

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

November 10, 1983

Vincent's Gourmet, Ltd.
and Vincent Pernicone, Individually and as an Officer
c/o Vincent Pernicone
St. George Ferry Terminal
Staten Island, NY 10301

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
Jack M. Portney
207 Main St., Box 346
Fort Lee, NJ 07024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Vincent's Gourmet, Ltd. :
and Vincent Pernicone, Individually and as an Officer : 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 :
September 1, 1974 - August 31, 1977. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Vincent's Gourmet, Ltd. and Vincent Pernicone, Individually and as an Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vincent's Gourmet, Ltd.
and Vincent Pernicone, Individually and as an Officer
c/o Vincent Pernicone
St. George Ferry Terminal
Staten Island, NY 10301

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
10th day of November, 1983.

Maucha L. Drunelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Vincent's Gourmet, Ltd. :
and Vincent Pernicone, Individually and as an Officer :
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 :
September 1, 1974 - August 31, 1977. :

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 State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Jack M. Portney the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack M. Portney
207 Main St., Box 346
Fort Lee, NJ 07024

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
10th day of November, 1983.

Martha L. Linnelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
VINCENT'S GOURMET, LTD.	:	DECISION
and VINCENT PERNICONE,	:	
Individually and as an Officer	:	
	:	
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, 1974	:	
through August 31, 1977.	:	

Petitioners, Vincent's Gourmet, Ltd. and Vincent Pernicone, individually and as an officer, c/o Vincent Pernicone, St. George Ferry Terminal, Staten Island, New York 10301, 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, 1974 through August 31, 1977 (File No. 21727).

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 10, 1983 at 9:45 A.M. Petitioner appeared by Jack M. Portney, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division used proper audit procedures in determining petitioners' sales tax liability.

FINDINGS OF FACT

1. On December 19, 1977, 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 petitioners, Vincent's Gourmet, Ltd. ("Vincent's") and

Vincent Pernicone, individually and as an officer, in the amount of \$42,793.76, plus penalty and interest of \$17,996.51 for a total due of \$60,790.27, for the period September 1, 1974 through August 31, 1977.

2. Petitioners operated a store with a take-out counter located in the Staten Island Ferry Terminal. Petitioners sold coffee to go in the morning to ferry passengers. Petitioners also sold sandwiches, beer, soda and baked goods. Customers had to enter the premises for service; however, there was no seating or other facilities for on-premises consumption. Petitioners employed four or five persons.

3. On audit, the auditor went to petitioners' place of business to perform an observation test in order to determine the ratio of taxable sales to total sales. One of Vincent's officers refused to allow the auditor to conduct such a test. On two other occasions the auditor returned to Vincent's place of business, but each time he was refused admittance to perform an observation test. The auditor went to petitioners' accountant's office to examine Vincent's books and records. Petitioners maintained a cash receipts journal, a general ledger and Federal and state tax returns. No cash register tapes or other such original sales records were available for audit.

4. Gross sales per petitioners' books amounted to \$649,057.58. The auditor accepted this figure as accurate and did not utilize a test period or markup test. Vincent's taxable sales, as reported for the audit period, amounted to \$49,231.00 on which tax of \$3,938.42 had been paid. Based on the records examined, the very limited observation of petitioners' place of business, and his own experience, the auditor determined that 90 percent of petitioners' gross sales were taxable. The auditor allowed credit for the taxable sales of \$49,231.00 reported and assessed liability on the balance of \$534,921.00.

5. The Comptroller's Office of the City of New York also performed an audit of Vincent's, and petitioner Vincent Pernicone or other officers were equally uncooperative with respect to allowing an observation test.

6. Petitioners maintained that the 90 percent taxable ratio figure determined by the auditor was excessive; however, they produced no evidence whatsoever, either testimonial or documentary, which would serve to refute or contradict the findings of the Audit Division.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person required to collect tax to maintain records of sales and to make these records available for audit. Such records include sales slips, cash register tapes and receipts.

"When records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due. The burden then rests upon the taxpayer to demonstrate...that the method of audit or the amount of the tax assessed was erroneous." (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858.)

B. That, since petitioners had no register tapes or other original sales receipts available for audit and refused to allow the auditor to conduct an observation test on the premises, the auditor had no alternative but to utilize external indices to determine taxable sales. Therefore, the auditor was justified in resorting to an estimate of the taxable sales ratio to arrive at petitioners' sales tax liability. [See Korba v. New York State Tax Commission, 84 A.D.2d 655; Tax Law §1138(a)].

C. That inasmuch as petitioners provided no proof whatsoever to substantiate their allegation that the taxable ratio was excessive, they have failed to meet their burden of proving that the audit findings were erroneous.

D. That the petition of Vincent's Gourmet, Ltd. and Vincent Pernicone, individually and as an officer, is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 19, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983

Rodica W. Chan
PRESIDENT

Francis Q. Koeng
COMMISSIONER

Mark J. Dineen
COMMISSIONER

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

November 10, 1983

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and Vincent Pernicone, Individually and as an Officer
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VINCENT'S GOURMET, LTD.	:	DECISION
and VINCENT PERNICONE,	:	
Individually and as an Officer	:	
	:	
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, 1974	:	
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B. That, since petitioners had no register tapes or other original sales receipts available for audit and refused to allow the auditor to conduct an observation test on the premises, the auditor had no alternative but to utilize external indices to determine taxable sales. Therefore, the auditor was justified in resorting to an estimate of the taxable sales ratio to arrive at petitioners' sales tax liability. [See Korba v. New York State Tax Commission, 84 A.D.2d 655; Tax Law §1138(a)].

C. That inasmuch as petitioners provided no proof whatsoever to substantiate their allegation that the taxable ratio was excessive, they have failed to meet their burden of proving that the audit findings were erroneous.

D. That the petition of Vincent's Gourmet, Ltd. and Vincent Pernicone, individually and as an officer, is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 19, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983

Rodnick A. Cline
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

TA 26 (9-79)

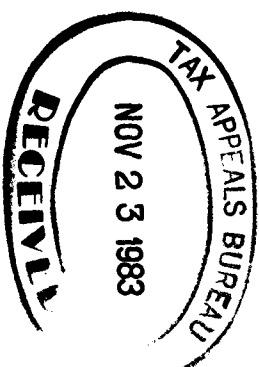
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CELTIFIED
470315
MAIL

Postmarked _____
Addressed _____
Insufficient address number _____
No such street in state _____
No such office in state _____
Do not return to this Bureau

Hold
11/10/83
PENDING
CHANCE

Vincent's Gourmet, Ltd.
and Vincent Pernicone, Individually and as an Officer
c/o Vincent Pernicone
St. George Ferry Terminal
Staten Island, NY 10301



P 470 315 141

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Vincent's Gourmet, Ltd.	
Street and No.	
St. George Ferry Terminal	
P.O., State and ZIP Code	
Staten Island, NY 10301	
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 470 315 142

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Jack M. Portney	
Street and No.	
307 Main St., Box 346	
P.O., State and ZIP Code	
Port Jervis, N.Y. 13824	
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