

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

September 21, 1984

Jack & Fred Pucci
d/b/a Pucci Bros. Esso
3125 Military Rd.
Niagara Falls, NY 14304

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
Gerald D'Ambrosio
1520 Pine Ave.
Niagara Falls, NY 14301
Taxing Bureau's Representative

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

Barbara A. Stachurski
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jack & Fred Pucci :
d/b/a Pucci Bros. Esso : 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 :
9/1/74 - 8/31/77. :

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Jack & Fred Pucci d/b/a Pucci Bros. Esso, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack & Fred Pucci
d/b/a Pucci Bros. Esso
3125 Military Rd.
Niagara Falls, NY 14304

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
21st day of September, 1984.

David Parchuck

William A. Heyburn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JACK AND FRED PUCCI	:	DECISION
d/b/a PUCCI BROTHERS ESSO	:	
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,	:	
1974 through August 31, 1977.	:	

Petitioners, Jack and Fred Pucci, d/b/a Pucci Brothers Esso, 3125 Military Road, Niagara Falls, New York 14304, 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, 1974 through August 31, 1977 (File No. 21394).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on October 18, 1983 at 2:15 P.M. with all briefs to be submitted by December 23, 1983. Petitioners appeared by Gerald D'Ambrosio, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from petitioners for the period September 1, 1974 through August 31, 1977.

II. Whether penalty and interest in excess of the statutory minimum should be waived.

FINDINGS OF FACT

1. On January 17, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners, individually

and as co-partners, for the period September 1, 1974 through August 31, 1977 for taxes due of \$166,521.32 plus penalty and interest.

2. On March 23, 1979, the Audit Division reduced the tax alleged due to \$121,758.56 after testing additional purchase and sales records of petitioners. On November 26, 1982, the Audit Division further reduced the tax alleged due to \$108,570.82. Petitioners' representative at the hearing herein noted that he had "no objection to that figure (\$108,570.82) being used as the basis for the sales tax being owed". Petitioners' defense is based upon their claim that in order to stay competitive with other retailers of gasoline and to remain in business, they could not charge and collect sales tax.

3. On November 7, 1977, Fred and Jack Pucci executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes in which they agreed that the amount of sales and use taxes due for the taxable period at issue could be determined at any time on or before December 20, 1978.

4. Petitioners operate two gasoline stations in Niagara Falls, New York which they lease from the Exxon Oil Corporation. No maintenance or repair work is performed at either location. According to the testimony of Fred Pucci, "They are gasoline only type stations". In order to compete against other gasoline retailers, petitioner Fred Pucci testified that petitioners could not charge and collect sales tax because their selling price per gallon (including sales tax) would be greater than the selling price of their competitors. As a result, petitioners computed their sales tax liability by determining their profit on the sale of gasoline and then used this amount as their reported gross sales and taxable sales.

CONCLUSIONS OF LAW

A. That the Audit Division may properly impose interest and penalty on sales tax due of \$108,570.82 because petitioners willfully failed to collect and pay over such sales tax as required by law. Their argument that in order to compete, they could not collect sales tax from their customers does not alter the fact that they knowingly failed to collect and pay over sales tax.

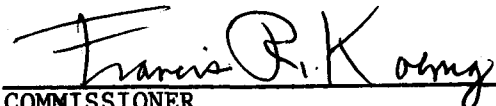
B. That the petition of Jack and Fred Pucci d/b/a Pucci Brothers Esso is denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984


PRESIDENT


COMMISSIONER

 
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Sent to Jack & Fred Pucci	
Street and No. 61A Pucci Bros. Esso.	
P.O., State and ZIP Code 125 Military Rd.	
Postage Niagara Falls, NY 14304	
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	

P 693 168 643

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Sent to Gerald D'Amrosio	
Street and No. 1520 Pine Ave.	
P.O., State and ZIP Code Niagara Falls, NY	
Postage 7430.1	\$
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	