

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

February 11, 1983

Ristorante Puglia Ltd.  
189 Hester St.  
New York, NY 10013

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 Laws 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  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Leonard Balin  
299 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

Ristorante Puglia Ltd. :

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:  
6/1/72 - 11/30/76.

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State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of February, 1983, he served the within notice of Decision by certified mail upon Ristorante Puglia Ltd., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ristorante Puglia Ltd.  
189 Hester St.  
New York, NY 10013

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  
11th day of February, 1983.

David Parchuck

Arnold P. Hagellund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Ristorante Puglia Ltd.

:  
:  
: 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 6/1/72 - 11/30/76.

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State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of February, 1983, he served the within notice of Decision by certified mail upon Leonard Balin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Balin  
299 Broadway  
New York, NY 10007

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  
11th day of February, 1983.

David Parchuck

Annunzio A. Haymond

**AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174**

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RISTORANTE PUGLIA LTD.

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, 1972  
through November 30, 1976.

DECISION

Petitioner, Ristorante Puglia Ltd., 189 Hester Street, New York, New York 10013, 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, 1972 through November 30, 1976 (File No. 21887).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 3, 1982 at 9:30 A.M. and continued to conclusion on February 4, 1982 at 1:45 P.M. Petitioner appeared by Leonard Bailin, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo A. Scopellito, Esq., of counsel).

#### ISSUE

Whether the Audit Division used proper audit procedures in determining petitioner's sales tax liability.

#### FINDINGS OF FACT

1. In 1977, as the result of an anonymous "squeal" telephone call, the Special Investigation Bureau performed a field audit of the books and records of petitioner, Ristorante Puglia Ltd. On December 6, 1977, as a result of the audit, a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due was issued against petitioner and Joseph Garafolo, Anthony Mancuso and Mary Mancuso, individually and as officers, in the amount of \$79,685.31 plus penalty and interest of \$50,258.12 for a total due of \$129,943.43 for the period June 1, 1972 through November 30, 1976.

2. Included in the aforesaid notice was a 50 percent fraud penalty. At the hearing the Audit Division determined that, since there was no provable fraud, all 50 percent fraud penalties should be cancelled. Furthermore, the Audit Division determined that the quarters ending August 31, 1972 and November 30, 1972 were outside the statute of limitations and since there was no provable fraud which would remove the statute of limitations bar, these two quarters should be eliminated from the assessment.

3. During the period in issue, petitioner operated a medium size, family style Italian restaurant located in the "Little Italy" area of New York City. The restaurant served food at prices which were lower than those of similar restaurants in the area. In the latter part of 1973 petitioner opened another restaurant in Brooklyn known as Puglia By The Sea. The second restaurant only remained in business for a little over a year and closed in the summer of 1975.

4. Petitioner's books and records consisted only of worksheets listing checks disbursed, worksheets listing bank deposits, a worksheet which related bank deposits to income tax returns and a daybook which was six months behind in posting. Petitioner could produce no guest checks or register tapes for the entire audit period. Petitioner claimed that it kept guest checks but that they were scattered during a burglary and eventually thrown away. Petitioner also did not keep any purchase records or invoices. The only evidence of purchases made was a worksheet listing checks disbursed.

5. On audit, in view of petitioner's lack of adequate purchase records, the auditor conducted a canvass of all of petitioner's suppliers as well as all other suppliers in the area for the years 1973, 1974 and 1975. The canvass results indicated that there were greater amounts of purchases in 1974 than in either of the other years. The auditor increased the amounts of the 1973 and 1975 purchase figures to bring them up to within the range of the 1974 figure because he did not think that all the purchases were reflected in the figures received from the canvass for those years. Due to lack of any purchase figures for the years 1972 and 1976, the auditor estimated those amounts based on the 1973 through 1975 figures.

6. Once the auditor had determined the purchases for each year he applied mark-up percentages to the various categories of purchases to compute total sales. This mark-up method was used due to the fact that petitioner kept no records of any of its sales for the audit period other than what it reported on its sales tax returns and what it recorded as bank deposits. These records were deemed wholly inadequate by the auditor to arrive at a taxable sales figure. The auditor used mark-up percentages based on prior field audits of similar restaurants; the percentages, however, were lower than average mark-up percentages due to the low prices and large portions of food served in petitioner's restaurant.

