

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

December 31, 1984

Plasco Enterprises, Inc.
401 Sunrise Hwy.
Lynbrook, NY 11563

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
Harry Diktaban
2 Wintergreen Dr. W.
Dix Hills, NY 11746
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Plasco Enterprises, 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 9/1/78-2/28/82.

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 December, 1984, he served the within notice of Decision by certified mail upon Harry Diktaban, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry Diktaban
2 Wintergreen Dr. W.
Dix Hills, NY 11746

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 December, 1984.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Plasco Enterprises, Inc.

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Plasco Enterprises, Inc.
401 Sunrise Hwy.
Lynbrook, NY 11563

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.

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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

NOTED TO FILE

W02PDS00 XAV STAT3

continued off in search of a

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100-442197-200

CALLER TO 91-551143

Period 01/75-01/80
under Article 18 of the Law for the
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1. Admission to the program

was given addressed as follows:

cautioned mail upon 9/1/40. The mail was placed in the office
This day of December, 1934, he advised the within subject that in
of the State Tax Commission, that in the year 1934 he had been
David Benckuck, being duly sworn, deposes and says that in the year

Psychopost, NY 10867
 (90) 3/21/88
 Psycho Information

1. The first part of the report, "Introduction", states that the purpose of the study is to determine the effectiveness of the new training program. It also mentions that the study was conducted over a period of six months.

That degree of interest was not maintained in the latter part of the summer of 1941 and that the subject was not in contact with the subject of the letter.

State of New York
County of New York

100-443889-100

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PLASCO ENTERPRISES, 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 September 1,
1978 through February 28, 1982.

DECISION

Petitioner, Plasco Enterprises, Inc., 19-21 Bertel Avenue, Mount Vernon, New York 10550, 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 February 28, 1982 (File No. 38255).

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 July 24, 1984, at 9:15 A.M. Petitioner appeared by Harry Diktaban, PA. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioner.

FINDINGS OF FACT

1. Petitioner, Plasco Enterprises, Inc., operated the Lynbrook Diner located at 401 Sunrise Highway, Lynbrook, New York. The business was sold on February 26, 1982. The diner was open 24 hours a day, seven days a week.

2. On May 7, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due

against petitioner covering the period September 1, 1978 through February 28, 1982 for taxes due of \$15,922.92, plus interest of \$2,890.32, for a total of \$18,813.24.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1978 through May 31, 1981 to December 20, 1982.

4. On audit, the Audit Division reconciled gross sales per the books with gross sales reported on sales tax returns and corporation income tax returns and found no discrepancies. Petitioner's books and records reflected a markup of 154 percent which was deemed adequate by the Audit Division for the operation of a diner. Based on the foregoing audit procedures, gross sales were accepted as reported.

Petitioner did not maintain guest checks, cash register tapes or other verifiable records of individual sales receipts. The Audit Division requested petitioner to retain such documents for four days (August 28 to 31, 1981). A review of these guest checks disclosed that petitioner over collected the sales tax and that such overcollections were not reported on the sales tax returns filed. An error factor of 1.0143 percent was determined and applied to the taxes paid for the audit period to arrive at additional tax due of \$1,630.91.

Petitioner reported nontaxable sales of \$259,986.00 for the audit period. The nontaxable sales in petitioner's operation were sales of newspapers and baked goods (muffins, danish, cheesecake, pie, bread and rolls) for off premise consumption. Petitioner, however, did not have the records to substantiate the amount of nontaxable sales it claimed. The Audit Division allowed nontaxable sales of \$64,966.00 (newspapers - \$39,426.00 and bakery products - \$25,540.00). The sale of baked goods was estimated at \$20.00 per day which was

based on the auditor's supervisors' experience with other audits of similar businesses. The balance of the nontaxable sales was disallowed (\$195,020.00) and additional taxes due were assessed in the amount of \$13,325.09.

Additionally, use tax of \$597.83 was determined due on expense purchases.

5. Petitioner's books and records did not account for either taxable sales or sales tax collected. Instead, petitioner estimated its nontaxable sales by applying 15 percent to gross sales. The difference was divided by 1.07 percent to arrive at taxable sales.

6. Petitioner employed a full time baker who worked six days a week. Peter Procops, president of the corporation, estimated that baked goods sold for off-premises consumption amounted to approximately \$200.00 per day.

7. The guest checks reviewed by the Audit Division to determine the erroneous sales tax collections referred to in Finding of Fact "4" did not show any sales of nontaxable baked goods.

8. Petitioner offered no evidence or testimony with respect to the tax assessed on the overcollections not reported or the use tax due on expense purchases.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law specifically provides, in pertinent part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax.

Section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "if necessary, the tax may be estimated on the basis of external indices".

B. Petitioner's books and records were inadequate and incomplete for purposes of verifying taxable sales or substantiating nontaxable sales. When books and records are incomplete, as here, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D. 2d 655). Accordingly, the Audit Division's determination of additional taxable sales and sales taxes due was proper pursuant to section 1138(a) of the Tax Law.


C. That the estimate procedure adopted using the office experience with similar businesses was reasonable under the circumstances herein. The burden rests upon petitioner to demonstrate by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D. 2d 858). Petitioner failed to sustain its burden of showing error.

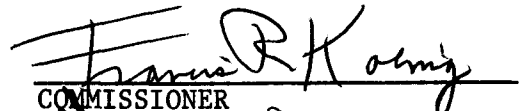
D. That the petition of Plasco Enterprises, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 7, 1982 is sustained.

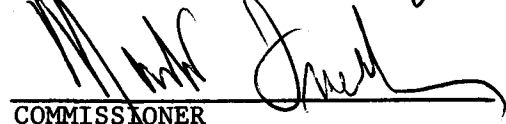
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 333
 RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Harry Diktabax</i>	
Street and No. <i>2 Wintergreen Dr. W</i>	
P.O., State and ZIP Code <i>100 Bell St NY 11754</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 470 316 332
 RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Edward Stepanov One</i>	
Street and No. <i>621 Sunrise Hwy</i>	
P.O., State and ZIP Code <i>Sydney NY 11783</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