

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

April 14, 1983

Schweller's Successor's Inc.
Joseph Dribinsky, Philip Dribinsky
& Bernard Colen
c/o Sol Wakstein
330 W. 42nd St.
New York, NY 10036

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
Sol Wakstein
330 W. 42nd St.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Schweller's Successor's Inc. :
Joseph Dribinsky, Philip Dribinsky :
& Bernard Colen : 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 3/1/75 - 5/31/78.

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 14th day of April, 1983, he served the within notice of Decision by certified mail upon Schweller's Successor's Inc., Joseph Dribinsky, Philip Dribinsky & Bernard Colen the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Schweller's Successor's Inc.
Joseph Dribinsky, Philip Dribinsky
& Bernard Colen
c/o Sol Wakstein
330 W. 42nd St.
New York, NY 10036

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
14th day of April, 1983.

David Parchuck

Gami 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 | : | |
| Schweller's Successor's Inc. | : | |
| Joseph Dribinsky, Philip Dribinsky | : | |
| & Bernard Colen | : | 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 3/1/75 - 5/31/78. | | |

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 14th day of April, 1983, he served the within notice of Decision by certified mail upon Sol Wakstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sol Wakstein
330 W. 42nd St.
New York, NY 10036

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
14th day of April, 1983.

David Parchuck

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SCHWELLER'S SUCCESSOR'S, INC.
JOSEPH DRIBINSKY, PHILIP DRIBINSKY
AND BERNARD COLEN

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, 1975
through May 31, 1978.

Petitioners, Schweller's Successor's, Inc., Joseph Dribinsky, Philip Dribinsky, and Bernard Colen, c/o Sol Wakstein, 330 W. 42nd Street, New York, New York 10036, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1975 through May 31, 1978 (File Nos. 25435, 25436, 25437, 25438).

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 June 17, 1982, at 9:15 A.M. Petitioners appeared by Sol Wakstein, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether it was proper for the Audit Division to estimate petitioners' sales tax liability for the period March 1, 1975 through May 31, 1978.

II. Whether a consent extending the period of limitation for assessment of sales and use taxes executed by a corporation also extends the time to assess a corporate liability against the responsible officers individually.

FINDINGS OF FACT

1. Petitioner Schweller's Successors, Inc. (hereinafter "Schwellers") operated a delicatessen located at 3411 Jerome Avenue, Bronx, New York. Schweller ceased operations on or about April 14, 1978 and filed for bankruptcy.

Schwellers sold prepared meals for on premises and off premises consumption as well as non-taxable food and grocery products.

2. On February 7, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Schwellers covering the period March 1, 1975 through May 31, 1978 for taxes due of \$45,042.98, plus minimum statutory interest of \$8,202.33, for a total of \$53,245.31. The Audit Division estimated the taxes due because Schwellers did not make books and records available for audit.

On March 7, 1979, notices were issued to petitioners Philip Dribinsky, Joseph Dribinsky and Bernard Colen for the amount of the foregoing taxes, plus penalty and interest, based on their being financially responsible officers of Schwellers.

3. Subsequent to the issuance of the notices, petitioner Schwellers produced certain books and records for audit at an informal conference with the Audit Division. The Audit Division reconciled gross sales per the general ledger with sales tax returns, Federal income tax returns and bank deposits. Also purchases per the general ledger were reconciled with Federal income tax returns. The general ledger categorized purchases for the period June 1, 1975 through May 31, 1978 as follows: liquor - \$5,252.00, beer - \$8,039.00, soda - \$16,344.00, meats - \$332,350.00, fish - \$5,186.00, poultry - \$54,723.00 and other foods - \$107,484.00 (cigarette purchases of \$7,674.00 were included in this amount). The Audit Division considered all the purchases of liquor, beer,

