

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

May 27, 1983

Wang Foods Co., Inc.
c/o Sheldon Walker
370 7th Ave., Suite 914
New York, NY 10001

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
Sheldon Walker
370 7th Avenue
New York, NY 10001
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wang Foods Co., 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 6/1/75-2/23/77. :
_____ :

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Wang Foods Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wang Foods Co., Inc.
c/o Sheldon Walker
370 7th Ave., Suite 914
New York, NY 10001

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
27th day of May, 1983.

David Parchuck

William A. Hugan

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wang Foods Co., 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 6/1/75-2/23/77. :
_____ :

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Sheldon Walker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sheldon Walker
370 7th Avenue
New York, NY 10001

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
27th day of May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

WANG FOODS CO., 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 February 23, 1977.

DECISION

Petitioner, Wang Foods Co., Inc., c/o Sheldon Walker, 370 7th Avenue, Suite 914, New York, New York 10001, 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 February 23, 1977 (File No. 30730).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 8, 1982, at 2:45 P.M. Petitioner appeared by Sheldon Walker, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irving Atkins, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof, were correct.

FINDINGS OF FACT

1. Petitioner, Wang Foods Co., Inc., operated a Key Food grocery store located at 597 East 16th Street, Brooklyn, New York. The business was purchased in July, 1975 and sold on February 23, 1977.

2. On January 10, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period July 1, 1975 through February 23, 1977 for taxes due of \$40,420.96, plus penalty and interest of \$16,334.59, for a total of \$56,755.55. Said Notice was issued as a result of petitioner's failure to submit information requested by the Audit Division. The Audit Division held 40 percent of reported gross sales as taxable sales.

Thereafter, petitioner submitted the following books and records for audit: cash receipts and disbursements journal, purchase invoices, check register, cash register tapes, sales tax returns and income tax returns.

3. On audit, the Audit Division accepted the accuracy of the gross sales reported. However, the reported taxable sales (10% of gross sales) appeared low for the nature of the business. The cash register tapes retained by petitioner did not identify the specific item sold and therefore, the auditor could not verify if sales tax was charged on all taxable items. Therefore, in order to verify taxable sales, the Audit Division analyzed Key Food purchase invoices for December 11, 1975, December 4, 1975, April 22, 1976, September 24, 1976 and November 13, 1975, (Key Food was petitioner's primary supplier since the store was a Key Food franchise. Each invoice contained approximately 40 pages.) This analysis showed that 17.677 percent of the items purchased would be taxable when resold. This percentage was applied to all Key Food purchases for the period September, 1976 through November, 1976 and the resulting taxable purchases from Key Food were combined with taxable purchases made from other suppliers to determine that purchases of taxable items represented 19.103 percent of total purchases for the three month test period. Total purchases for the audit period were \$1,649,191.90. This amount was adjusted to \$1,536,828.06

to reflect Key Food advertising and rebate charges included in purchases and a 2 percent allowance for pilferage. The taxable percentage of 19.103% was applied to the adjusted purchases to determine taxable purchases for the audit period of \$293,580.26.

The Key Food purchase invoices indicated a suggested mark-up percentage for each item. The average mark-up for all items (taxable and nontaxable) from the above invoices was 18.8 percent.

The taxable purchases determined above were marked up 18 percent to arrive at taxable sales of \$346,424.71. Petitioner reported taxable sales of \$185,456.75, leaving additional taxable sales of \$160,967.96 and tax due thereon of \$12,868.61.

4. On May 2, 1980, the Audit Division issued a Notice of Assessment Review to petitioner which revised the tax due as originally assessed to the \$12,868.61 found due based on the audit of petitioner's books and records.

5. Petitioner's accountant analyzed cash register tapes prior to filing the sales tax return for the first period in business (July, 1975 and August, 1975) and determined that taxable sales were 10 percent of total sales. Thereafter, taxable sales were estimated on sales tax returns filed based on the accountant's analysis.

After the audit was completed, petitioner's accountant analyzed the register tapes for the entire period. Said analysis showed that the 10 percent reported was an accurate representation of the actual tax collected.

6. An audit of the Key Food store under the previous ownership for the period September 1, 1973 through June 30, 1975 disclosed that taxable sales represented 8.5 percent of gross sales.

7. Petitioner argued that the audit did not consider sales of "loss leaders"; that the allowance for pilferage was insufficient to cover its actual losses; and that the 18 percent markup used by the Audit Division was excessive.

Petitioner further argued that the detailed audit of cash register tapes performed by its accountant showing that sales taxes collected were properly paid over is more accurate than an audit based on purchases.

Petitioner failed to establish what effect, if any, the sale of "loss leaders" had on the audit results. Petitioner produced no evidence that pilferage losses were in excess of 2 percent or to show that the markups used by the auditor were inaccurate.

8. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That petitioner's books and records were inadequate for verifying taxable sales receipts, and as such, the audit procedures and tests performed by the Audit Division to determine such sales were proper in accordance with section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44 Matter of Sakran v. State Tax Commission, 73 A.D. 2d 989).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has not overcome its burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D. 2d 929).

C. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

D. That the petition of Wang Foods Co., Inc. is granted to the extent indicated in Conclusion of Law "C"; that in all other respects, the petition is

denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 10, 1978, as revised on May 2, 1980, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 840

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Wing Foods Co., Inc.</u>	
c/o <u>Sheldon Walker</u>	
Street and No. <u>370 7th Ave. Suite 914</u>	
P.O., State and ZIP Code <u>New York, NY 10001</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 481 207 841

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Sheldon Walker</u>	
Street and No. <u>370 7th Avenue</u>	
P.O., State and ZIP Code <u>New York, NY 10001</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