

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

July 8, 1983

Timothy P. O'Brien  
d/b/a Petrol Service Station  
c/o Roche & Wolkenbreit  
90 State St.  
Albany, NY 12207

Dear Mr. O'Brien:

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  
Jeb B. Wolkenbreit  
Roche & Wolkenbreit  
Suite 1436, 90 State St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Timothy P. O'Brien :  
d/b/a Petrol Service Station : 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 :  
12/1/70-2/29/72. :  
\_\_\_\_\_

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 Timothy P. O'Brien d/b/a Petrol Service Station, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Timothy P. O'Brien  
d/b/a Petrol Service Station  
c/o Roche & Wolkenbreit  
90 State St.  
Albany, NY 12207

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	:	
Timothy P. O'Brien	:	
d/b/a Petrol Service Station	:	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 12/1/70-2/29/72.	:	

---

State of New York  
County of Albany

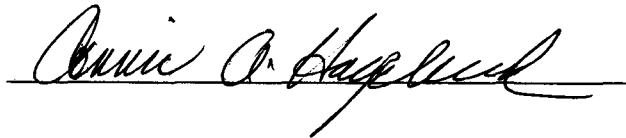
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon Jeb B. Wolkenbreit the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jeb B. Wolkenbreit  
Roche & Wolkenbreit  
Suite 1436, 90 State St.  
Albany, NY 12207

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	:	
TIMOTHY P. O'BRIEN	:	
d/b/a PETROL SERVICE STATION	:	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, 1970 through	:	
February 29, 1972.	:	

---

Petitioner, Timothy P. O'Brien d/b/a Petrol Service Station, 65 Meadow Lane, Albany, New York, 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, 1970 through February 29, 1972 (File No. 01504).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on January 13, 1981 at 9:15 A.M. Petitioner appeared by Jeb B. Wolkenbreit, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul LeFebvre, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed an application for a hearing to review the Audit Division's determination of additional sales taxes due issued March 19, 1974.

II. Whether the Audit Division properly determined additional sales taxes due from petitioner for the period September 1, 1970 through February 29, 1972.

FINDINGS OF FACTS

1. During the period at issue, petitioner, Timothy P. O'Brien d/b/a Petrol Service Station, operated a gasoline service station located at 1358 New Scotland Avenue, Albany, New York. The business was discontinued on or about January 1, 1972.

2. On December 18, 1973, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period September 1, 1970 through November 30, 1970 for taxes due of \$2,000.00, plus penalty and interest of \$800.00, for a total of \$2,800.00. On March 13, 1974, said Notice was adjusted to \$2,224.72, including tax, penalty and interest.

The Audit Division issued a second Notice on March 19, 1974 covering the period December 1, 1971 through February 29, 1972 for taxes due of \$8,331.24, plus penalty and interest of \$2,864.76, for a total of \$11,196.00. The foregoing notices were issued as a result of a field audit.

3. Petitioner timely filed an application for a hearing to review the determination issued December 18, 1973. However, the Audit Division raised the issue that a timely protest was not received with respect to the Notice issued March 19, 1974.

4. At the time the audit was to be performed, petitioner was out of business for approximately one year. Sometime during this period, flooding occurred in the basement of petitioner's residence and destroyed most of the business records. The only records available were worksheets showing the calculation of petitioner's sales tax liability reported for the periods ending November 30, 1970 and August 31, 1971. Therefore, the Audit Division contacted

petitioner's supplier of gasoline to obtain the quantity of gasoline purchased by petitioner for said periods. The supplier's records indicated 698,371 gallons of gasoline delivered to petitioner as compared to 447,868 gallons reported sold by petitioner on his worksheets. Because of this discrepancy, the Audit Division listed gallons of gasoline delivered to petitioner for the entire audit period as shown in the supplier's records. The supplier's suggested retail selling price was applied to the number of gallons, resulting in additional sales taxes due of \$9,886.99.

