

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

May 27, 1983

Thomas Maloney
d/b/a T's Superette
7116 Abbott Rd.
N. Boston, NY 14110

Dear Mr. Maloney:

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
Lawrence A. Ceglia
4211 Seneca St.
W. Seneca, NY 14224
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Thomas Maloney
d/b/a T's Superette

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
12/1/76-11/30/79.

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Thomas Maloney d/b/a T's Superette, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas Maloney
d/b/a T's Superette
7116 Abbott Rd.
N. Boston, NY 14110

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
27th day of May, 1983.

David Parchuck

William 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	:	
Thomas Maloney	:	
d/b/a T's Superette	:	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 12/1/76-11/30/79.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Lawrence A. Ceglia the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence A. Ceglia
4211 Seneca St.
W. Seneca, NY 14224

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
27th day of May, 1983.

David Parchuck

James A. Highland
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THOMAS MALONEY	:	DECISION
d/b/a T'S SUPERETTE	:	
	:	
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, 1976	:	
through November 30, 1979	:	

Petitioner, Thomas Maloney d/b/a T's Superette, 7116 Abbott Road, N. Boston, New York 14110 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period December 1, 1976 through November 30, 1979 (File No. 29569).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 25, 1981 at 9:00 A.M. Petitioner appeared with Lawrence A. Ceglia, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division to determine additional sales taxes due from petitioner were proper.

FINDINGS OF FACT

1. Petitioner, Thomas Maloney d/b/a T's Superette operated a grocery store until November, 1979 when the business was sold.
2. On March 12, 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 petitioner covering the period December 1, 1976 through November 30,

1979 for taxes due of \$12,835.54, plus minimum statutory interest of \$1,863.01, for a total of \$14,698.55.

3. On audit, the Audit Division analyzed purchase invoices for the period March 1, 1979 through August 31, 1979 and determined the following purchases would result in a taxable sale when sold: beer - \$63,799.80, soda - \$3,617.78 and candy and tobacco - \$2,886.97. Said purchases represented 71 percent of total purchases for the test period.

A weighted markup was computed for each of the above categories of taxable purchases based on the cost and selling prices in effect in November, 1979. The resultant markups were applied to applicable purchases to arrive at taxable sales of \$93,039.11 for the test period. Petitioner reported taxable sales of \$62,231.00 leaving additional taxable sales of \$30,808.11 or an error factor of 49.2 percent for the six month test period. The error factor was applied to reported taxable sales for the audit period to determine total additional taxable sales of \$183,364.94 and tax due thereon of \$12,835.54.

4. Subsequent to the audit, the error factor was adjusted to 42.1 percent because of an error in the original markup computations. The revised weighted average markup was 25.8 percent.

5. Petitioner argued that the Audit Division's use of a test period as a basis for determining the tax liability for the entire period under review was not proper since he maintained sufficient books and records to conduct a complete audit.

6. Petitioner maintained the following books and records: cash register tapes, daily sales record, monthly profit and loss statement, purchase invoices, and sales and income tax returns. The monthly profit and loss statement indicated total sales, itemized purchases and expenses, gross profit, net income or loss and tax collected.

7. Petitioner's total purchases for the audit period amounted to \$473,583.00.

8. Petitioner's cash register tapes did not delineate taxable and nontaxable sales. The Audit Division maintained that as such, it was unable to verify the accuracy of taxable sales reported and necessitated the use of markup tests.

CONCLUSIONS OF LAW

A. That from the cash register tapes retained by petitioner 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. Accordingly, the Audit Division was authorized to determine petitioner's taxable sales from such information as was available pursuant to section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44).

B. That the Audit Division erroneously computed additional taxable sales and such sales are hereby revised as follows:

Total purchases	\$473,583
Taxable percentage	<u>71%</u>
Taxable purchases	\$336,244
Weighted markup	25.8%
Taxable sales	422,995
Taxable sales reported	<u>372,693</u>
Additional taxable sales	50,302
Tax Due	\$3,521.14

6. That the petition of Thomas Maloney d/b/a T's Superette is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 12, 1980; and that, except as so granted, the petition is in all other respects denied.

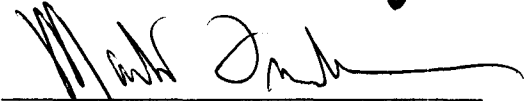
DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 832

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Thomas Maloney	
d/b/a T'S Superette	
Street and No.	
7116 Abbott Rd.	
P.O., State and ZIP Code	
N. Boston, NY 14110	
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 481 207 833

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Lawrence A. Caglia	
Street and No.	
4211 Seneca St.	
P.O., State and ZIP Code	
W. Seneca, NY 14224	
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	
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PS Form 3800, Feb. 1982