

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

December 20, 1983

Pings Delicatessen, Inc.
63-12 Woodhaven Blvd.
Rego Park, NY 11374

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 & 1243 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
John T. Landers
62-87 Woodhaven Blvd.
Rego Park, NY 11374
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Pings 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 6/1/76-5/31/79.

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 20th day of December, 1983, he served the within notice of decision by certified mail upon John T. Landers, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John T. Landers
62-87 Woodhaven Blvd.
Rego Park, NY 11374

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
20th day of December, 1983.

David Parchuck

James A. O'Keefe
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Pings 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 6/1/76-5/31/79.

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 20th day of December, 1983, he served the within notice of decision by certified mail upon Pings Delicatessen, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

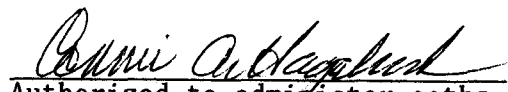
Pings Delicatessen, Inc.
63-12 Woodhaven Blvd.
Rego Park, NY 11374

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
20th day of December, 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	:	
	:	
PINGS 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 June 1, 1976	:	
through May 31, 1979.	:	

Petitioner, Pings Delicatessen, Inc., 63-12 Woodhaven Boulevard, Rego Park, New York 11374, 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, 1976 through May 31, 1979 (File Nos. 31478 and 31858).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1983 at 9:15 A.M., with additional evidence to be submitted by March 15, 1983. Petitioner appeared by John T. Landers, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Pings Delicatessen, Inc., operated a delicatessen located at 63-12 Woodhaven Boulevard, Rego Park, New York.
2. On September 19, 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 June 1, 1976 through May 31, 1979 for taxes due of \$9,575.99, plus interest of \$2,105.68, for a total of \$11,681.67.

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

4. Petitioner provided the Audit Division with the following books and records for audit: A day book listing total receipts on a daily basis, purchase invoices, sales tax returns and federal income tax returns. Petitioner did not have cash register tapes or any record of taxable sales, and purchase records were incomplete. The taxable sales reported by petitioner on sales tax returns filed for the audit period were estimated at 10 percent of gross sales for the period June 1, 1976 through November 30, 1978 and 15 percent for periods thereafter. Petitioner's inadequate recordkeeping necessitated the use of a markup test to determine taxable sales.

The Audit Division analyzed purchase invoices for August, 1978 and February, 1979 and found that 39.37 percent of these purchases were items that would result in a taxable sale when resold. This percentage was applied to total purchases from petitioner's federal income tax return for the fiscal year 1978 to determine taxable purchases of \$34,680.64.

A markup test was conducted using costs and selling prices in effect at the time of the audit. The average markup for the taxable items was 60.19 percent. The taxable purchases determined above were marked up 60.19 percent to arrive at taxable sales of \$55,554.92. This amount was adjusted to \$54,999.37 to allow 1% for pilferage. Petitioner reported taxable sales of \$13,017.48 for the same period, leaving additional taxable sales of \$41,981.89 or an increase of 322.5 percent. This margin of error was applied to taxable sales reported

for the audit period to determine total additional taxable sales of \$119,699.12 and taxes due thereon of \$9,575.99.

5. Petitioner argued that it was burglarized numerous times during the audit period. Petitioner was unable to obtain copies of police reports to substantiate the extent of its losses of merchandise (loss of currency would have no effect on the computation of taxable sales).

CONCLUSIONS OF LAW

A. That petitioner failed to keep the records required by section 1135 of the Tax Law and therefore, the Audit Division properly determined petitioner's tax liability from "such information as was available" as authorized in section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That in view of petitioner's inadequate recordkeeping, the Audit Division reasonably calculated petitioner's tax liability and petitioner has not overcome its burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That the petition of Pings 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.

DATED: Albany, New York

DEC 20 1983

STATE TAX COMMISSION

Richard W. Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

P 470 315 192

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Ping Pong Delicatessen Inc.</i>	
Street and No. <i>63-12 Woodhaven Blvd</i>	
P.O., State and ZIP Code <i>Rego Park, NY 11374</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 470 315 193

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>John T. Landers</i>	
Street and No. <i>62-87 Woodhaven Blvd</i>	
P.O., State and ZIP Code <i>Rego Park, NY 11374</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