

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

September 30, 1983

Vincenzo & Angelo Enterprises, Inc.
705 2nd Avenue
New York, NY 10017

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
Martin A. Wein
65-12 69th Place
Middle Village, NY 11379
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Vinny's Mangiamo Enterprises, Inc. :
for Revision of a Determination or a Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period June 1, 1975 through :
August 31, 1977. :
: AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Vincenzo & Angelo Enterprises, Inc. :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 1974 through :
February 28, 1979. :
:

State of New York
County of Albany

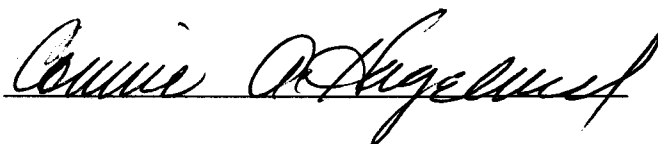
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon Vincenzo & Angelo Enterprises, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

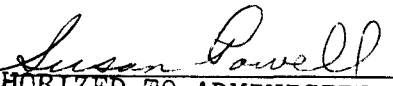
Vincenzo & Angelo Enterprises, Inc.
705 2nd Avenue
New York, NY 10017

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
30th day of September, 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 :
Vinny's Mangiamo Enterprises, Inc. :
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In the Matter of the Petition :
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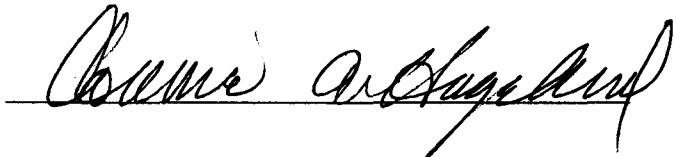
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon Vinny's Mangiamo Enterprises, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Vinny's Mangiamo Enterprises, Inc.
705 2nd Ave.
New York, NY 10017

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
30th day of September, 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 :
Vinny's Mangiamo Enterprises, Inc. :
for Revision of a Determination or a Refund of :
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Tax Law for the Period June 1, 1975 through :
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AFFIDAVIT OF MAILING

In the Matter of the Petition :
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for Revision of a Determination or for Refund of :
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Tax Law for the Period September 1, 1974 through :
February 28, 1979. :

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 30th day of September, 1983, she served the within notice of Decision by certified mail upon Martin A. Wein the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin A. Wein
65-12 69th Place
Middle Village, NY 11379

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
30th day of September, 1983.

Susan Powell
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
VINNY'S MANGIAMO ENTERPRISES, INC.
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 June 1, 1975
through August 31, 1977.

DECISION

In the Matter of the Petition
of
VINCENZO & ANGELO ENTERPRISES, INC.
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,
1974 through February 28, 1979.

Petitioner, Vinny's Mangiamo Enterprises, Inc., 705 2nd Avenue, New York, New York 10017, 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 June 1, 1975 through August 31, 1977 (File No. 29195).

Petitioner, Vincenzo & Angelo Enterprises, Inc., 705 2nd Avenue, New York, New York 10017, 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 February 28, 1979 (File No. 32512).

A consolidated formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 22, 1982 at 1:15 P.M., with all briefs to be submitted

by February 11, 1983. Petitioners appeared by Martin A. Wein, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna B. Colello, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that sales and use taxes were due based upon a field audit of Vincenzo & Angelo Enterprises, Inc.

II. Whether the Audit Division properly determined that sales and use taxes were due based upon the application of external indicia to the purchases reported by Vinny's Mangiamo Enterprises, Inc.

FINDINGS OF FACT

1. On November 20, 1979, the Audit Division issued to petitioner Vincenzo & Angelo Enterprises, Inc. (hereinafter "V & A Enterprises") two Notices of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1974 through February 28, 1979. The amount assessed in the Notices was \$55,940.78 in tax, plus penalty of \$12,558.27 and interest of \$16,997.50, for a total amount due of \$85,496.55.

