

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

June 29, 1983

Charles Tokos, Indiv. & as Partner  
d/b/a Flower Factory  
2518 Smith Rd.  
Binghamton, NY 13905

Dear Mr. Tokos:

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  
Charles Petrolawicz  
Thompson, Watson & Company, P.C.  
3301 E. Main St.  
Endwell, NY 13760  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Charles Tokos, Indiv. & as Partner :  
d/b/a Flower Factory : 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:  
9/1/75-11/30/75 & 3/1/76-11/30/77.

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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 29th day of June, 1983, she served the within notice of Decision by certified mail upon Charles Tokos, Indiv. & as Partner, d/b/a Flower Factory the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles Tokos, Indiv. & as Partner  
d/b/a Flower Factory  
2518 Smith Rd.  
Binghamton, NY 13905

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  
29th day of June, 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  
Charles Tokos, Indiv. & as Partner :  
d/b/a Flower Factory

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 9/1/75-11/30/75 & 3/1/76-11/30/77.

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 29th day of June, 1983, she served the within notice of Decision by certified mail upon Charles Petrolawicz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles Petrolawicz  
Thompson, Watson & Company, P.C.  
3301 E. Main St.  
Endwell, NY 13760

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  
29th day of June, 1983.





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	:	
	:	
CHARLES TOKOS, INDIVIDUALLY AND AS PARTNER	:	DECISION
D/B/A FLOWER FACTORY	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods September 1,	:	
1975 through November 30, 1975 and March 1,	:	
1976 through November 30, 1977.	:	

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Petitioner, Charles Tokos, Individually and as Partner, d/b/a Flower Factory, 2518 Smith Road, Binghamton, New York 13905, 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 September 1, 1975 through November 30, 1975 and March 1, 1976 through November 30, 1977 (File No. 28027).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on February 10, 1983 at 9:15 A.M., Petitioner appeared by Charles F. Petrolawicz, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUES

I. Whether the Audit Division correctly determined the taxable sales and taxes due from the partnership operation of the Flower Factory.

II. Whether the partnership which operated the Flower Factory terminated on May 10, 1977, relieving petitioner, Charles Tokos, of his personal liability from said time.

FINDINGS OF FACT

1. Petitioner, Charles Tokos, operated the Flower Factory in partnership with William Woller. The Flower Factory had two locations within Grandway Department Stores at Binghamton and Endicott, New York and sold fresh flowers, plants and related supplies such as pots and soil.

2. On June 20, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Charles Tokos, for taxes of \$13,076.43 plus penalty and interest of \$6,971.02 for the periods September 1, 1975 through November 30, 1975 and March 1, 1976 through November 30, 1977.

3. On audit, the partnership's records were deemed incomplete and inadequate due to the auditor's findings of discrepancies in sales reported in the sales ledger, Federal partnership returns and sales tax returns, in addition to illegible and missing cash register tapes.

4. The audit began in 1979 at which time William Woller operated the Flower Factory in Binghamton as a sole proprietorship. A comparison of prices shown on purchase invoices for April 1979 to shelf marked prices revealed the sole proprietorship's markup was 139.77 percent. The auditor determined that the partnership purchased \$141,121.00 in plants and flowers over the period March 1, 1975 through November 30, 1977. She considered that 5 percent of said purchases were lost in spoilage and that 1 percent were given away to exempt organizations. The balance was added to the supply purchases of \$22,031.00 which resulted in goods for sale of \$154,755.00. Application of a 139.77 percent markup resulted in sales before adjustments of \$371,056.06.

The auditor had found that the partnership's records showed a 423.18 percent increase in sales for the week preceeding certain holidays. As the

audit period had 16 such holidays, sales for the pre-holiday weeks were increased by 423.18 percent. A further adjustment allowed for a 15 percent discount for the weekly sales succeeding a holiday. The adjustments for holidays resulted in taxable sales of \$509,644.60. The partnership reported taxable sales of \$268,818.33. The difference of \$240,846.27 was added to the \$3,600.00 which was attributable to the bulk sale of the assets at the Endicott store to arrive at additional taxable sales of \$244,434.29 and tax due of \$17,110.36 for the period March 1, 1975 through November 30, 1977.

5. At the hearing, petitioner's representative introduced into evidence income statements for the nine month period ended November 30, 1975, and the twelve month periods ended November 30, 1976 and November 30, 1977 as prepared by Thompson, Watson & Company, P.C. Said certified public accounting firm certified that the books and records used in the generation of the income statements were examined in accordance with generally accepted auditing standards and included such tests and auditing procedures as considered necessary under the circumstances. It was qualified by the statement that the gross profit method of computing some of the inventories was utilized since Thompson, Watson & Company was not engaged as accountants until late 1981.

6. The aforementioned certification was not signed by a member of Thompson, Watson & Company and did not contain the corporate seal. Thompson, Watson & Company's representative, testifying at the hearing, indicated that the sales shown on the statements were extracted from the partnership's records and that no independent reconstruction was undertaken to verify the sales.

7. The auditor's adjustments for pre-holiday weeks had the effect of increasing the normal markup of 139.77 percent to 914.66 percent during those weeks.

8. Petitioner was not assessed for the portion of the audit period December 1, 1975 through February 28, 1976 due to the three year statute of limitations. The period September 1, 1975 through November 30, 1975 was not time barred due to the late filing of the sales and use tax return for this period.

9. It was petitioner's contention that his partnership with William Woller in the Flower Factory terminated on May 10, 1977. A U.S. Partnership Return of Income filed for the Flower Factory for the calendar year 1977 and included in the auditor's field audit report indicated the partnership operated for 12 months. A Federal Schedule K-1 filed by William Woller for the calendar year 1977 and also included in the auditor's report indicated that the partnership had terminated during the year. The auditor was unable to find any record of a dissolution in the office of the Broome County Clerk. Petitioner presented no documentary evidence to substantiate the dissolution of the partnership in the period under review.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in pertinent part, that "(i)f a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...."

B. That the Audit Division properly used its authority within the meaning and intent of section 1138 in its determination of the partnership's sales and sales tax due when, in fact, sales records were not adequately maintained.

C. That the Audit Division, however, erred in increasing the pre-holiday sales. It is inconceivable that an arrangement selling normally at a 139.77

percent markup would sell prior to a holiday at a 914.66 percent markup as is reflected in the Audit Division's pre-holiday mark-up. That all sales are to be recomputed using the audited markup of 139.77 percent and making the other adjustment and allowances stated in Finding of Fact "4".


D. That the burden of proof is upon the petitioner and Charles Tokos has failed to show that he was not a partner of the Flower Factory during any part of the audit period. Charles Tokos is therefore liable for the entire amount of tax assessed as a result of the markup audit as well as the bulk sale of the furniture, fixtures, equipment and supplies.

E. That the petition of Charles Tokos, Individually and as Partner, d/b/a Flower Factory is granted to the extent indicated in Conclusion of Law "C" above; that the Audit Division is hereby directed to recompute petitioner's tax liability and accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 20, 1979; that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

JUN 29 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Charles Tokos, Individ. + as partner della Flower Factory	
Street and No. 2518 Smith Rd.	
P.O., State and ZIP Code Binghamton, NY 13905	
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 481 207 653

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Charles Petrowicz Thompson, Watson & Company, Inc.	
Street and No. 3301 E. Main St.	
P.O., State and ZIP Code Endwell, NY 13760	
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