape necessitated the use of tests to verify taxable sales.

6. Petitioners' cash registers produced both a detailed tape which is given to the customer showing each transaction with applicable sales tax and a summary tape showing total sales and sales tax collected by categories. The cash register tapes categorized sales as follows: health and beauty aids, frozen foods, produce, taxable groceries, nontaxable groceries, magazines, soda pop, beer, candy, dairy and meat. The summary tapes were available to the auditor for the entire period under review.

The summary tapes were petitioners' source of recording sales on the daily sales summary and in the cash receipts journal from which quarterly sales tax returns were prepared.

7. Taxable sales reported by petitioners for the grocery stores over the audit period averaged 40 percent of gross sales.

8. Notwithstanding petitioners' position with respect to the use of a test period audit, petitioners argued that the audit did not adequately provide for employee purchases and theft and did not give consideration to "loss leaders" and inventories.

Petitioners produced no evidence to support the foregoing argument.

CONCLUSIONS OF LAW

A. That although there is statutory authority for the use of a "test period" to determine the amount of tax due, resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which

makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44.

That from the cash register tapes retained by petitioners, the audit Division could not determine if sales tax was charged on all taxable items. Therefore, such documents were inadequate for verifying taxable sales or ascertaining the exact amount of tax due.

B. That the audit procedures set forth in Finding of Fact "4" disclosed a significant variance with taxable sales reported (an increase of 45 percent) to conclude that sales tax was not properly charged on all items subject to tax. That such a discrepancy established the inadequacy and unreliability of petitioners' books and records (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

Accordingly, the determination of additional taxes due was proper in accordance with the provisions of section 1138(a) of the Tax Law (Matter of Chartair, supra, Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

C. That the petitioners failed to sustain their burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

D. That the petition of Carl J. Licata, Joseph S. Licata, Thomas J. Licata and Salvatore W. Licata, d/b/a Jiffy Mart is denied and the Notice of

Determination and Demand for Payment of Sales and Use Taxes Due issued July 21,
1980 is sustained.

DATED: Albany, New York

JUL 13 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 208 020

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Carl J. Lpcata, E+M	
d/b/a Jiffy Mart	
Street and No.	
255 Walnut St.	
P.O., State and ZIP Code	
Lockport, NY 14094	
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 481 208 021

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Vincent J. Sanchez	
Mogavern, Mogavern, Howe,	
Bellevue, N.Y. 14202	
Street and No.	
20 Cathedral Park	
P.O., State and ZIP Code	
Buffalo, NY 14202	
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