soda, fish and one-half of the meat and poultry purchases as sold through the restaurant operation. Estimated mark-ups were applied to each category of purchases to arrive at taxable restaurant sales of \$662,086.00. The remaining 50 percent of the meat and poultry purchases and the cigarette purchases were considered sold at the counter. Estimated mark-ups were also applied to these purchases to arrive at counter sales of \$497,628.00. It was estimated that except for cigarettes, 60 percent of the counter sales were taxable which resulted in taxable counter sales of \$299,114.00. The gross sales as estimated above (\$1,159,714.00) were less than those reported in Schwellers' books and records and, as a result, the gross per books were accepted as correct by the Audit Division. However, estimated taxable sales were \$221,466.00 greater than Schweller reported. Schweller substantiated sales of \$43,213.00 to Montefiore Hospital, an exempt organization, and therefore, the Audit Division adjusted the additional taxable sales to \$178,253.00. Said amount was increased to \$194,503.00 to include sales for the period March 1, 1975 through May 31, 1975.

4. A consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1975 through May 31, 1978, to June 20, 1979 was executed by Philip Dribinsky, as treasurer, for Schweller.

5. As a result of the audit performed, the Audit Division revised the tax due on notices referred to in Finding of Fact "2" to \$15,560.24.

6. At the time Schweller filed for bankruptcy, its books and records were turned over to the Trustee in Bankruptcy. The trustee misplaced guest checks and cash register tapes. Without these records, the Audit Division could not independently verify taxable sales reported by Schweller and for this reason, adopted the estimate procedures outlined above.

7. Schwellers recorded sales in the cash receipts journal as taxable tables, taxable counter, counter not taxable and counter not taxable due to exempt. The receipts were recorded daily from cash register tapes and guest checks kept in the ordinary course of business.

The percentage of taxable sales to gross sales was 59.3268 percent. The percentage of taxable counter sales to total counter sales was 30 percent. In comparison, the Audit Division estimates were 76.76 percent and 60 percent, respectively.

8. On a previous audit of Schwellers' books and records for the period December 1, 1966 through November 30, 1969, the Audit Division determined that 53 percent of Schwellers' sales were taxable. However, during this period, meals of less than \$1.00 were not taxable.

9. The Audit Division examined the records of Montefiore Hospital which verified the sales recorded in Schwellers' cash receipts journal as "counter not taxable due to exempt".

10. Since the Audit Division accepted the gross sales reported by Schweller and restaurant sales are taxable in their entirety, the sole estimate at issue is the percentage of taxable sales made over the counter.

The estimated mark-ups used to compute gross sales for the entire audit period were based on audits of similar businesses.

The Audit Division failed to establish the basis upon which it estimated 60 percent of counter sales were taxable.

CONCLUSIONS OF LAW

A. That, in the absence of cash register tapes and guest checks to make independent verification of taxable sales recorded in Schwellers' books and records, the Audit Division properly estimated Schwellers' tax liability as

authorized pursuant to section 1138(a) of the Tax Law. However, said section of the Tax Law also provides that the tax be estimated on the basis of external indices.

That since the Audit Division failed to establish the basis for its estimate of taxable counter sales, such estimate is erroneous. Moreover, petitioner retained guest checks and cash register tapes which would have been available for examination had the trustee not misplaced them, the exempt sales to Montefiore Hospital were independently verified for accuracy and the application of estimated mark-ups to purchases substantiated gross sales reported. These factors, although not conclusive, indicate that Schwellers' books and records were reliable. Accordingly, the additional taxes due of \$15,560.24 are cancelled.

B. That since the taxes assessed against Schweller are cancelled, Issue II is moot.

C. That the petitions of Schweller's Successor's, Inc., Joseph Dribinsky, Philip Dribinsky and Bernard Colen are granted and the notices of determination and demand for payment of sales and use taxes due issued February 7, 1979 and March 7, 1979 are cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

APR 14 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 389 758 822
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to | |
| Schwartz, Steven | |
| Street and No. | |
| 330 W. 42nd St | |
| P.O., State and ZIP Code | |
| New York, NY 10036 | |
| 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 389 758 821
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to | |
| Sol. Wapstein | |
| Street and No. | |
| 330 W. 42nd St | |
| P.O., State and ZIP Code | |
| New York, NY 10036 | |
| 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