2. On November 20, 1979, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Vinny's Mangiamo Enterprises, Inc. (hereinafter "Mangiamo Enterprises") for the period June 1, 1975 through August 31, 1977. The Notice assessed a tax due of \$4,940.08, plus penalty of \$1,235.02 and interest of \$1,833.19, for a total amount due of \$8,008.29.

3. The assessments in issue were based upon the tax allegedly due arising from the sales of three separate establishments: Mangiamo Enterprises which was located at 558 3rd Avenue in New York City ("558 3rd Avenue") and V. & A. Enterprises, Inc. which had locations at 705 2nd Avenue ("705 2nd Avenue") and 808 2nd Avenue ("808 2nd Avenue") in New York City.

4. The store at 558 3rd Avenue was an establishment which sold pizza and soda.

5. The stores at 705 and 808 2nd Avenue were establishments which sold "hero" sandwiches, hot and cold food to take out, ice cream cones, cigarettes, bakery goods and snack items. Although these stores also sold pizza, it represented a minor portion of their total sales.

6. During the period December 1, 1973 through May 31, 1975, each of the three establishments reported its sales on the same sales tax return under the name Nick's Pizza, V & A Enterprises, Inc. In June, 1975, the store at 558 3rd Avenue was separately incorporated under the name Vinny's Mangiamo Enterprises, Inc. Thereafter, Mangiamo Enterprises reported its sales on a separate return under its own name until it was sold sometime prior to August 31, 1977.

7. The audit was commenced by an observation of the establishment located at 705 2nd Avenue. On May 12, 1978, the auditor went to 705 2nd Avenue and took a reading of the amount of sales shown on the business's two cash registers. Thereafter, the auditor kept a record of the establishment's nontaxable sales from 11:00 a.m. until 2:00 p.m. whereupon the auditor again took note of the total sales recorded in the cash register. The auditor found that during this three-hour period, the 705 2nd Avenue store had sales of approximately \$508.00 and that 87 percent of the store's sales were taxable. The auditor then proceeded on the assumption that \$500.00 represented one day's sales at 705 2nd Avenue even though that store was open from 6:00 A.M. to 10:00 P.M. from Monday to Friday and until 5:00 P.M. on Saturday. This amount of sales was projected on the basis of a five-day week for fifty weeks a year which resulted in total projected sales of \$125,000.00. The auditor then compared the \$125,000.00 against the \$151,000.00 which V & A Enterprises reported on sales tax returns

for the year and concluded that V & A Enterprises was only reporting the sales of the 705 2nd Avenue store.

8. After the audit of 705 2nd Avenue store was concluded, the auditor examined 808 2nd Avenue store. At the time he went to 808 2nd Avenue store, the partners of V & A Enterprises were not on the premises. Since the auditor was not familiar with anyone on the premises, he did not attempt to examine the cash register. The auditor observed that this did not have as good a commercial location and was smaller than 705 2nd Avenue. In view of the foregoing, the auditor added 67 percent to the total taxable sales of the 705 2nd Avenue location to determine the amount of gross sales of 808 2nd Avenue.

9. The auditor did not go to 558 3rd Avenue purportedly because it was outside of his territory. However, upon examining the 558 3rd Avenue corporate income tax returns, the auditor found that the markup computed from the information reported on the corporate income tax returns was 200 percent. The auditor concluded that this markup was insufficient based upon the Audit Division's experience with establishments of this nature. Therefore, the auditor increased the markup to 300 percent and redetermined the amount of this store's sales accordingly.

10. On the basis of the foregoing observations and computations, the assessment issued to V & A Enterprises was based on three adjustments. First, an adjustment was made to include the income of the 808 2nd Avenue store in accordance with Finding of Fact "8". Second, an adjustment was made to include the income of the 558 3rd Avenue location for the period September 1, 1974 through May 31, 1975 in accordance with Finding of Fact "9". Lastly, an adjustment was made to V. & A. Enterprise's reported gross sales to reflect the result of the auditor's observation that 87 percent of the sales of the 705 2nd

Avenue store were subject to sales tax. The foregoing adjustments resulted in additional taxable sales of \$699,259.73 and additional sales tax allegedly due of \$55,940.78.

