

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

September 30, 1983

Rainbow III Restaurant, Inc.
2197 White Plains Rd.
Bronx, NY 10462

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
John R. Serpico
186 Joralemon St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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

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 30th day of September, 1983, she served the within notice of Decision by certified mail upon Rainbow III Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rainbow III Restaurant, Inc.
2197 White Plains Rd.
Bronx, NY 10462

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
30th day of September, 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 :
Rainbow III Restaurant, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 6/1/76-5/31/79. :

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 30th day of September, 1983, she served the within notice of Decision by certified mail upon John R. Serpico 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 R. Serpico
186 Joralemon St.
Brooklyn, NY 11201

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
30th day of September, 1983.

Susan Powell

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
RAINBOW III 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 June 1, 1976	:	
through May 31, 1979.	:	

Petitioner, Rainbow III Restaurant, Inc., 2197 White Plains Road, Bronx, New York 10462, 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 No. 30364).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 28, 1982 at 3:10 P.M. Petitioner appeared by John R. Serpico, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the Audit Division, in the absence of adequate records, properly determined petitioner's taxable sales based upon a field audit of petitioner's restaurant.

FINDINGS OF FACT

1. Petitioner, Rainbow III Restaurant, Inc. ("Rainbow III"), is a restaurant which has two cash registers, seating for patrons at about fourteen booths, each of which seat four to six people, and twelve stools at a counter. There is a kitchen in the back of the restaurant. Rainbow III employs two cashiers, one cook, one dishwasher, and three or four waitresses.

2. On March 5, 1980 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1976 through May 31, 1979 for taxes due of \$44,714.08, plus interest of \$7,876.15, for a total of \$52,590.23.

3. Rainbow III did not maintain books and records for the audit period. The only documents available to the auditors for inspection were tax returns. In order to conduct the audit, Mr. Arsenis, the president of Rainbow III, and the auditor agreed to an observation test. This test was conducted by two auditors who observed the actual sales of Rainbow III for a twenty-four hour period on two non-consecutive days. The restaurant's average daily sales according to this test were \$903.50. However, the restaurant's average daily sales reported on the sales tax returns, after adjustment for nontaxable bakery sales and reconciliation with the restaurant's Federal returns, were \$411.18 for the period June 1, 1979 through August 31, 1979. Thus, the observed sales were 120 percent greater than the adjusted reported sales. This percentage increase was then applied to Rainbow III's total sales (regular and bakery sales) during the audit period of \$372,765.00, resulting in adjusted gross sales during the audit period of \$820,083.00. The reported taxable sales of Rainbow III restaurant during the audit period of \$261,157.00 were subtracted from the adjusted gross sales during the audit period to arrive at \$558,926.00 of additional taxable sales. This resulted in an additional tax due of \$44,714.08.

4. The restaurant's reported gross sales on its sales tax returns were not accepted by the auditors because of the discrepancy between the reported gross sales and the actual sales which occurred during the observation test. Petitioner's purported nontaxable bakery sales were considered by the auditors to be a part of the additional taxable sales, since the auditors did not

observe any bakery sales which in their opinion were nontaxable during their two days of observation. The auditors found that during the audit period recurring expenses were insignificant and that there were no fixed assets to check.

5. In the course of their audit, the auditors observed a substantial amount of baked goods on hand consisting mostly of Danish pastry. The auditors did not observe a bakery counter or large quantities of Danish pastry being bought and taken out of the restaurant. However, the auditors did see some sales being made of doughnuts or Danish pastry with coffee for consumption outside of the restaurant.

6. At the hearing, Mr. George Arsenis testified that sometime prior to June 1, 1979, the restaurant was usually open five days a week for twelve hours a day and open on Saturdays from 9:00 a.m. until 7:00 p.m. However, Mr. Arsenis further testified that, in the period prior to June 1, 1979, the restaurant would, on occasion, be open for longer hours when there were customers present and he had sufficient help to keep the restaurant open. Mr. Arsenis could not recall at the hearing exactly when the restaurant's hours changed, or produce documentation showing when the restaurant's hours changed. The utility expenses of Rainbow III during the audit period did not reflect a significant change in the hours of the restaurant's operation over the period of the audit.

7. During the audit period the restaurant sold whole cheesecakes for consumption outside of the restaurant.

8. Three percent of the restaurant's gross sales consisted of sales of doughnuts, Danish pastry, or cheesecakes for off-premises consumption.

9. The tax returns of Rainbow III restaurant were prepared by an accountant based upon documentation which Mr. Arsenis would give to this accountant on a monthly basis.

CONCLUSIONS OF LAW

A. That Rainbow III Restaurant, Inc. failed to keep the records required by section 1135 of the Tax Law. Therefore, it was proper for the Audit Division to utilize such external indices as were available in determining the amount of tax due (Tax Law §1138(a)). Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices (cf. Matter of Markowitz v. State Tax Comm., 54 A.D.2d 1023, aff'd 44 N.Y.2d 684; Matter of APC Superette, Inc. (Seller), State Tax Commission, November 26, 1979).

B. That the sales of doughnuts, Danish pastry and cheesecakes for off-premises consumption are not subject to New York sales and use tax [Tax Law §1105(d)(i)(3); 20 NYCRR 527.8(3)]. In accordance with Finding of Fact "8", the Audit Division is directed to reduce petitioner's gross sales which it found subject to sales tax by three percent as an adjustment for nontaxable bakery sales.

C. That except for the nontaxable bakery sales noted in Conclusion of Law "B", the tax was properly estimated as provided for in section 1138(a) of the Tax Law.

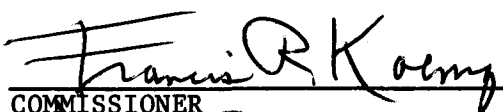
D. That the petition of Rainbow III Restaurant, Inc. is granted to the extent of Conclusion of Law "B" and is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 30 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 032

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Rainbow III Restaurant, Inc.	
Street and No.	
2197 White Plains Rd.	
P.O., State and ZIP Code	
Bronx, NY 10462	
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 470 316 033

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
John R. Serpico	
Street and No.	
186 Joralemon St.	
P.O., State and ZIP Code	
Brooklyn, NY 11201	
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