

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

July 8, 1983

Henry Masin, Individually and as Officer
of Kent's 14th St. Corp.
69-58 182nd St.
Flushing, NY 11365

Dear Mr. Masin:

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
J. David Kindman
Schmall & Kindman
155 East 38th Street
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Henry Masin, Individually and as Officer :
of Kent's 14th St. Corp. : 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:
6/1/71 - 9/30/72.

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 8th day of July, 1983, she served the within notice of Decision by certified mail upon Henry Masin, Individually and as Officer, of Kent's 14th St. Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Henry Masin, Individually and as Officer
of Kent's 14th St. Corp.
69-58 182nd St.
Flushing, NY 11365

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
8th 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 :
Henry Masin, Individually and as Officer :
of Kent's 14th St. Corp. :

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 6/1/71 - 9/30/72.

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 8th day of July, 1983, she served the within notice of Decision by certified mail upon J. David Kindman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. David Kindman
Schmall & Kindman
155 East 38th Street
New York, NY 10016

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
8th 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	:	
	:	
HENRY MASIN, INDIVIDUALLY AND AS	:	DECISION
OFFICER OF KENT'S 14TH ST. CORP.	:	
	:	
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 June 1, 1971 to	:	
September 30, 1972.	:	

Petitioner, Henry Masin, individually and as an officer of Kent's 14th St. Corp., 69-58 182nd Street, Flushing, New York 11365, 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 June 1, 1971 to September 30, 1972 (File No. 25772).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1981 at 9:15 A.M. Petitioner appeared by Schmall & Kindman (J. David Kindman, CPA). The Audit Division appeared by Ralph J. Vecchio, Esq. (James Morris, Esq., of counsel).

ISSUE

Whether, in the absence of any books and records, the Audit Division properly determined the sales tax liability of petitioner, as an officer of Kent's 14th St. Corp.

FINDINGS OF FACT

1. On June 28, 1974, the Audit Division issued to petitioner, Henry Masin, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, asserting liability against him as an officer of Kent's 14th St. Corp. ("Kent's")

for sales taxes for the period June 1, 1971 through September 30, 1972, plus penalties and interest, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY AND INTEREST</u>	<u>TOTAL</u>
8/31/71	\$ 3,243.31	\$1,232.45	\$ 4,475.76
11/30/71	3,534.86	1,237.20	4,772.06
2/29/72	3,596.95	1,151.02	4,747.97
5/31/72	4,664.66	1,352.75	6,017.41
8/31/72	5,250.00	1,365.00	6,615.00
9/30/72	1,750.00	402.50	2,152.50
	<u>\$22,039.78</u>	<u>\$6,740.92</u>	<u>\$28,780.70</u>

2. Mr. Masin was an employee and the secretary-treasurer of Kent's, a restaurant located at 20 East 14th Street, New York, New York. The restaurant was a dual operation, consisting of a coffee shop with counter and tables and a hot dog stand. The principal food items sold were hamburgers, hot dogs, beverages, and the ninety-nine cent meal which included soup or juice, a hot plate and a beverage.

3. Kent's patrons were mostly office workers from nearby businesses. Thus, when some of these businesses relocated uptown, Kent's sales declined. Sales suffered further when a drug store and a retail store, each with large counters and fountain service, opened on the same block. As Mr. Masin stated, the business "...was going downhill. I kept throwing money back into it. I thought business was going to get better."

4. On September 20, 1972 Kent's was sold for \$16,939.00 in cash and promissory notes totalling \$59,500.00.

Sales for the nine-day period immediately prior to the sale of the business (September 11 through September 19) were \$2,661.84. These sales were reflected in the Statement of Closing of Title.

In December, 1972, the purchasers defaulted. Mr. Masin subsequently recovered the business, and in March, 1973, the corporation filed bankruptcy.

5. Petitioner's attorney advised him to turn over to the trustees all the books and records of the corporation. Mr. Masin stated that he submitted to them register tapes, the general ledger and payroll records.

6. Sometime during the first half of 1974, a sales tax examiner of the Audit Division attempted to conduct an audit of Kent's books and records. Petitioner and his accountant both informed the examiner that all books and records were in the hands of the trustees. Upon inquiry the examiner determined that the trustees were only in possession of payroll records and bank statements. The examiner contacted petitioner or his accountant on approximately five more occasions, requesting access to other records from which sales and sales tax could be calculated. Because his efforts proved unsuccessful, the examiner made an estimated assessment.