11. The assessment issued to Mangiano Enterprises was based solely on the adjustment to the markup noted in Findings of Fact "9".

12. At the time the audit was commenced, no sales records were available and the only records provided to the auditor were three purchase invoices.

13. It was a practice of petitioners' principals to pay invoices as they arrived and then send the original documents to their accountant. As the audit was being performed, petitioners' accountant was unable to provide any additional documentation other than that noted in Finding of Fact "12".

14. After the assessments were issued, petitioners' principals retained a new accountant who was able to obtain petitioners' purchase invoices, check book, and check stubs. Utilizing the documents and markups on purchases purportedly provided by the auditor, the accountant reconstructed V & A Enterprises' sales for the period June, 1977 through June, 1978. According to the accountant's reconstructed sales, V & A Enterprises underpaid sales tax during this period by \$770.00.

15. Upon being presented with the worksheet purporting to show V & A Enterprises' reconstructed sales, the auditor contacted the suppliers of V & A Enterprises in an attempt to verify its purchases as shown on the worksheet. The auditor found that the information provided by V & A Enterprises' suppliers did not correspond with the amount of purchases shown on the worksheet. Therefore, the auditor did not give the worksheet any credence.

16. At the hearing, petitioners' representative submitted sufficient documentation to establish that petitioner's markup on pizza was approximately 200 percent.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

B. That in determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "'reasonably calculated to reflect the taxes due' (Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206)." (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, 227, mot. for lv. to app. den. 44 N.Y.2d 645). When the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Comm., supra).

C. That V & A Enterprises did not maintain proper books and records. Therefore, the use of an observation test to determine the amount of the taxable sales of the 705 2nd Avenue store was a reasonable method, under the circumstances, to calculate the amount of sales tax due arising from the sales of this store (Tax Law §1138(a)). Similarly, the use of an observation test of a similar store to determine taxable sales of the 808 2nd Avenue store with an adjustment for the size and location of the store was a reasonable method, under the circumstances, to calculate the amount of tax due (Tax Law §1138(a)). It is noted that exactness is not required where it is petitioner's own failure

to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Comm., 54 A.D.2d 1023 aff'd, 44 N.Y.2d 684). Moreover, petitioners have not presented any evidence which would establish that the use of the observation test resulted in an incorrect determination of sales and use taxes due. The analysis of V & A Enterprises' purchases is deficient inasmuch as all purchases were not included.

D. That in view of Finding of Fact "16", the markup of 300 percent which was applied to the sales of Mangiamo Enterprises was unwarranted. Petitioners have sustained their burden of proof of establishing that the markup computed from the information provided on the corporate income tax returns filed by Mangiamo Enterprises was accurate.

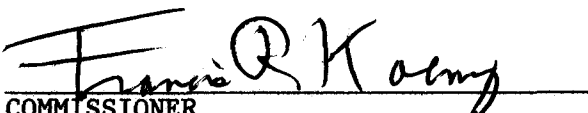
E. That the petitions of Vinny's Mangiamo Enterprises, Inc. and Vincenzo & Angelo Enterprises, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued to petitioners; and that the petitions of Vinny's Mangiamo Enterprises, Inc. and Vincenzo & Angelo Enterprises, Inc. are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 30 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 208 393

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	<i>Victor & Joseph Entenza</i>
Street and No.	<i>715-2 Ave</i>
P.O., State and ZIP Code	<i>New York NY 10017</i>
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 481 208 395

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P 481 208 394

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Sent to	<i>Martin A Weir</i>
Street and No.	<i>65-12 69th Place</i>
P.O., State and ZIP Code	<i>Midville Village NY</i>
Postage	<i>\$3.79</i>
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	\$
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