

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Coral Delicatessen & Restaurant, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 9/1/78-5/31/81. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of July, 1984, he served the within notice of Decision by certified mail upon Coral Delicatessen & Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Coral Delicatessen & Restaurant, Inc.
1473 Second Avenue
New York, NY 10021

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of July, 1984.

David Parchuck

James A. Hall
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Coral Delicatessen & Restaurant, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 9/1/78-5/31/81. :
_____:

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of July, 1984, he served the within notice of Decision by certified mail upon David Alster, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Alster
2271 80th St.
Brooklyn, NY 11214

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of July, 1984.

David Parchuck

Ann M. DeGardner
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Coral Delicatessen & Restaurant, Inc.
1473 Second Avenue
New York, NY 10021

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
David Alster
2271 80th St.
Brooklyn, NY 11214
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
CORAL DELICATESSEN & RESTAURANT, 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 September 1, 1978 :
through May 31, 1981.

Petitioner, Coral Delicatessen & Restaurant, Inc., 1473 Second Avenue, New York, New York 10021, 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, 1978 through May 31, 1981 (File No. 38192).

A 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 September 15, 1983 at 10:45 A.M. with all briefs to be submitted by October 12, 1983. Petitioner appeared by M. J. Schutz, Esq. and David Alster, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's taxable sales for the audit period based on a two-day observation test of petitioner's sales.

FINDINGS OF FACT

1. On May 12, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Coral Delicatessen & Restaurant, Inc. covering the period September 1, 1978 through May 31, 1981.

The Notice was issued as a result of a field audit and asserted additional tax due of \$14,773.51 plus interest of \$3,195.85 for a total due of \$17,969.36.

2. Petitioner, by signature of its president, Arnold Weisenfeld, executed two consents to extend the period of limitation for the issuance of an assessment for the period September 1, 1978 through February 28, 1979 to June 20, 1982.

3. On audit, an auditor for the Audit Division found that petitioner's records were insufficient for the determination of an exact amount of taxable sales for the audit period in that cash register tapes and guest checks were available only after July, 1981. Further, petitioner's cash register tapes did not differentiate between taxable sales and nontaxable sales and did not separately show the sales tax collected.

4. Petitioner estimated the taxable sales which it reported on sales and use tax returns filed by taking 75 percent of its total sales recorded and dividing the result by 108 percent to extract the sales tax included therein.

5. The auditor conducted an observation test on December 3 and December 7, 1981 from 9:30 a.m. to 4:15 p.m. each day. The result of the observations disclosed total sales for the two days observed of \$2,466.00. Of that total, \$918.00 constituted bulk sales of meat sold by the pound and \$481.00 were other nontaxable sales. This resulted in a taxable sales percentage of 43.25 percent. The auditor rationalized, however, that the volume of sandwich meat sold by the pound increased during the holiday season; therefore, it requested an additional observation test day during January, 1982. This request was refused by petitioner's accountant for health reasons.

The auditor, therefore, deleted from the observation test of December 3 and 7, 1981 the sandwich meat sold by the pound (Gross sales of \$2,466.00 were

reduced by \$918.00) and determined a taxable sales percentage of 68.9 percent (taxable sales of \$1,066.51 divided by \$1,548.00 gross sales).

In order to determine sales made for the hours not observed from 4:15 p.m. to 8:00 p.m., the auditor averaged the two days observed and divided the result by the number of hours observed to determine average hourly sales. This was multiplied by the number of hours open for business each day and average gross sales per day were determined of \$1,920.00. This was multiplied by the 30 days open for business in December, 1981 which resulted in gross sales of \$57,600.00.

The auditor then determined gross sales for December, 1980 using a consumer price index of 10.7 percent. This was done in order to make a comparison to gross sales reported. The auditor determined gross sales at the December, 1980 price level to be \$52,033.00. Petitioner reported gross sales during the same period of \$36,660.00 based on its recorded gross sales. The auditor determined a margin of error in reporting gross sales of 41.9 percent. Petitioner reported gross sales of \$859,073.00 during the audit period to which the auditor applied the 41.9 percent margin of error. Adjusted gross sales were thereby determined of \$1,219,025.00 during the audit period and taxable sales including sales tax were determined of \$839,980.00 at the 68.9 percent rate of taxable sales. This was divided by 108 percent to determine taxable sales of \$777,693.00 for the audit period. The auditor deducted \$601,823.00 in taxable sales reported by petitioner during the same period and determined additional taxable sales of \$175,870.00 and tax due thereon of \$14,069.60.

The audit results also included use tax due of \$469.04 on expense purchases and over and undercollections of sales tax of \$234.87. These items, however, are not at issue.

6. The auditor, in deducting taxable sales reported by petitioner, understated those sales by \$20,000.00. He conceded therefore that petitioner's sales tax liability should be reduced by \$1,600.00.

7. Petitioner argued that if the same method of calculation was made using taxable sales instead of gross sales, no additional sales tax liability would be due. These calculations are as follows:

Taxable sales both days (6 3/4 hrs. ea. day)	\$ 1,064.11
Taxable sales average for one day (6 3/4 hrs.)	532.06
Taxable sales average for one hour	78.82
Taxable sales average for a full day (10 1/2 hrs.)	827.61
Taxable sales for Dec. 1981 (30 days)	24,828.30
Dec. 1981 Price Level	
(\$24,828.30 divided by 1.107)	22,428.26 ¹
Taxable sales reported for Dec. 1980	26,428.26

8. Petitioner further argued that the auditor's observation of a high volume of meat sold by the pound applied to December 1980 as well as December 1981. If a comparison was to be made to sales reported, the result of the actual observations should be applied; namely the original taxable sales percentage of 43.25 percent.

It was reasoned by petitioner that even though gross sales increased by the method of audit, this increase had no bearing on taxable sales.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of external indices to determine taxable sales receipts when an exact amount of tax due cannot be determined from information available.

B. That petitioner did not maintain records sufficient for the determination of an exact amount of its taxable sales receipts. The audit method employed by

¹ This calculation includes sales tax.

the Audit Division of observing the actual sales being made by petitioner was therefore proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

That the auditor for the Audit Division, however, in his extrapolation of its observations failed to consider that December, 1980 sales had the same characteristically higher volume of meat sold by the pound as did December, 1981. Further, if any increase to gross sales is warranted, that increase is due to nontaxable meat sold by the pound. The audit results therefore should have reflected the taxable sales percentage of 43.25 percent as observed on the increased gross sales determined.


C. That the application of the taxable sales percentage as concluded in "B" above results in no additional taxable sales. The additional sales tax of \$14,069.60 determined by the auditor is hereby cancelled. The additional sales tax of \$234.87 based on collection errors and use tax of \$469.04 on expense purchases is sustained.

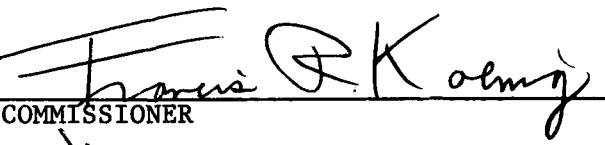
D. That the petition of Coral Delicatessen & Restaurant, Inc. is granted to the extent indicated in Conclusion "C" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1982; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>David Aelter</i>	
Street and No. <i>2271 80th St.</i>	
P.O., State and ZIP Code <i>Brooklyn, NY 11214</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

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Coral Restaurant, Inc.</i>	
Street and No. <i>1473 Second Ave.</i>	
P.O., State and ZIP Code <i>NY, NY 10021</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