

STATE TAX COMMISSION

In the Matter of the Petition
of
Samuel Levine & Son, 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 6/1/75-2/28/79.

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

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 29th day of February, 1984, he served the within notice of Decision by certified mail upon Samuel Levine & Son, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel Levine & Son, Inc.
1016A Park Blvd.
Massapequa Park, NY 11762

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
29th day of February, 1984.

David Paruch

Connie A. Cleveland
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Samuel Levine & Son, 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 6/1/75-2/28/79. :
_____ :

AFFIDAVIT OF MAILING

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

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 29th day of February, 1984, he served the within notice of Decision by certified mail upon Robert M. Rosen, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert M. Rosen
549 Broadway
Massapequa, NY 11758

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
29th day of February, 1984.

David Parchuck

Rosanne A. DePaulis
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 29, 1984

Samuel Levine & Son, Inc.
1016A Park Blvd.
Massapequa Park, NY 11762

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
Robert M. Rosen
549 Broadway
Massapequa, NY 11758
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SAMUEL LEVINE & SON, 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 June 1, 1975	:	
through February 28, 1979.	:	

Petitioner, Samuel Levine & Son, Inc., 1016A Park Boulevard, Massapequa Park, New York 11762, 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 28, 1979 (File No. 28432).

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 May 10, 1983 at 1:15 P.M. with all evidence to be submitted by July 12, 1983. Petitioner appeared by Robert M. Rosen, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the result of a field audit conducted by the Audit Division properly reflected petitioner's taxable sales and the additional sales tax determined due thereon.

FINDINGS OF FACT

1. Petitioner operated a retail drug and variety store. Taxable sales reported on sales and use tax returns filed were determined by dividing the sales tax collected during the filing period by the appropriate sales tax rate.

2. On December 20, 1979, as a result of a field audit, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against Samuel Levine & Son, Inc. covering the period June 1, 1975 through February 28, 1979. The notices asserted total additional tax due of \$10,966.31, plus interest of \$2,272.76, for a total of \$13,239.07.

3. Petitioner executed two consents to extend the period of limitation for the issuance of an assessment. The first covered the period June 1, 1975 through May 31, 1978 extending such period to September 20, 1979. The second extended the period June 1, 1975 through February 28, 1979 to March 20, 1980.

4. On audit, the Audit Division found that petitioner's sales records did not break down sales between taxable and nontaxable sales and that no controls were maintained to detect errors in over or under-charges of tax. The Audit Division therefore proceeded to review purchases made by petitioner during the calendar year 1977 in order to verify taxable sales. It was determined that 46.51 percent of the purchases made during 1977 were taxable when resold. Petitioner made total purchases of \$933,900.00 from June, 1975 to May, 1978. The Audit Division increased these purchases by \$24,545.00 due to a decrease in inventory during this period and applied the taxable percentage thereon. The Audit Division thereby determined that purchases of \$445,773.00 from June, 1975 to May, 1978 were taxable when resold.

A markup analysis was performed with the aid of petitioner with respect to the selling prices. A weighted markup of 26.1 percent was determined and applied to the purchases which were taxable when resold, resulting in taxable sales of \$562,120.00 for the period June, 1975 through May, 1978.

The Audit Division then reviewed charge sales made by petitioner in order to verify discounts. Based on a six-month review of charge sales from

July 1, 1978 through December 31, 1978, the Audit Division determined that 43.75 percent of petitioner's total sales were charge sales and that 24.42 percent of charge sales were taxable. Based on a review of December, 1978, the Audit Division determined that discounts on taxable sales were 4.25 percent of total charge sales. The Audit Division then applied these percentages to the gross sales made from June, 1975 to May, 1978 and computed discounts on taxable sales of \$5,837.00 for this period.

