

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

December 14, 1984

Ralph Schiano  
d/b/a Marine Market  
9202 3rd Ave.  
Brooklyn, NY 11209

Dear Mr. Schiano:

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

In the Matter of the Petition :  
of  
Ralph Schiano  
d/b/a Marine Market :

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 9/1/78-5/31/81.

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 14th day of December 1984, he served the within notice of Decision by certified mail upon Ralph Schiano, d/b/a Marine Market the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ralph Schiano  
d/b/a Marine Market  
9202 3rd Ave.  
Brooklyn, NY 11209

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  
14th day of December, 1984.

David Parchuck

David A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
RALPH SCHIANO	:	DECISION
D/B/A MARINE MARKET	:	
	:	
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 May 31, 1981.	:	

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Petitioner, Ralph Schiano d/b/a Marine Market, 9202 3rd Avenue, Brooklyn, New York 11209, 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 May 31, 1981 (File No. 36966).

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 May 23, 1984 at 1:15 P.M. Petitioner appeared by Arthur Firestone, P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division's use of markup percentages as a basis for determining petitioner's taxable sales was proper.

II. If so, whether the additional taxable sales resulting from the use of such procedure were correct.

#### FINDINGS OF FACT

1. Petitioner, Ralph Schiano d/b/a Marine Market, operated a grocery store located at 9202 3rd Avenue, Brooklyn, New York. Approximately seventy-five percent of petitioner's sales were of fruits and vegetables.

2. On March 19, 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 May 31, 1981 for taxes due of \$4,385.82, plus penalty and interest of \$1,992.26, for a total of \$6,378.08.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue to March 20, 1982.

4. On audit, the Audit Division initially analyzed purchases for the months of January, 1979, August, 1979, February, 1980 and June, 1980 to determine those purchases that would result in taxable sales when resold. At petitioner's request, the purchase analysis was expanded to include fourteen months which petitioner indicated were representative of the entire audit period. The purchases were categorized as follows: nontaxable - 78.23 percent; miscellaneous taxable - 13.24 percent; beer - 4.75 percent; soda - 3.41 percent; and cigarettes - .37 percent. These percentages were applied to total purchases, after adjusting for inventory and personal consumption, to determine taxable purchases by category. Markup percentages were computed for each category of purchases based on costs and selling prices in effect at the time of the audit for selected items within each category. The markups were applied to the respective categories to arrive at taxable sales of \$308,444.00. Said amount was adjusted to \$302,275.00 to allow 2 percent for pilferage. Petitioner reported taxable sales of \$248,661.00, leaving additional taxable sales of \$53,614.00 and tax due thereon of \$4,306.78.

Use tax of \$79.04 was assessed on the personal use of taxable items.

5. Following a pre-hearing conference, the Audit Division analyzed purchases for the entire thirty-three month audit period. This resulted in a reduction of \$12,723.00 in taxable purchases. In addition, the markups computed

for the categories of "miscellaneous taxable" and "beer" were revised and a further inventory adjustment was made. The foregoing revisions reduced the sales tax deficiency to \$3,008.46.

6. At the hearing, petitioner submitted a schedule showing certain discrepancies in the markup test regarding the miscellaneous taxable category that reduced the sales by \$12,459.71. The Audit Division agreed with the accuracy of the schedule and conceded that the sales tax liability should be further reduced to \$2,031.00. This represents an error factor of approximately 10 percent.

7. Petitioner argued that the audit did not consider sales promotions where items are sold at cost or at minimal markups. These sales represented 15 percent of total sales. Petitioner also argued that the 2 percent allowance for pilferage was insufficient to cover spoilage, breakage and obsolescence.

8. Petitioner labeled the taxable items placed on the shelf with "tx" so that they were readily identifiable to the cashier. The Audit Division did not verify if items were properly marked.

9. Petitioner's cash registers produced both a detailed tape which was given to the customer showing individual transactions and a summary tape showing total sales and total tax collected. The summary tapes were available to the auditor for the entire audit period. The Audit Division maintained that the summary tapes were inadequate for verifying taxable sales since they did not show individual sales and that it was therefore impossible to determine if sales tax was properly charged on taxable items.

Petitioner took the position that it diligently collected the proper sales tax, retained all cash register tapes and paid over to the state all sales tax shown thereon.

CONCLUSIONS OF LAW

A. That from the cash register tapes retained by petitioner, the Audit Division could not determine if sales tax was charged on all taxable items. Therefore, such documents were inadequate for verifying taxable sales or ascertaining the exact amount of tax due and necessitated the use of a markup test to verify taxable sales. When books and records are inadequate, test period and percentage markup audits are permissible (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That although the use of a markup procedure was proper, the markup test did not give sufficient weight to promotional sales. Taking into account a reduced markup based on such factor, petitioner's recordkeeping, the internal controls employed and the efforts made by petitioner to ensure proper collection of the tax, petitioner's sales as recorded in the books and records are accepted as being correct. Petitioner, however, is liable for the use tax determined on the self-consumption of taxable items.

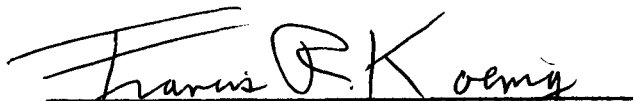
C. That the petition of Ralph Schiano d/b/a Marine Market is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 19, 1982; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 14 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 470 316 295

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Ralph Schiano	
Street and No.	
4th Marine Market	
P.O., State and ZIP Code	
9202 3rd Ave	
Postmark	
Brooklyn NY 11209	
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