

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

October 7, 1983

WSB Enterprises, Inc.  
c/o John Hatcher, Sr.  
292 S. Burnet St.  
East Orange, NJ 07018

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  
Vasilios P. Exarchos  
Exarchos and Misthos, P.C.  
32-15 Broadway  
Long Island City, NY 11106  
Taxing Bureau's Representative

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

October 7, 1983

Candy Traders Co.  
170 Broadway, Suite 201  
New York, NY 10038

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.

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Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

WSB Enterprises, Inc.

:

:

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:  
6/1/75 - 5/31/78.

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon WSB Enterprises, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

WSB Enterprises, Inc.  
c/o John Hatcher, Sr.  
292 S. Burnet St.  
East Orange, NJ 07018

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  
7th day of October, 1983.

Susan Powell

Connie Hagelund

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 :  
WSB Enterprises, Inc. : 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 6/1/75 - 5/31/78.

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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 State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Vasilios P. Exarchos the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vasilios P. Exarchos  
Exarchos and Mithos, P.C.  
32-15 Broadway  
Long Island City, NY 11106

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  
7th day of October, 1983.

Susan Powell

Connie A. Hagelund

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

Candy Traders Co. :

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:  
6/1/75 - 5/21/78.

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State of New York  
County of Albany

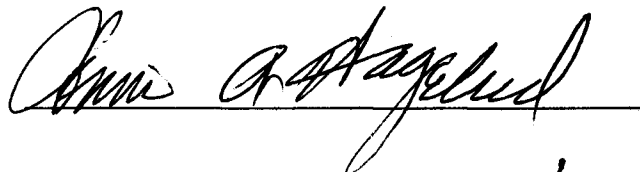
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Candy Traders Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Candy Traders Co.  
170 Broadway, Suite 201  
New York, NY 10038

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  
7th day of October, 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  
WSB 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 May 21, 1978.

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DECISION

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In the Matter of the Petition  
of  
CANDY TRADERS CO.  
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 May 21, 1978.

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Petitioner, WSB Enterprises, Inc., c/o John Hatcher, Sr., 299 South Burnet Street, East Orange, New Jersey 07018, 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 May 21, 1978 (File No. 34998).

Petitioner, Candy Traders Co., 170 Broadway, Suite 201, New York, New York 10038, 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 May 21, 1978 (File No. 28834).

A combined small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 19, 1983 at 1:15 P.M. with all evidence to be submitted by February 18, 1983. Petitioner WSB Enterprises, Inc. appeared by

Vasilios P. Exarchos, P.A. Petitioner Candy Traders Co. appeared by Om P. Raja, owner. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

### ISSUES

I. Whether the result of a field audit performed on the available books and records of petitioner WSB Enterprises, Inc., whereby its purchases were marked up to determine taxable sales, properly reflected such sales and the additional tax determined due thereon.

II. Whether penalty and interest above the minimum statutory rate should be cancelled.

### FINDINGS OF FACT

1. On May 21, 1978, Om P. Raja d/b/a Candy Traders Co. purchased the business assets of WSB Enterprises, Inc. (hereinafter "WSB"). Mr. Raja notified the State Tax Commission of said purchase on May 21, 1978, the notice having been received on May 24, 1978. The State Tax Commission then notified Candy Traders Co. of a possible claim for any sales and use taxes due from WSB.

2. On August 18, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against WSB Enterprises, Inc. covering the period June 1, 1975 through May 21, 1978 (Notice No. S780803713C). The Notice was issued as a result of WSB's failure to submit information requested by the Audit Division. The Division reviewed the sales and use tax returns filed by WSB and determined that 60 percent of its reported gross sales were taxable. It held additional sales tax due thereon of \$4,433.00, plus penalty and interest of \$1,490.39, for a total due of \$5,923.39.

3. A similar Notice was also issued on August 18, 1978 against Candy Traders Co. (Notice No. S780803714C). This Notice represented the purchaser's

liability under section 1141(c) of the Tax Law for the taxes determined to be due from WSB. In addition, the Audit Division issued a separate Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 18, 1978 for tax due of \$280.75, plus penalty and interest of \$77.84, for a total of \$358.59 (Notice No. S780803715C). This Notice represented a tax liability of the seller in addition to that disclosed in Finding of Fact "2" for which two notices and demand for payment of sales and use taxes due were previously issued against WSB but not paid as of August 18, 1978. WSB was delinquent in filing its sales tax returns for the periods August 31, 1977 and November 30, 1977.

4. A field audit was later conducted by the Audit Division. On February 25, 1980, the notices of determination and demand for payment of sales and use taxes due (Notice Nos. S780803713C and S780803714C) issued against WSB and Candy Traders Co. were reduced to tax due of \$1,839.60, plus penalty and interest of \$1,153.49, for a total due of \$2,993.09.

