

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

September 9, 1983

Idris Sari  
d/b/a Corner Luncheonette  
564 Flatbush Ave.  
Brooklyn, NY 11225

Dear Mr. Sari:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Idris Sari :  
d/b/a Corner Luncheonette :  
: 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 :  
12/1/74-11/30/77. :

---

State of New York  
County of Albany

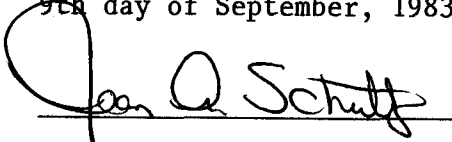
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of September, 1983, she served the within notice of Decision by certified mail upon Idris Sari d/b/a Corner Luncheonette, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

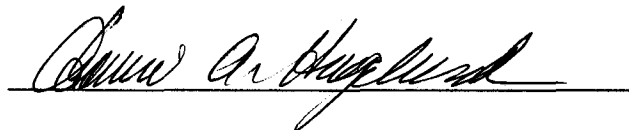
Idris Sari  
d/b/a Corner Luncheonette  
564 Flatbush Ave.  
Brooklyn, NY 11225

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  
9th day of September, 1983.

  
\_\_\_\_\_  
Jean A. Schutt

  
\_\_\_\_\_  
Connie A. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
IDRIS SARI	:	DECISION
d/b/a CORNER LUNCHEONETTE	:	
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 December 1, 1974	:	
through November 30, 1977.	:	

---

Petitioner, Idris Sari, d/b/a Corner Luncheonette, 564 Flatbush Avenue, Brooklyn, New York 11225, 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 December 1, 1974 through November 30, 1977 (File No. 28494).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 11, 1983 at 9:00 A.M. Petitioner appeared by Ara Ghazarian, Accountant. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the result of an audit performed by the Audit Division properly reflected petitioner's sales tax liability.

II. Whether petitioner's tax liability at issue should be the amount assessed or a lower amount computed prior to assessment which was presented to petitioner for his consent.

FINDINGS OF FACT

1. On November 2, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Idris Sari d/b/a Corner Luncheonette covering the period December 1, 1974 through November 30,

1977. The Notice, issued as a result of a field audit, asserted additional sales and use tax of \$9,615.19 plus penalty and interest of \$5,974.39 for a total of \$15,589.58.

2. Petitioner consented in writing to extend the period of limitation for the issuance of an assessment for the period December 1, 1974 through November 30, 1977 to March 20, 1980.

3. Petitioner operated a luncheonette which also sold newspapers, candy and tobacco products. Petitioner did not have available for verification of sales guest checks or cash register tapes. Audit report information sheets indicate that petitioner estimated taxable sales reported on sales and use tax returns filed at about 8 percent of gross sales.

4. In order to verify taxable sales, the Audit Division reviewed purchases for the months of January and May, 1977. Based on this review, the Audit Division allocated petitioner's purchases which were taxable when resold to the following categories:

<u>Category of Purchase</u>	<u>% of Total Purchases</u>
Candy and Gum	11.69%
Cigarettes	30.18%
Cigars	5.60%
Soda	6.60%
Food	29.00%
Total Taxable on Resale	<u>83.07%</u>

A markup test was then performed on April 11, 1978 using current purchase invoices and selling prices. The Audit Division determined the following markups:

	<u>Markup %</u>
Candy and Gum	56.64%
Cigarettes	20.67%
Cigars	27.77%
Soda	52.54%
Food	84.63%

The Audit Division then categorized petitioner's total purchases for the audit period of \$121,575.22 based on the percentages determined above. Deductions from food purchases were made of 2 percent or \$705.14 for spoilage and \$3,360.00 for employee meals. An adjustment to cigarette sales was made for the exclusion of the cigarette excise taxes included therein. The Audit Division then applied the markups determined to the respective category of purchases and determined taxable sales for the audit period to be \$129,400.17 and sales tax which should have been reported to be \$10,352.04. Petitioner paid sales tax of \$798.05 with sales and use tax returns filed for the period December 1, 1974 through May 31, 1977. Petitioner did not remit any sales tax for the period June 1 through November 30, 1977. The Audit Division thereby determined additional sales tax due of \$9,553.99.

Upon review of petitioner's fixed asset acquisitions, the Audit Division found a purchase amounting to \$765.00 on which no sales tax was paid. The Audit Division included tax due of \$61.20 on this purchase in its audit findings and determined petitioner's total sales and use tax liability for the audit period to be \$9,615.19.

5. As a result of a conference held with petitioner, the Audit Division adjusted its audit findings to tax due of \$8,638.52. The revision was based on the acceptance of petitioner's gross sales as recorded in its books. Deleted therefrom were exempt sales of newspapers and the exempt portion of the amount of cigarette sales claimed to have been made by petitioner.<sup>1</sup> The Audit Division

---

<sup>1</sup> Petitioner claimed more cigarette sales than that originally determined by the Audit Division in its application of the purchase ratio and markup method.

also reduced the penalties and interest assessed to the minimum statutory rate except for the period June 1 through November 30, 1977, where no sales tax had been remitted by petitioner.

6. Petitioner argued that originally, as a result of the field audit, a Consent to Fixing of Tax Not Previously Determined and Assessed had been offered by the Audit Division showing tax due of \$8,635.35. Petitioner, however, never signed the Consent. Upon correction of errors in the audit workpapers, petitioner was assessed \$9,615.19 as described in Finding of Fact "4". Petitioner argued that the adjustment made as a result of the conference should have been deleted from the original audit findings of \$8,635.35.

7. Petitioner's other arguments centered around the application of percentages based on two months reviewed which were applied to purchases for the audit period and the application of markups thereon. The audit results however no longer reflect tax due on this basis. Petitioner offered no evidence of additional nontaxable sales made over and above those allowed by the Audit Division at the conclusion of the conference held whereby petitioner's gross sales were accepted as recorded in his books and nontaxable sales were deleted therefrom.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of purchases to determine sales where returns filed are incorrect or insufficient. Where sales records are incomplete, the use of tests to verify sales reported is also authorized. (Chartair, Inc. v. State Tax Commission; 65 A.D.2d 44, 411 N.Y.S.2d 41).

That the method used by the Audit Division in the original performance of its audit was proper and in accordance with Tax Law §1138(a).

B. That as a result of a conference held, the revisions made by the Audit Division no longer reflect markup applications to petitioner's purchases. That petitioner's own recording of sales was accepted by the Audit Division and the known nontaxable sales deleted therefrom. That petitioner has failed to substantiate any more nontaxable sales than those allowed by the Audit Division in Finding of Fact "5".

C. That petitioner's argument regarding the offering by the Audit Division of a Consent to Fixing of Tax Not Previously Determined and Assessed in a lower amount than that assessed is without merit in that petitioner never executed such consent by his signature. Moreover, even if such Consent were signed, it is subject to review for any error. Matter of William Mifsud d/b/a Seven Corners Liquor Store, State Tax Commission, January 2, 1980.

D. That the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against petitioner in accordance with Finding of Fact "5".

E. That the petition of Idris Sari d/b/a Corner Luncheonette is granted to the extent indicated in Conclusion "D" above; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 09 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 208 368

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Idris SAA:</b>	
<b>Albia Cozier Luchmonette</b>	
Street and No. <b>564 Flatbush Ave</b>	
P.O., State and ZIP Code <b>Brooklyn N.Y 11225</b>	
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