

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

November 10, 1983

Rainbow Restaurant, Inc.
1 E. Kingsbridge Rd.
Bronx, NY 10468

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
William P. Jacobs
25-41 31st St.
Astoria, NY 11105
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rainbow Restaurant, Inc. :
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 3/1/76-5/31/79. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Rainbow Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rainbow Restaurant, Inc.
1 E. Kingsbridge Rd.
Bronx, NY 10468

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
10th day of November, 1983.

March L. Drunelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rainbow Restaurant, Inc. :
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 3/1/76-5/31/79. :
_____ :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon William P. Jacobs the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William P. Jacobs
25-41 31st St.
Astoria, NY 11105

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
10th day of November, 1983.

Martha L. Druselle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RAINBOW RESTAURANT, 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 March 1, 1976	:	
through May 31, 1979.	:	

Petitioner, Rainbow Restaurant, Inc., 1 East Kingsbridge Road, Bronx, New York 10468, 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 March 1, 1976 through May 31, 1979 (File No. 29418).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 24, 1982, and continued to completion on December 2, 1982. Petitioner appeared by William Paul Jacobs, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from petitioner for the period March 1, 1976 through May 31, 1979.

II. Whether the assessment of additional sales taxes for the period March 1, 1976 through May 31, 1976 was timely issued.

FINDINGS OF FACT

1. Petitioner, Rainbow Restaurant, Inc., is the operator of a 24 hour diner type restaurant in the Bronx, New York. It filed quarterly New York

State and Local Sales and Use Tax Returns during the period March 1, 1976 through May 31, 1979.

2. On September 20, 1979, 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 for taxes due of \$127,291.28 plus penalty and interest of \$50,617.49 for the period March 1, 1976 through May 31, 1979.

3. A consent extending the period of limitation to assess sales and use taxes for the period March 1, 1976 through May 31, 1976 was not executed by petitioner, and no evidence was offered to show that the quarterly return for said period was late filed.

4. On audit, the Audit Division's auditor reviewed petitioner's sales tax returns, Federal and State income tax returns, check disbursement journal and monthly bank statements. He requested but did not receive a day book, cash register tapes and purchase bills. The documents examined revealed that petitioner's bank deposits and cash payouts exceeded the gross sales reported on the sales and use tax returns by \$56,112.00 and the sales recorded in the books by \$29,158.00.

The auditor next requested, but was denied, permission to conduct an on-premises observation test. Thereafter, on two separate occasions, Audit Division employees observed and recorded the number of persons leaving petitioner's diner. The guest checks and register tapes for the two 24 hour periods observed were secured by the auditor and analyzed to determine the average sale per records. The average sale was then multiplied by the number of persons observed leaving the diner to arrive at audited taxable sales. The auditor found that the audited taxable sales were 321.7 percent greater than the sales petitioner recorded. This 321.7 percentage was applied to sales petitioner reported on

its sales and use tax returns for the audit period resulting in additional taxable sales of \$1,591,141.00 and a tax due thereon of \$127,291.28.

5. The surveys administered by the Audit Division occurred on Friday and Saturday, August 24 and 25, 1979 and Wednesday and Thursday, August 29 and 30, 1979. Each survey lasted 24 hours and resulted in the following head count of persons leaving petitioner's diner.

<u>TIME</u>	<u>AUGUST 24, 25</u>	<u>AUGUST 29, 30</u>
8:00 - 9:00 A.M.	38	40
9:00 - 10:00	31	42
10:00 - 11:00	32	24
11:00 - 12:00	31	30
12:00 - 1:00 P.M.	37	37
1:00 - 2:00	56	69
2:00 - 3:00	34	36
3:00 - 4:00	23	44
4:00 - 5:00	25	46
5:00 - 6:00	25	26
6:00 - 7:00	44	44
7:00 - 8:00	35	44
8:00 - 9:00	45	32
9:00 - 10:00	47	33
10:00 - 11:00	38	25
11:00 - 12:00	47	18
12:00 - 1:00 A.M.	42	35
1:00 - 2:00	30	28
2:00 - 3:00	46	22
3:00 - 4:00	65	25
4:00 - 5:00	100	36
5:00 - 6:00	73	31
6:00 - 7:00	26	8
7:00 - 8:00	7	53
TOTALS	977	*853

*The correct total is 828

6. At the hearing, petitioner argued that a survey was unnecessary since records were maintained during the audit period. It introduced into evidence summary records to support the taxable sales and sales tax reported on the sales and use tax returns. These summary records can not be verified as

petitioner destroyed its guest checks after retaining them for a period of one month.

7. Petitioner further argued that the survey failed to take into account the seating capacity of the diner, the number of employees, and other factors particular to the business and its location.

Petitioner's president testified that the diner has a seating capacity of 80 to 84 persons and employs "not more than seven or eight" persons in any 24 hour period that it is open. During the period under review, three people worked a shift from 9:00 P.M. to 8:00 A.M.; two from 8:00 A.M. to 11:00 A.M.; four from 11:00 A.M. to 5:00 P.M. and three from 5:00 P.M. to 9:00 P.M. This scheduling allowed for the fullest employment during "lunchtime itself, the busiest time, from 1:00 to 2:30, 3:00 o'clock." He further testified that the diner has one cigarette machine and two public telephones as well as rest rooms all of which attract a considerable amount of traffic due to the diner's proximity to a subway entrance and the neighborhood schools. This store traffic does not always result in a sale of food or drink by petitioner.

8. That 4 percent of the persons observed by the Audit Division leaving petitioner's diner purchased cigarettes or used the public telephone or restrooms and were not customers of petitioner.

9. Petitioner did not maintain adequate books and records from which the Audit Division could determine the exact amount of sales tax.

10. Petitioner did not raise the issue of penalty and interest.

CONCLUSIONS OF LAW

A. That resort to the use of a test as a method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually

impossible to verify such liability and conduct a complete audit. Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44.

B. That in the absence of adequate books and records, the test adopted by the Audit Division to determine petitioner's taxable sales and sales tax due was proper.

C. That it is incumbent upon petitioner to show that the additional taxes due as determined by the Audit Division were incorrect. Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929.

D. That petitioner has shown by a fair preponderance of the evidence that the projection of sales by the Audit Division was not a fair representation of the sales actually made by Rainbow Restaurant, Inc., in that it did not allow for persons using petitioner's facilities without purchasing food or drink in accordance with Finding of Fact "8". Moreover, the total persons counted in the August 29-30 survey is 828 persons and not 853.

E. That exactness is not required where it is the petitioner's own failure to maintain proper records which prevents exactness in the determination of sales tax liability. Markowitz v. State Tax Commission, 54 A.D.2d 1023, 44 N.Y.2d 684.

F. That section 1147(b) of the Tax Law provides, in part, "except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return."

G. That the assessment of additional sales tax for the period March 1, 1976 through May 31, 1976 was not timely issued.

H. That the petition of Rainbow Restaurant, Inc. is granted to the extent indicated in Conclusions of Law "D" and "G" above; that the Audit Division is


directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 121

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Rainbow Restaurant</i>	
Street and No. <i>12 Kingsbridge Rd.</i>	
P.O., State and ZIP Code <i>Bronx, NY 10468</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 470 315 122

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>William P. Jacobs</i>	
Street and No. <i>25-41 31st St.</i>	
P.O., State and ZIP Code <i>Astoria, NY 11105</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	\$
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