5. In order to verify taxable sales reported, the Audit Division reviewed the purchases made by WSB for the period June, August and September, 1976 and February, March and July, 1977. Based on this review, the Audit Division determined that 48.7 percent of petitioner WSB's purchases were taxable when resold. This percentage was applied to total purchases of \$116,460.00 made by WSB for the audit period to determine purchases which were taxable on resale of \$56,716.00. This was done because the Audit Division found in its review of the six months' purchases that petitioner's purchases in its cash disbursement books were not accurately categorized.



Based on the six-month review of purchases, the Audit Division allocated the taxable purchases of \$56,716.00 made by petitioner to the various categories and applied markups thereon as follows:

	<u>% of Total</u>	<u>Purchases</u>	<u>Markup</u>	<u>Taxable Sales</u>
Candy	34%	\$19,283.	40. %	\$26,996.
Cigarettes	57%	32,328.	29.6%	41,897.
Greeting Cards	7%	3,970.	100. %	7,940.
Books	2%	1,135.	66.7%	1,892.
Totals		<u>\$56,716.</u>		<u>\$78,725.</u>
Adjustment for Excise Tax on Cigarettes at 32.8%				<u>13,742.</u>
Total Adjusted Taxable Sales				<u>\$64,983.</u>

Petitioner WSB reported taxable sales of \$41,988.00 on sales and use tax returns filed for the audit period. The Audit Division determined additional taxable sales of \$22,995.00 and the tax due thereon of \$1,839.60.

6. Petitioner WSB operated a newsstand. It did not issue any sales invoices and the cash register it used did not produce a register tape to substantiate the sales as recorded in its cash receipts book.

Since no selling prices were available on audit, the Audit Division used standard markups based on similar businesses for candy and the industry markup on greeting cards. The markup on books was determined from the suggested retail selling prices appearing on the purchase invoices. The Audit Division estimated cigarette sales to be 70 cents a pack based on the location and the fact that the newsstand was not a discount operation. The audit supervisor testified that the markups used were reasonable and in line with similar businesses of this nature.

7. Petitioner WSB contended that the selling price of its cigarettes ranged from 55 cents a pack to 65 cents a pack within the three-year period audited, increasing at 5 cent intervals. It also argued that the markup on its

candy was no more than 25 percent. Petitioner was unable to offer any evidence of selling prices to show that the markups used by the Audit Division were in error.

8. Petitioner Candy Traders Co. did not argue its ultimate liability under section 1141(c) of the Tax Law. It was aware of its contingent obligation if any tax due was not paid by WSB. Over the objection of WSB, it was willing to pay any settlement from funds withheld in escrow to curtail the accrual of any additional interest. To date, however, no payment has been made.

9. Although petitioner WSB requested the abatement of penalty and interest, it offered no explanation for filing several of its sales and use tax returns beyond their due dates.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the determination of tax due from such information as may be available when a return filed is incorrect or insufficient. If necessary, the tax may be estimated on the basis of external indices such as purchases or other factors.

That petitioner WSB Enterprises, Inc. had no source documents available for the verification of an exact amount of sales or the determination of an exact amount of tax due. The audit method employed by the Audit Division was therefore proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

That the markups applied to petitioner WSB's purchases were reasonable. That petitioner has failed to meet the burden of showing error. (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, 402 N.Y.S.2d 74.)

B. That the notices of determination and demand for payment of sales and use taxes due issued against petitioner Candy Traders Co. were proper and in accordance with the provisions of section 1141(c) of the Tax Law.

C. That no reasonable cause exists for the abatement of penalties and interest on the part of WSB Enterprises, Inc. That although petitioner Candy Traders Co. acted in good faith, it was properly assessed for penalty and interest applicable to the seller in accordance with the provisions of Tax Law §§1141(c) and 1145(a)(3). (Matter of Anna Manzella (Purchaser), State Tax Commission, November 20, 1981.)

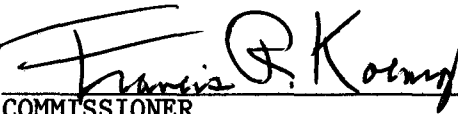
D. That the petitions of WSB Enterprises, Inc. and Candy Traders Co. are denied and the notices of determination and demand for payment of sales and use taxes due issued August 18, 1978 and those revised on February 25, 1980 are sustained with applicable penalty and interest thereon.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1983

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
\_\_\_\_\_  
COMMISSIONER

P 470 316 122

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>WSB Enterprises Inc</u>	
C/o John Hatcher SR	
Street and No. <u>292 S Burnett St</u>	
P.O., State and ZIP Code <u>E Orange NY 07018</u>	
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 470 316 116

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Candy T Raduoso</u>	
Street and No. <u>170 Broadway Suite 24</u>	
P.O., State and ZIP Code <u>NY NY 10038</u>	
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 470 316 123

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Vasilios P Exarchos</u>	
Street and No. <u>Exarchos &amp; M13thos</u>	
3215 Broadway	
P.O., State and ZIP Code <u>Long Island City NY 11106</u>	
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	
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PS Form 3800, Feb. 1982