

## STATE TAX COMMISSION

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Mil-Voi, 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 12/1/77-5/31/81.

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 Isaac Sternheim, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Isaac Sternheim  
Turetzky, Steinheim & Co.  
114 Liberty Street  
New York, NY 10006

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

James P. [Signature]

Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 31, 1984

Mil-Voi, Inc.  
25-71 Steinway St.  
Astoria, NY 11103

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  
Isaac Sternheim  
Turetzky, Steinheim & Co.  
114 Liberty Street  
New York, NY 10006  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MIL-VOI, 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 December 1, 1977	:	
through May 31, 1981.	:	

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Petitioner, Mil-Voi, Inc., 25-71 Steinway Street, Astoria, New York 11103, 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 December 1, 1977 through May 31, 1981 (File No. 38553).

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 October 18, 1983 at 9:15 A.M., with all evidence to be submitted by November 17, 1983. Petitioner appeared by Isaac Sternheim, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUES

I. Whether the audit method employed by the Audit Division properly reflected the additional sales tax determined due from petitioner.

II. Whether penalties and interest in excess of the minimum statutory rate should be cancelled.

#### FINDINGS OF FACT

1. On May 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Mil-Voi, Inc. covering the period December 1, 1977 through May 31, 1981. The Notice was issued as a

result of a field audit and asserted additional sales tax due of \$11,276.82, plus penalty and interest of \$6,267.05, for a total due of \$17,543.87.

2. Petitioner executed two consents to extend the period of limitation for the issuance of an assessment. The second extended the period to September 20, 1982.

3. Petitioner operated a restaurant under the trade name of Sirena Restaurant. On audit, the Audit Division found that petitioner did not maintain a cash receipts journal for verification of the proper recording of its sales. The Audit Division reviewed guest checks made available by petitioner for audit. Although some guest checks were undated and not kept in a discernible order, the Audit Division was able to segregate February, 1981 by the date noted and numerical sequence of the guest checks. Based on this review, the Audit Division determined that taxable sales were made during February, 1981 of \$9,160.15. Petitioner reported taxable sales of \$4,449.00 on the sales and use tax return filed for the three-month period of December 1, 1980 through February 28, 1981.

Petitioner did not have available any record of cash payouts for the audit period, although some cash purchases were found. Federal returns were not filed for the years 1978, 1979 and 1980; therefore, the amount of total purchases was unavailable. In lieu of a markup test, the Audit Division determined a relationship between check disbursements and the sales determined based on the review of the aforementioned guest checks during February, 1981. The Audit Division found that sales were 398.4 percent of the purchases recorded in the check disbursements book during February, 1981.

The Audit Division then totaled the check purchases made by petitioner from records available for the period December 1, 1977 through November 30,

1978, March 1, through May 31, 1980 and December 1, 1980 through February 28, 1981. It determined total check purchases made of \$30,859.00 during this period to which the sales ratio of 3.984 was applied. The Audit Division determined sales for this period of \$122,941.00. Petitioner reported taxable sales of \$42,713.00 on sales and use tax returns filed for the same period. The Audit Division determined that the difference of \$80,228.00 yields a 187.8 percent rate of increase and applied that increase to the taxable sales reported in the sales tax quarters where check disbursements records were not available, except for the quarter ended November 30, 1980. Petitioner reported sales in that quarter far in excess of the other quarters; therefore, the Audit Division estimated taxable sales at \$16,000.00 based on the average audited sales for the other quarters.

The Audit Division determined taxable sales for the period December 1, 1977 through May 31, 1981 of \$224,788.00 and tax due thereon of \$17,983.04. Petitioner paid sales tax of \$6,706.22<sup>1</sup> for the same period. The Audit Division thereby determined the additional sales tax due of \$11,276.82.

4. Petitioner contended that all cash register tapes were available for the audit period and, along with the guest checks provided, should have been used to verify taxable sales receipts. Although given the opportunity after hearing to support the availability of those records, petitioner failed to do so.

In the alternative, petitioner argued that a markup test on purchases should have been conducted if the records were deemed to be insufficient. Further, petitioner argued that the purchases paid for in February, 1981 bore no relationship to sales in February, 1981 in that those purchases were made

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<sup>1</sup> Of this amount, \$1,249.00 constituted sales tax previously estimated by the Audit Division and paid by petitioner for the filing quarter ended February 28, 1978. The tax was estimated due to the non-filing of the sales tax return.

and consumed in the prior month. Petitioner offered no evidence to disprove the audit findings made by the Audit Division.

5. Petitioner requested the abatement of penalty and interest in excess of the minimum statutory rate. Petitioner contended that there was no intent to defraud the state if any additional tax was sustained. It was argued that penalties were already paid on the sales tax remitted with the late filing of its returns.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. The Audit Division found petitioner's return for the quarter ended February, 1981 to be insufficient based on its review of guest checks.

That petitioner failed to show that it maintained sales records from which an exact amount of tax due could be determined. The audit method employed by the Audit Division based on the information available was therefore permissible. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

B. That once it is established that the audit method employed was permissible, the burden is upon petitioner to show that the determination should be overturned by showing error. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.)

That petitioner failed to show any error in the determination or that it was unreasonable.<sup>2</sup> Exactness is not required when it is the taxpayer's own

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<sup>2</sup> Although not the audit method employed by the Audit Division, the sales based on guest checks during the month of February, 1981, if found to be indicative of all months in the audit period, would have yielded sales of \$834,726.00 as opposed to \$224,788.00 as determined.

failure to maintain proper records which prevents exactness in the determination.

(Markowitz v. State Tax Commission, 44 N.Y.2d 684.)

C. That petitioner failed to show reasonable cause for consistently filing its sales and use tax returns beyond their due dates and not remitting the proper sales tax due thereon.

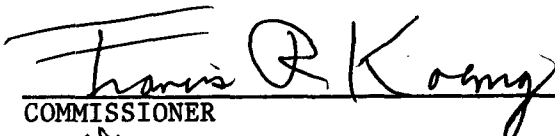
D. That the petition of Mil-Voi, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1982 is sustained with applicable penalty and interest thereon.


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>Isaac Sternheim</i>	
Street and No. <i>114 Liberty St.</i>	
P.O., State and ZIP Code <i>NY, NY 10006</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 440 977 357

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Phil-Lbi, Inc.</i>	
Street and No. <i>25-71 Steinway St.</i>	
P.O., State and ZIP Code <i>Astoria, NY 11103</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