

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

May 6, 1983

265 City Island Sea Food Market
500 City Island Ave.
Bronx, NY 10464

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
Benjamin Schmelkin
Schmelkin & Schmelkin
54 W. Broad St., P.O. Box 65
Mt. Vernon, NY 10552
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
265 City Island Sea Food Market :
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 12/1/74-5/31/78. :

AFFIDAVIT OF MAILING

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon 265 City Island Sea Food Market, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

265 City Island Sea Food Market
500 City Island Ave.
Bronx, NY 10464

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
6th day of May, 1983.

David Parchuck

James A. DeAngelis

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
265 City Island Sea Food Market :
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 12/1/74-5/31/78. :

AFFIDAVIT OF MAILING

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Benjamin Schmelkin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benjamin Schmelkin
Schmelkin & Schmelkin
54 W. Broad St., P.O. Box 65
Mt. Vernon, NY 10552

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
6th day of May, 1983.

David Parchuck

Annunzio 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	:	
265 CITY ISLAND SEA FOOD MARKET, INC.	:	DECISION
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes Due under Articles 28 and 29:	:	
of the Tax Law for the Period December 1, 1974	:	
through May 31, 1978.	:	

Petitioner, 265 City Island Sea Food Market, Inc., 500 City Island Avenue, Bronx, New York 10464, 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 May 31, 1978 (File No. 27989).

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 May 13, 1982 at 1:30 P.M. Petitioner appeared by Schmelkin & Schmelkin, CPA's (Kenneth Schmelkin, CPA). The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the result of an audit by the Audit Division, which utilized an observation test of petitioner's business, properly reflects additional sales tax due from petitioner for the period December 1, 1974 through May 31, 1978.

FINDINGS OF FACT

1. On November 20, 1978, the Audit Division issued to petitioner, 265 City Island Sea Food Market, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the aggregate amount of \$44,293.00, plus

penalty and interest. This Notice was the result of an audit and covered the period from December 1, 1974 through May 31, 1978.

2. Petitioner, by its president, Pat Capasso, executed on December 8, 1977, a consent allowing assessment of sales and use taxes for the period December 1, 1974 through November 30, 1977 to be made at any time on or before September 20, 1978. On June 19, 1978, a second, similar consent was executed, allowing assessment for the same period to be made at any time on or before December 20, 1978.

3. Petitioner, a corporation utilizing a cash basis system of accounting, operates a seafood restaurant and also is engaged, to some extent, in wholesale and retail fish sales. Petitioner's business premises are located at 500 City Island Avenue, Bronx, New York.

4. An initial examination of petitioner's books and records by the Audit Division revealed the existence of a day book wherein wholesale sales, retail sales and restaurant sales were entered daily. In addition, there were sales invoices claimed to be for wholesale sales. These invoices contained a name and a dollar amount, but did not show the purchaser's address. Sales tax returns, as filed by petitioner, were also available. Petitioner's records did not include either cash register tapes or guest checks.

5. The Audit Division conducted an observation test of petitioner's premises during the period commencing on Thursday, July 13, 1978 and continuing through Sunday, July 16, 1978.¹ The premises were observed each day from noon until midnight, with the observation including wholesale sales, market food,

¹ Petitioner's premises were also observed by the Audit Division during a portion of Sunday, July 23, 1978, but the results of this day of observation were not utilized by the Audit Division in computing the asserted deficiency.

restaurant sales and bar sales. Total sales for this four (4) day period, as based on this observation test, were as follows:

<u>Restaurant Sales</u>	<u>Bar Sales</u>	<u>Market Food</u>	<u>Wholesale</u>
\$4,886.10	\$229.55	\$1,087.50	\$422.50

6. For each category of sales tested (e.g. bar sales, restaurant sales, etc.), the lowest daily sales figure found during the test period was multiplied by three (3) and added to the above four-day totals from the observation test period (for each category) to arrive at a weekly total sales figure. This total figure was then multiplied by the number of weeks in the quarter (13) to arrive at projected total sales of \$127,481.00 and taxable sales of \$83,159.00 for the quarter ended August 31, 1978. The taxable sales were comprised of the restaurant sales and bar sales.

7. Taxable sales of \$14,865.00, as reported by petitioner on form ST-100 for the quarter ended August 31, 1977, were increased by sixteen percent (16%) to reflect menu price increases between 1977 and 1978. This resulted in an adjusted taxable sales total of \$17,243.00 for the quarter ended August 31, 1977. Finally, the projected taxable sales figure of \$83,159.00, per the observation test (see Finding of Fact "6"), was reduced by \$17,243.00 (reported taxable sales for the quarter ended August 31, 1977, as adjusted) to arrive at additional taxable sales of \$65,916.00.

8. Additional taxable sales (\$65,916.00) over adjusted taxable sales (\$17,243.00) resulted in a margin of increase of three hundred eighty two percent (382%), which was applied through the entire audit period (December 1, 1974 through May 31, 1978) to taxable sales as reported by petitioner.

9. Petitioner contests the use of an observation test and asserts that, notwithstanding the lack of cash register tapes and guest checks, it was

possible to verify petitioner's tax liability on the basis of the existing records kept by petitioner. In addition, petitioner asserts that changes in its business facilities, including increases in the amount of restaurant seating and retail bar space, made after the period at issue but prior to the Audit Division's observation test, should cause reduction of the amount found by the Audit Division as unreported taxable sales. Finally, petitioner asserts that the Audit Division understated the portion of sales made by petitioner to wholesale buyers, and also that the Division conducted its test during the busiest season for petitioner's business.

10. Petitioner asserts that the tax, penalty and interest at issue herein were cancelled as the result of a pre-hearing conference held on June 9, 1980. However, the Audit Division was not properly notified of this conference and was not represented at this conference. Accordingly, a second conference was held, following proper notice to both parties, resulting in no cancellation of any portion of the taxes, penalty or interest at issue.

11. Petitioner did not produce resale certificates from its wholesale customers, nor was the Audit Division able to obtain a complete file of invoices for such customers (see Finding of Fact "4").

CONCLUSIONS OF LAW

A. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Matter of George Korba v. New York State Tax Comm., et al., 84 A.D.2d 655.

B. That where the taxpayer's records are insufficient or inadequate for use in conducting an audit, it is permissible to utilize a test period in determining the amount of tax due. Matter of George Korba, supra.

C. That petitioner had neither cash register tapes nor guest checks from which the Audit Division could verify amounts entered on petitioner's books and records and ultimately reported on petitioner's sales tax returns. Accordingly, the Audit Division's use of figures resulting from an observation of petitioner's business during the specified test period to determine petitioner's tax liability was proper. Furthermore, petitioner has not produced evidence substantiating either the asserted changes in its business operation or facility or the claimed higher amount of wholesale sales such as would invalidate the method or result of the Audit Division's audit.


D. That the petition of 265 City Island Sea Food Market, Inc. is hereby denied and the Notice of Determination and Demand dated November 20, 1978, together with such penalty and interest as may be lawfully owing, is sustained.

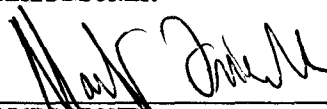
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 743

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
265 City Island Sea Food	
Street and No. MARKET	
500 City Island Ave	
P.O., State and ZIP Code	
BRONX N.Y. 10464	
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 481 207 744

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Benjamin Schmeltz	
Street and No. Schmeltz + Schmeltz	
54 W. 34th St P.O. Box 65	
P.O., State and ZIP Code	
MT. VERMONT N.Y. 10552	
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