

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

James Owens :

d/b/a Big O Grocery :

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 :
6/1/78 - 11/30/80. :

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 December, 1984, he served the within notice of Decision by certified mail upon James Owens d/b/a Big O Grocery, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James Owens
d/b/a Big O Grocery
808 Northway St.
Syracuse, NY 13224

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 December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

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

December 31, 1984

James Owens
d/b/a Big O Grocery
808 Northway St.
Syracuse, NY 13224

Dear Mr. Owens:

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: Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12224

December 31, 1984

James Brown
c/o Big O Records
808 Hudson St.
New York, NY 10024

Dear Mr. Brown:

Please take notice of the Division of the State Tax Commission's decision
regarding:

You have now exhausted your right of appeal of the Commission's decision
regarding the matter of the State Tax Commission's decision regarding the
advance decision by the State Tax Commission and may be required to pay the
Article 78 of the Civil Practice Law and Rules, and must be required to pay the
Supreme Court of the State of New York, Albany County, within a certain time from the
date of this notice.

Indicates concerning the Commission's decision regarding the matter of the
with this decision may be required to pay the

100 West 100th Street
New York, NY 10024
Albany, NY 12224
Phone: (518) 487-1000

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	:	
JAMES OWENS	:	DECISION
d/b/a BIG O GROCERY	:	
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, 1978	:	
through November 30, 1980.	:	

Petitioner, James Owens d/b/a Big O Grocery, 808 Northway Street, Syracuse, New York 13224, 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, 1978 through November 30, 1980 (File No. 43589).

A small claims hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on February 1, 1984 at 2:45 P.M., with all briefs and documents to be filed on or before March 1, 1984. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that sales and use taxes were due based upon a field audit.

FINDINGS OF FACT

1. On September 18, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the Big O Grocery. The Notice assessed sales and use taxes due of \$3,831.78 plus minimum interest of \$880.58 for a total amount due of \$4,712.36. The Notice stated that taxes were

determined to be due in accordance with section 1138 of the Tax Law and was based upon an audit of the Big O Grocery.

2. Petitioner, James Owens, owned and operated a retail grocery store known as the Big O Grocery ("grocery store") from the commencement of the period in issue until September 29, 1980.

3. On March 12, 1981, the Audit Division commenced an audit of the grocery store. In the course of the audit, the Audit Division examined Mr. Owens' income tax returns and the grocery store's cash receipts and purchase journals, check book and purchase invoices for the test period. On the basis of this audit, the assessment subsequently issued was premised upon asserted deficiencies of sales and use taxes in three areas.

4. In the first part of the audit, the Audit Division examined the adequacy of petitioner's sales records. The Audit Division concluded that the grocery store's sales records were inadequate since the grocery store did not have cash register tapes. The Audit Division considered the cash register tapes important because, in their absence, it was not possible to determine the portion of the grocery store's sales that was exempt from sales and use tax. Therefore, the Audit Division proceeded on the assumption that the grocery store's sales were reflected by what the grocery store purchased.

5. In order to determine the percentage of the grocery store's sales subject to sales tax, the Audit Division examined the grocery store's purchases during the test period September 1, 1979 through November 30, 1979. The Audit Division then divided the value of those purchases of items which would be taxable when sold by the value of all of the grocery store's purchases during the test period. This resulted in a conclusion that 51.40 percent of the grocery store's sales were subject to sales tax.

6. In order to determine the amount of the grocery store's gross purchases for the test period September 1, 1979 through November 30, 1979, the Audit Division began by reconciling the grocery store's purchases per its cash disbursements journal with the cost of goods sold portion of Mr. Owens' schedule C from his federal income tax return. The reconciliation disclosed that Mr. Owen's underreported purchases on his federal income tax return by \$1,564.00 for 1978 and \$7,756.00 for 1979.

7. Thereafter, the Audit Division concluded that a markup of twenty percent should be applied to the grocery store's taxable purchases. The markup of twenty percent was determined from an examination of Mr. Owens' federal income tax returns during the periods in issue and from the results of a Tax Appeals Bureau conference arising from a prior audit.

8. On the basis of the foregoing, the Audit Division applied the twenty percent markup to the grocery store's taxable purchases of \$15,249.00 during the test period in order to arrive at taxable sales of \$18,299.00. This figure was then reduced by six percent to account for theft resulting in taxable sales during the audit period of \$17,201.00. During the same period, the grocery store reported taxable sales of \$10,057.00. Inasmuch as the grocery store paid \$703.99 during this quarterly period, the Audit Division determined that there was a net New York State sales and use tax liability during this period of \$500.08. Petitioner's sales and use tax liability was determined in the same manner for the remaining periods in issue with the exception of the last quarterly period. During the last period in issue, the auditor concluded that since the Big O Grocery was closed and empty, all of the inventory in the store was sold.

