

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

May 27, 1983

Vincent Santucci  
and Vincent Santucci Enterprises, Inc.  
2777 Grove St.  
East Meadow, NY 11554

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  
Owen L. Kilgannon  
Kilgannon & Furey  
18 Unqua Rd.  
Massapequa, NY 11758  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Vincent Santucci :  
and Vincent Santucci Enterprises, 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 :  
5/1/76 - 11/7/78. :  
\_\_\_\_\_

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Vincent Santucci and Vincent Santucci Enterprises, Inc., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vincent Santucci  
and Vincent Santucci Enterprises, Inc.  
2777 Grove St.  
East Meadow, NY 11554

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  
27th day of May, 1983.

David Parchuck

James R. Heyland  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Vincent Santucci	:	
and Vincent Santucci Enterprises, 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 5/1/76 - 11/7/78.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Owen L. Kilgannon the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Owen L. Kilgannon  
Kilgannon & Furey  
18 Unqua Rd.  
Massapequa, NY 11758

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  
27th day of May, 1983.

David Parchuck

James A. Haglund

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	:	
VINCENT SANTUCCI	:	DECISION
and VINCENT SANTUCCI ENTERPRISES, INC.	:	
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 November 7, 1978.	:	

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Petitioners, Vincent Santucci and Vincent Santucci Enterprises, Inc., 2777 Grove Street, East Meadow, New York 11554, 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 November 7, 1978 (File Nos. 29817 and 30193).

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 November 19, 1981 at 1:15 P.M. Petitioners appeared by Owen L. Kilgannon, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records accurately determined additional sales taxes due for the period March 1, 1976 through November 7, 1978.

FINDINGS OF FACT

1. Petitioner, Vincent Santucci Enterprises, Inc. (VSE), operated a bar known as Neptune Pub located at 487 Bellmore Avenue, East Meadow, New York. The business was sold on November 7, 1978.

2. On March 31, 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 Vincent Santucci Enterprises, Inc. covering the period March 1, 1976 through November 7, 1978 in the amount of \$23,137.04, including tax, penalty and interest.

A Notice of Assessment Review was issued subsequently that revised the taxes due to \$8,414.77, plus penalty and interest of \$4,804.77, for a total of \$13,219.54.

The Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Vincent Santucci, individually and as officer, for taxes due of \$7,994.31, plus minimum statutory interest.

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

4. On audit, the Audit Division determined that VSE made the following purchases for the audit period: liquor - \$41,280.00, beer (draft) - \$65,457.00, beer (bottled) - \$41,892.00, food - \$3,561.00 and cigarettes - \$2,974.00. Initially, estimated markups (liquor - 350 percent, draft beer - 175 percent, bottled beer - 200 percent, food - 150 percent, cigarettes - 55 percent) were applied to these purchases to arrive at VSE's taxable sales. However, VSE established that nightly specials were offered where drinks were sold at reduced prices to attract customers and therefore, the above markups were adjusted as follows: liquor - 300 percent, all beer - 175 percent and food - 100 percent. The application of the adjusted markups resulted in taxable sales of \$357,352.00.

The auditor visited the premises while under the new ownership and observed a sign indicating a \$1.00 admission charge. The auditor assumed that

VSE also charged admission and computed taxable admission charges of \$42,840.00. VSE's books and records did not reflect any income from admission charges.

VSE reported taxable sales of \$292,205.00 for the audit period as compared to taxable sales of \$400,192.00 determined above, leaving additional taxable sales of \$107,987.00 and taxes due thereon of \$7,994.31.

The audit also disclosed use taxes due of \$420.26 on purchases of supplies and fixed assets.

5. VSE provided the following books and records for examination: cash receipts and cash disbursements journals, purchase invoices, sales tax returns, bank statements and cancelled checks. VSE was unable to produce cash register tapes.

6. The estimated markups used to determine VSE's sales were based on office experience which the auditor explained were averages derived from audits of similar establishments. The Audit Division did not perform markup tests to ascertain actual markups because VSE did not have cash register tapes which the auditor determined was required to substantiate selling prices.

VSE provided the auditor with a price list for drinks, including prices for certain nightly specials, together with advertising flyers to substantiate the prices stated thereon. The auditor rejected this documentation.

7. VSE had various nightly specials during the audit period such as, ladies' night (girls drinks \$.50 all night), college night (\$.25 beer and \$.75 mixed drinks), two for one night (two mixed drinks for the price of one) and every night until 10 p.m. (\$.25 beer and \$.75 mixed drinks).

8. VSE's actual selling prices during the period at issue were those as indicated on the price list above and that, based on such selling prices and average costs of liquor and beer, petitioner's markups are as follows: liquor

- 267 percent and 120 percent (specials), draft beer - 200 percent and 100 percent (specials), bottled beer - 200 percent and 100 percent (specials). The markups used by the Audit Division for food and cigarettes were correct.

9. VSE did not charge for admission during the period under audit.

10. Reasonable cause exists for the cancellation of penalty and interest in excess of the minimum statutory rate.

#### CONCLUSIONS OF LAW

A. That in the absence of cash register tapes, the Audit Division could not independently verify VSE's sales journal for accuracy, and that under such circumstances, the Audit Division was authorized to perform a markup percentage audit in accordance with section 1138(a) of the Tax Law (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D.2d 947).

However, the estimated markups used by the Audit Division were incorrect. Petitioner's actual markups were those indicated in Finding of Fact "8"; that said markups applied to applicable purchases result in sales that are in substantial agreement with the taxable sales reported by VSE. Accordingly, the additional taxes of \$7,994.31 determined due by the Audit Division are cancelled.

B. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

C. That the petition of Vincent Santucci Enterprises, Inc. is granted to the extent indicated in Conclusions of Law "A" and "B"; that the Audit Division is hereby directed to modify the revised Notice of Determination and Demand for

Payment of Sales and Use Taxes Due; and that, except as so granted, the petition is in all other respects denied.

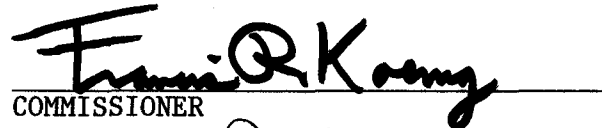
That the petition of Vincent Santucci, individually and as officer of Vincent Santucci Enterprises, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 31, 1980 is cancelled.

DATED: Albany, New York

**MAY 27 1983**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 481 207 837

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Vincent Santucci and Vincent Santucci Enterprises, Inc.	
Street and No. 2777 Grove St.	
P.O., State and ZIP Code East Meadow, NY 11554	
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 481 207 838

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Owen L. Kilgannon Kilgannon & Furey	
Street and No. 18 Ungva Rd.	
P.O., State and ZIP Code Massapequa, NY 11758	
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