

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

September 9, 1983

Uniondale Farms, Inc.
c/o Norman Heiman
266 Wyckoff Ave.
Brooklyn, NY 11237

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
Norman Heiman
266 Wyckoff Ave.
Brooklyn, NY 11237
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Uniondale Farms, Inc. :
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 3/1/79-11/11/80. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

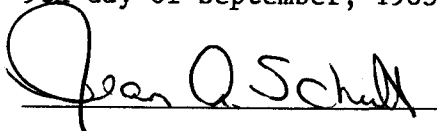
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of September, 1983, she served the within notice of Decision by certified mail upon Uniondale Farms, Inc., the petitioner in the within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

Uniondale Farms, Inc.
c/o Norman Heiman
266 Wyckoff Ave.
Brooklyn, NY 11237

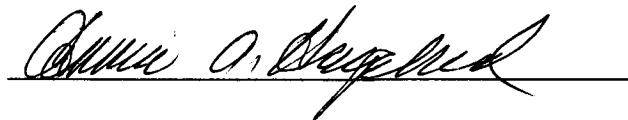
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 Q. Schull



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
UNIONDALE FARMS, INC.	:	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, 1979	:	
through November 11, 1980.	:	

Petitioner, Uniondale Farms, Inc., c/o Norman Heiman, 266 Wyckoff Avenue, Brooklyn, New York 11237, 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, 1979 through November 11, 1980 (File No. 32952).

On February 21, 1983, petitioner filed a waiver of hearing and requested that this matter be decided by the State Tax Commission on the basis of the contents of the file and additional worksheets to be submitted by petitioner by March 30, 1983. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Uniondale Farms, Inc., operated a fruit and vegetable store located at 973 Front Street, Uniondale, New York. Petitioner also sold grocery and dairy products.

The business was sold on November 11, 1980 to Remunco, Inc. for \$115,000.00. The sales price of the furniture and fixtures was \$5,000.00 on which petitioner remitted a bulk sales tax of \$350.00.

2. On February 20, 1981, 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 petitioner covering the period March 1, 1979 through November 11, 1980 for taxes due of \$3,924.88, plus interest of \$283.16, for a total of \$4,208.04.

3. On audit, the Audit Division analyzed purchase invoices for the months of February, 1980 and August, 1980 to determine the percentage of items purchased that would result in a taxable sale when resold. This analysis revealed that purchases in the categories of meat, produce and bakery were entirely nontaxable and comprised 68 percent of total purchases. Of the remaining categories of purchases (grocery and dairy), the Audit Division found that 46 percent of grocery and 1.02 percent of dairy were taxable items. These percentages were applied to total purchases for the audit period in those categories to arrive at taxable purchases of \$87,217.95. The taxable purchases were marked up 25 percent to determine taxable sales of \$109,002.44. (The markup of 25 percent was based on the auditor's experience with audits of similar businesses.) The taxable sales were adjusted to \$107,387.10 to allow 1½ percent for pilferage. Petitioner reported taxable sales of \$56,187.00 for the same period, leaving additional taxable sales of \$51,250.10 and taxes due thereon of \$3,587.51.

The audit also disclosed use taxes due of \$160.13 on expense purchases and \$177.24 on fixed assets. Petitioner did not contest its liability with respect to these taxes in the petition or perfected petition.

4. Petitioner did not retain cash register tapes; consequently, the Audit Division could not independently verify the sales recorded in petitioner's books and records.

5. Petitioner contended that the test months used by the Audit Division did not accurately reflect the actual percentage of taxable grocery purchases over the entire audit period. Petitioner alleged that the actual percentage was 32 percent rather than 46 percent.

6. At a pre-hearing conference, petitioner was given the opportunity to perform a test for the months of January, 1980 and September 1980 to determine the percentage of taxable purchases. Petitioner submitted incomplete tests. Petitioner was given additional time to complete the tests; however, it did not comply.

7. Petitioner offered no evidence in any form to show that the Audit Division's determination was erroneous.

CONCLUSIONS OF LAW

A. That petitioner's failure to retain cash register tapes as required by section 1135 of the Tax Law justified the use of the "test period" method of audit to determine petitioner's taxable sales (Matter of McCluskey's Steak House, Inc. v. State Tax Commission, 80 A.D.2d 713; Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D.2d 947).


B. That the Audit Division reasonably calculated petitioner's tax liability and that petitioner failed to overcome its burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

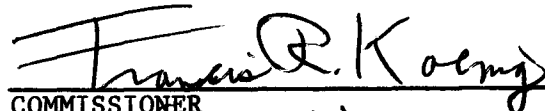
C. That the petition of Uniondale Farms, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 20, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 09 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to LEONARDO FARRAS	
Street and No. CLORAN HEIMAN	
266 Wyckoff Ave	
P.O., State and ZIP Code BROOKLYN N.Y. 11237	
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 481 208 370

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to NORMAN HEIMAN	
Street and No. 266 Wyckoff Ave	
P.O., State and ZIP Code BROOKLYN N.Y. 11237	
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