7. Petitioner maintained that the reason for the higher amount of purchases for 1974 was that the Brooklyn restaurant was in operation at that time and all purchases were made through the first restaurant and sent to Brooklyn by station wagon. Petitioner's testimony alleged that when the Brooklyn restaurant closed the purchases returned to the pre-1974 level. Petitioner presented testimony and notarized statements from suppliers stating that these suppliers

were aware that part of the purchases were going to the Brooklyn restaurant. Petitioner was unable, however, to produce any evidence showing what percentage of the purchases were actually accountable to the second restaurant. The Brooklyn restaurant's records were as inadequate as those of petitioner's first restaurant, therefore no accurate figures reflecting the amount of purchases used by the second restaurant could be ascertained.

8. Petitioner also contested the mark-up percentages used by the Audit Division arguing that the low prices charged and the large portions served by the restaurant were indicative of a much lower mark-up. Petitioner, however, could not demonstrate by any evidence that a more accurate mark-up percentage could be determined. Due to the lack of adequate purchase invoices and records, the auditor could not conduct a standard mark-up test.

9. Petitioner further argued that the auditor should have made allowances for spoilage and employee meals but was unable to substantiate either of these allowances by any credible evidence.

#### CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person required to collect tax to maintain records of its sales and to make these records available for audit. Section 1138(a) of the Tax Law requires the state, when conducting an audit, to determine the amount of tax due "from such information as may be available" but "[i]f necessary, the tax may be estimated on the basis of external indices" (See Korba v. New York State Tax Commission, 84 A.D.2d 655). Inasmuch as petitioner's purchase records were so inadequate as to render them useless in conducting an audit, the auditor was justified in canvassing petitioner's suppliers and, based on the canvass results, in estimating the purchase amounts for the years in issue. In view of the condition of

petitioner's records and the inherent limitations of the canvass procedure, the purchase figures arrived at by the auditor were reasonable.

B. That when a taxpayer's records are not sufficient to provide an adequate basis on which to determine the amount of tax due, percentage mark-up audits are permissible. "Moreover, when a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit" (Korba, supra; Meyer v. State Tax Commission, 61 A.D.2d 223, 228 mot. for lv. to app. den. 44 N.Y.2d 645). Because of petitioner's lack of any usable records to determine taxable sales, it was reasonable for the auditor to apply mark-up percentages based on his experience and results of prior audits of similar businesses. The auditor took into account the nature of petitioner's business by using lower mark-up percentages in arriving at taxable sales.

C. That section 1132(c) of the Tax Law places on petitioner the burden of showing that any particular item of food was not taxable. Petitioner failed to meet this burden with respect to the allowances for employee meals and losses through spoilage. Petitioner produced no records to show the numbers of meals consumed by employees. Petitioner also failed to produce any evidence of the amount of food lost through waste and spoilage. "Neither the Tax Commission nor the auditor was required to fix an allowance for those items through speculation" (Korba, supra at 657).

D. That in view of the Audit Division's admitted inability to prove fraud on the part of petitioner, the 50 percent fraud penalty and the deficiency for the quarters ending August 31, 1972 and November 30, 1972 as discussed in Finding of Fact "2" are hereby cancelled.

E. That the petition of Ristorante Puglia Ltd. is granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is hereby



directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 6, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

*Robert A. Buechel*  
PRESIDENT

*Francis R. Koeng*  
COMMISSIONER

*Mark J. Zindel*  
COMMISSIONER

**P 389 758 556**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Restaurante Eugenia Ltd</i>	
Street and No. <i>184 West St</i>	
P.O., State and ZIP Code <i>New York, NY 10013</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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

**P 389 758 555**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Leonard Balin</i>	
Street and No. <i>899 Broadway</i>	
P.O., State and ZIP Code <i>New York, NY 10007</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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982