The Audit Division made a further adjustment to taxable sales of 2 percent as an allowance for pilferage and determined the taxable sales to be \$545,157.00 for the period June 1, 1975 to May 31, 1978. Petitioner reported taxable sales of \$422,510.00 on sales and use tax returns filed. The Audit Division therefore determined additional taxable sales of \$122,647.00 for this period, an error of 29.0281 percent. The Audit Division updated its audit findings to include the period June 1, 1978 through February 28, 1979 by applying the percentage of error to the taxable sales reported for those periods. Total additional taxable sales of \$150,707.00 were thereby determined due, resulting in the sales tax deficiency of \$10,966.31.

5. As a result of a conference held with petitioner subsequent to the issuance of the notices, another markup test was performed covering the period July, 1978 through December, 1978. This resulted in a markup determination on taxable items sold of 31.88 percent. The Audit Division, however, did not increase its audit findings.

The Audit Division did make an adjustment, however, to its taxable percentage of purchases previously determined from 46.51 percent to 45.93 percent. The adjustment reduced the error rate from 29.0281 percent to 27.4024

percent. The Audit Division conceded that the additional tax due as a result of the audit should be reduced to \$10,352.29.

6. Petitioner argued that all its sales and sales tax collections were recorded and that daily postings were made from the cash register totals. It therefore contended that all sales and use tax returns filed were correct.

7. Petitioner contended that the adjustments made in the audit for discounted sales was insufficient to reflect its business operation in that discounts ranged from 10 percent for senior citizens and other courtesy discounts to 33 percent for other customers such as doctors and dentists. Petitioner offered no substantiation of these discounts during the audit period nor did it show how they might effect the Audit Division's analysis of discounts given on taxable sales.

8. Petitioner contended that certain items in the Audit Division's markup analysis were either sold at cost, marked up only 5 percent as promotional items or marked down from the original markup due to obsolescence. Petitioner failed to substantiate sales made at a lower markup or at cost in order to warrant any reduction to the Audit Division's original markup determination of 26.1 percent. The overall markup on Federal tax returns filed for the years 1975, 1976 and 1977 ranged from 36.99 percent to 40.86 percent.

9. In the determination of the percentage of purchases which were taxable when resold, the Audit Division failed to exclude the exempt portion of cigarette purchases due to the excise taxes being included therein. Instead, the Audit Division deleted the excise taxes from petitioner's markup.¹

¹ This method was not detrimental to petitioner in that the original markup percentage would have been 43.98 percent had the excise taxes not been deleted therefrom. Although petitioner's percentage of taxable purchases would have been lower, the end result would have been similar.

Petitioner submitted evidence sufficient to show that purchases made during 1977 in the amount of \$1,594.00 were not taxable on resale, but were purchases resold at cost as an accommodation sale to Life Style Photographers. This, combined with the adjustment which the Audit Division made (Finding of Fact #5), results in purchases which were taxable upon resale of 45.46 percent of total purchases.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of purchases to verify sales when sales records are insufficient for the determination of the exact amount of taxable sales. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44.)

B. That once it is established that the Audit Division's independent determination was permissible, the burden of proof is upon petitioner to show that the Audit Division's determination should be overturned. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.) That petitioner has failed to meet that burden with respect to the markup on purchases applied on audit.

C. That petitioner has sustained the burden of showing that only 45.46 percent of its purchases were taxable when resold pursuant to Finding of Fact "9".

D. That the petition of Samuel Levine & Son, Inc. is granted to the extent indicated in Conclusion of Law "C" above; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 29 1984

STATE TAX COMMISSION

Roderica W. Olin
PRESIDENT

Francis R. Koehn
COMMISSIONER

Mark J. Olin
COMMISSIONER

P 470 315 255

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Sam, Inc.</i>	
Street and No. <i>1016 Park Blvd.</i>	
P.O., State and ZIP Code <i>Massapequa Park, NY</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 470 315 256

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Robert M. Rosen</i>	
Street and No. <i>549 Broadway</i>	
P.O., State and ZIP Code <i>Massapequa, NY 11758</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