5. On January 16, 1975, an informal conference was held by representatives of the Albany District Office regarding the audit described herein. A Notice of Calendar Call was sent to petitioner on June 25, 1975. Petitioner was notified of a small claims hearing on July 11, 1978. A Default Order dated January 24, 1979 was issued to petitioner for failure to appear at said hearing; however, the default was subsequently vacated.

The Audit Division contended that the first evidence of a protest to the Notice issued March 19, 1974 is a letter dated May 22, 1975 from petitioner's representative. Said letter also makes reference to Protest #PR 284-12, which was the Audit Division's system of recording taxpayer protests prior to December, 1975. Such reference indicates that a protest was filed prior to the date of the letter.

6. The Audit Division obtained the quantity of gasoline purchased by petitioner from a ledger maintained by the supplier. The ledger indicated a location code for the purchaser, number of gallons delivered, delivery date and suggested selling price. Petitioner examined the same ledger, as well as

delivery slips which were also provided by the supplier. Petitioner argued that the delivery slips examined showed that in many instances the actual gallons delivered were less than what was recorded in the ledger and thus explains the discrepancy found by the Audit Division.

Petitioner offered no documentary evidence to support this argument.

7. Petitioner acted in good faith at all times and did not willfully attempt to evade the tax.

#### CONCLUSIONS OF LAW

A. That considering the actions of the Audit Division and the State Tax Commission prior to this proceeding as set forth in Finding of Fact No. "5", it is hereby determined that petitioner timely applied for a hearing pursuant to section 1138(a) of the Tax Law.

B. That the Audit Division, in the absence of sufficient books and records, properly determined additional sales taxes due from petitioner based on such information as was available and external indices in accordance with the provisions of section 1138(a) of the Tax Law.

That petitioner has failed to meet his burden of showing error  
(Matter of Manny Convissar v. State Tax Commission, 69 AD2d 929).

C. That the penalty and interest in excess of the minimum statutory rate are cancelled.


D. That the petition of Timothy P. O'Brien d/b/a Petrol Service Station is granted to the extent indicated in Conclusion of Law "C". That the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued December 18, 1973 and March 19,

1974; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

JUL 08 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

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

~~July 8, 1983~~

*Remailed  
July 21 1983*

Dear Mr. O'Brien:

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  
Jeb B. Wolkenbreit  
Roche & Wolkenbreit  
Suite 1436, 90 State St.  
Albany, NY 12207  
Taxing Bureau's Representative

P 481 208 007

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Timothy P. O'Brien Albany Petrol Service Station c/o Roche & Wolkenbreit	
Street and No. 90 State St.	
P.O., State and ZIP Code Albany, NY 12207	
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 481 208 008

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Jeb B. Wolkenbreit Roche & Wolkenbreit	
Street and No. Suite 1436, 90 State St.	
P.O., State and ZIP Code Albany, NY 12207	
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

TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N.Y. 12227

*John G. P. 1/5*

Jeb B. Wolkenbreit  
Roche & Wolkenbreit  
Suite 1436, 90 State St.  
Albany, NY 12207

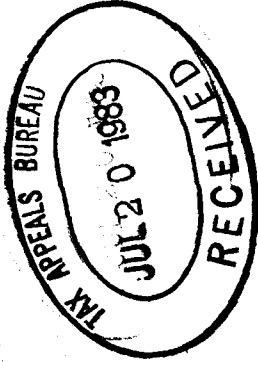
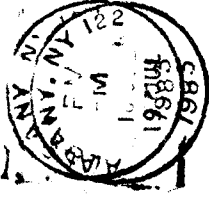
CERTIFIED

P 481 208 008

MAIL

TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227



*and app*

Timothy P. O'Brien  
d/b/a Petrol Service Station  
c/o Roche & Wolkenbreit  
90 State St.  
Albany, NY 12207



**CERTIFIED**

**P 481 208 007**

**MAIL**