9. The second portion of the audit arose from petitioner's failure to file a sales and use tax return for the period ended November, 1980. In order to determine the sales and use tax due for this period, the auditor utilized the grocery store's gross sales from its cash disbursements journal and made the same adjustments as described above, except that no reduction was required for sales tax paid.

10. The last portion of the audit pertained to a use tax liability arising from Mr. Owens' withdrawal of inventory for personal consumption. The Audit Division found, through an examination of Mr. Owens' personal income tax returns, that inventory valued at \$1,560.00 per year, or \$390.00 per quarterly period, was withdrawn for personal consumption. The auditor then multiplied the taxable ratio percentage of 51.4 percent by the \$390.00 per quarter to arrive at the amount of \$200.46 which represented the value of the inventory withdrawn per quarter that was subject to use tax. The auditor then multiplied the \$200.46 by the tax rate of 7 percent to determine that \$14.03 of use tax was due per quarterly period.

11. In January and February of 1983, conferences were held with Mr. Owens and the Audit Division. It was discovered at the conferences that the Audit Division failed to take into account the federal excise tax included in cigarette purchases. The result of taking the federal excise tax into account was to reduce the taxable ratio from 51.4 percent to 49.87 percent. This, in turn, reduced the sales and use tax assessed to \$3,522.72 plus interest.

12. The Big O Grocery was a small retail grocery store which sold a wide variety of items such as ham, baloney, salami, bacon, eggs, cheese, beer, cigarettes and soda. The store was located in the inner city and suffered from

frequent thefts. During at least a portion of the audit period, a window was broken and the space was boarded up.

13. It was Mr. Owens' practice to use a key on a cash register that recorded sales and sales tax collected. At the end of the day, these amounts were totalled on the machine and recorded. Mr. Owens felt that using a cash register tape was impractical because many of his sales were for small amounts.

14. Every three months, Mr. Owens took his books and records to his accountant in order for his accountant to prepare the sales and use tax returns. Mr. Owens' accountant, in turn, reported taxable sales as a fixed percentage of total sales.

15. Mr. Owens testified that after the grocery store ceased operating, all of the inventory was stolen. Although police reports were introduced substantiating that there were thefts of items in the grocery store, no police reports were offered which established that the grocery store's entire ending inventory was stolen.

16. At the hearing, Mr. Owens argued that: sales and not purchases should have been examined; the fact that something was purchased does not mean it was sold; the number of individual items contained in boxes purchased should be considered; the taxable ratio was too great; the auditor did not check the ending inventory; using an overall markup is erroneous since the actual markup varied with the item sold; and he should not be held personally liable for sales tax since the sales tax is a tax which is collected from consumers.

CONCLUSIONS OF LAW

A. That, in determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "reasonably calculated to reflect

the taxes due" (see Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206, cert. den. 355 U.S. 869). When the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Comm., 61 A.D.2d 223, mot. for lv. to app. den. 44 N.Y.2d 645).

B. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

C. That resort to the use of a test period to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Comm., 65 A.D.2d 44). Petitioner did maintain some books and records which were available to the Audit Division. These records, however, were insufficient for verification of taxable sales since one could not verify from the available records the portion of the grocery store's sales that were exempt from sales and use taxes. Therefore, the Audit Division properly used an analysis of the grocery store's purchases to determine the portion of the grocery store's sales that were subject to sales tax. It is noted that no evidence was presented establishing that the audit resulted in an incorrect determination of sales and use taxes due.

D. That Mr. Owens was properly determined to be personally liable for the sales tax due from the grocery store since he was a person required to collect tax within the meaning of Tax Law sections 1131(1) and 1133(a).

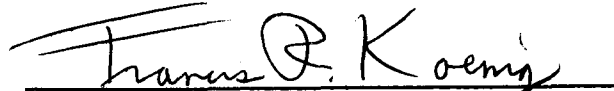
E. That the petition of James Owens d/b/a Big O Grocery is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, with the modification noted in Finding of Fact "11", is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 326

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
James Owens	
Street and No.	
1111 Big O Gallery	
P.O., State and ZIP Code	
218 Northway St	
Postage	
Sydney NY 10224	
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