7. The examiner used gross sales for the period ended February 28, 1971 (\$69,458.00) as the starting point for his calculations. He estimated sales of \$75,000.00 per quarter, assuming a moderate increase and taking inflation into account. For June 1 through June 30, 1971, when only meals selling for \$1.00 or more were taxable, he estimated that 75 percent of sales were taxable. Thereafter, due to statutory changes, all sales were taxable.

8. Kent's reported and paid sales taxes for the period June 1, 1969 through November 30, 1970, in the following amounts:

<u>PERIOD ENDED</u>	<u>SALES TAX PAID</u>
8/31/69	\$750.50
11/30/69	638.10
2/28/70	634.80
5/31/70	697.80
8/31/70	845.10
11/30/70	937.80

Kent's reported gross and taxable sales and paid sales taxes for the period December 1, 1970 through May 31, 1972 in the following amounts:

<u>PERIOD ENDED</u>	<u>GROSS SALES</u>	<u>TAXABLE SALES</u>	<u>SALES TAX REPORTED & PAID</u>
2/28/71	\$69,458.00	\$11,870.00	\$ 712.20
5/31/71	11,906.00	11,906.00	714.36
8/31/71	22,417.00	22,417.00	1,569.19
11/30/71	24,502.00	24,502.00	1,715.14
2/29/72	23,615.00	23,615.00	1,653.05
5/31/72	20,080.00	20,080.00	1,405.60*

* Kent's remitted payment for only \$585.34.

9. Petitioner maintains that the assessment is arbitrary and excessive in amount for the following reasons:

- (a) The estimate began with gross sales for a quarter which included the Christmas season, when many shoppers patronized Kent's.
- (b) The gross sales figure is "gratuitous" insofar as it does not enter into any computation on the return.
- (c) The examiner failed to consider that sales were declining.
- (d) The examiner failed to consider any sales as for consumption off-premises and therefore non-taxable.

CONCLUSIONS OF LAW

A. That paragraph (1) of subdivision (a) of section 1138 of the Tax Law empowers the State Tax Commission, in the event a return is incorrect or insufficient, to determine the proper amount of sales tax from such information as may be available. If necessary, the tax may be estimated, based upon external indices. The method applied must be "reasonably calculated to reflect the taxes due." Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206.

B. That records reflecting sales and the tax payable and charged thereon were not made available to the sales tax examiner (or to the Commission). The Audit Division was therefore justified in its resort to estimate procedures. Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858 (3rd Dept.). The examiner's assumption of a "moderate increase" was inappropriate, however, in light of Mr. Masin's testimony that the business was declining.

The Audit Division is hereby directed to recalculate the assessment, employing the gross sales figure for the period ended February 28, 1971 of \$69,458.00 and treating as taxable 75 percent of sales made between June 1 and June 30, 1971.

C. That there has been no gross negligence or willful intent to disobey the tax law on petitioner's part; therefore, all penalties and interest in excess of the minimum amount of interest prescribed by statute are remitted.
20 NYCRR 536.1.

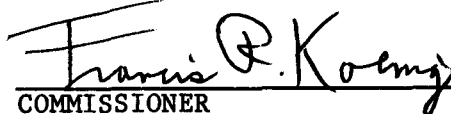
D. That the petition of Henry Masin, individually and as an officer of Kent's 14th St. Corp., is granted to the extent indicated in Conclusions of Law "B" and "C"; the Audit Division is directed to modify accordingly the Notice of Determination and Demand issued on June 28, 1975; and except as so granted, the petition is in all other respects denied.

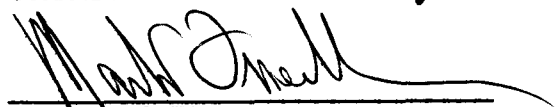
DATED: Albany, New York

STATE TAX COMMISSION

JUL 08 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 982

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Henry Masin, Individually</i> <i>and as Officer of Kent's 14th St. G.P.</i>	
Street and No. <i>69-58 182nd St.</i>	
P.O., State and ZIP Code <i>Flushing, NY 11365</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 481 207 983

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>J. David Kindman</i> <i>Schmall & Kindman</i>	
Street and No. <i>155 East 38th Street</i>	
P.O., State and ZIP Code <i>New York, NY 10016</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