STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of John A. Snyder d/b/a Snyder's 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 12/1/72 - 5/31/76.	:	

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 20th day of January, 1984, he served the within notice of Decision by certified mail upon John A. Snyder,d/b/a Snyder's Grocery the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John A. Snyder
d/b/a Snyder's Grocery
523 E. High St.
Painted Post, NY 14870

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
20th day of January, 1984.

David Parchuck

Connie A. Hagelund Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
John A. Snyder
d/b/a Snyder's 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 12/1/72 - 5/31/76.

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 20th day of January, 1984, he served the within notice of Decision by certified mail upon Walter R. Conlin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter R. Conlin
P.O. Box 1386
Corning, NY 14830

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
20th day of January, 1984.

David Parchuck

Connie A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 20, 1984

John A. Snyder
d/b/a Snyder's Grocery
523 E. High St.
Painted Post, NY 14870

Dear Mr. Snyder:

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
Walter R. Conlin
P.O. Box 1386
Corning, NY 14830
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of JOHN A. SNYDER d/b/a SNYDER'S 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 December 1, 1972 through May 31, 1976.	:	DECISION

Petitioner, John A. Snyder, d/b/a Snyder's Grocery, 523 E. High Street, Painted Post, New York 14870, 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, 1972 through May 31, 1976 (File No. 17035).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, State Office Building Annex, 164 Hawley Street, Binghamton, New York on January 12, 1983 at 9:15 A.M., with all briefs to be submitted by April 30, 1983. Petitioner appeared by Walter R. Conlin, Public Accountant. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of a "test period" and mark-up audit as a basis for determining additional sales and use taxes due from petitioner was proper.

II. Whether the assessment of additional sales and use taxes due for the periods ended February 28, 1973 and May 31, 1973, respectively, was barred by operation of the statute of limitations.

III. Whether the Audit Division's (Law Bureau's) answer to petitioner's perfected petition was so untimely and lacking in requisite form and content, as specified in the Commission's Rules of Practice and Procedure, as to warrant cancellation of the assessed deficiency in sales and use taxes.

FINDINGS OF FACT

1. On August 12, 1976, the Audit Division issued to petitioner, John A. Snyder, d/b/a Snyder's Grocery ("Snyder's"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $43,435.16, plus penalty and interest, for the period December 1, 1972 through May 31, 1976.

2. Snyder's, by its duly authorized representative, Walter R. Conlin, had executed a consent, validated by the Audit Division on January 23, 1976, allowing the determination of sales and use taxes due from Snyder's for the period December 1, 1972 through May 31, 1973 to be made at any time on or before September 20, 1976.

3. Snyder's was a retail grocery store, located and operated during the period at issue in Painted Post, New York, selling such taxable items as gasoline (both regular and premium), cigarettes, soft drinks, beer, candy, and other miscellaneous taxable items. Snyder's used a cash basis, single entry system of accounting and reported on a calendar year basis. Sales tax returns were filed on a quarterly basis.

4. On August 29, 1975, auditors for the Audit Division commenced a sales and use tax field audit of petitioner's business. According to the field audit report, at the commencement of the audit, petitioner's journals and ledgers were not up to date, and no income tax returns had been filed since 1972. The auditors noted further that cash register tapes, as maintained, did not identify individual products sold thus preventing the auditors from determining taxable

items sold from such tapes. The auditors also asserted that the total purchases for the entire audit period could not be determined due to the aforementioned lack of up to date records.

5. Records maintained and audited included sales tax returns (Forms ST-100), cancelled checks, purchase invoices, and the cash receipts book and disbursements journal for 1974. Although the audit report mentions a purchase journal, petitioner asserted no such journal was maintained.

6. The auditors selected the months of September, October and November of 1974 and calculated a cash flow (beginning bank balance plus deposits plus cash payouts less ending bank balance) of $149,533.36. Gross sales for the same period as reported per ST-100's totalled $106,367.00, thus leaving an unexplained difference of $43,166.36. Petitioner asserted this discrepancy was due to deposits to the business accounts consisting of small business administration loans, other loans and personal funds for business use. No evidence of such loans was produced at the hearing.

7. The auditors selected September, October and November of 1974 as a test quarter and listed all purchases from actual purchase invoices for this period by category of items sold, including cigarettes, beer, soda, candy, etc. This listing, including invoice number, supplier and date paid (except for beer and soda purchases which were deemed too numerous to be listed separately and so were compiled by adding machine), revealed purchases for the test quarter which would result in taxable sales when resold of $53,263.88,[1] out of total purchases for this quarter of $106,363.36.

8. Selling prices for the merchandise sold in the test quarter were not available as part of petitioner's records at the time of the audit, and could

[1] Gasoline and cigarette purchases were included and reflected at cost with taxes subtracted out by the auditors.

not be identified from the cash register tapes since particular items sold were not specified thereon. The auditors therefore determined selling prices (for each category of item) from petitioner's shelves during a one week test period covering the first week of January, 1976. Such selling price (per category of item) was divided by purchase invoice cost (per category of item) to arrive at a mark-up percentage (per category of item). These mark-up percentages were then carried to the purchases at cost for the three month test quarter and applied to the various categories of items to arrive at audited taxable sales for the test quarter ($70,095.40). This figure was compared to reported taxable sales for the test quarter ($31,703.00) to arrive at a 2.211 margin of error. This error margin was applied to reported taxable sales for the entire audit period ($508,590.00) to arrive at audited taxable sales of $1,124,492.48.

9. Recurring purchases for the test quarter totalled $331.33 (items such as advertising handbills, cash register tape, etc.), and when compared to reported gross sales for the test quarter yielded a taxable percentage of gross sales subject to use tax of .00311. This factor was projected to reported gross sales for the entire audit period, resulting in use tax due on recurring purchases of $4,599.94.

10. Tax due at seven percent on audited taxable sales ($1,124,492.48) and on recurring purchases ($4,599.94) was calculated, and then reduced by a credit for tax remitted with returns, to arrive at the ultimate deficiency assessed ($43,435.16).

11. The auditors noted in support of their assertion of inaccurate books and records that total (taxable and non-taxable) purchases at cost for the test quarter equalled $106,363.36, while gross sales as reported for the same period

totalled $106,367.00, leaving a gross profit of only $3.64. Petitioner asserts added stock purchased for newly expanded store area was responsible for the close relationship of purchases at cost to gross sales during the test quarter.

12. Petitioner admits that all records were not up to date as of the start of the audit, but asserts that completed records were made available within a few months after the commencement of the audit. The reason for the tardiness in completing records was due to the devastation caused by a severe flood which occurred on June 22, 1972 in the wake of Hurricane Agnes.

13. Petitioner's accounting system utilized a "T" account structure in lieu of a general ledger. Under this structure petitioner categorized disbursements and income, obtained a trial balance and was better able to oversee the cash flow of the business. The "T" account balances were also used to prepare the petitioner's income tax returns (specifically Schedule C for Form 1040). Petitioner asserts that at the time of audit only the "T" accounts and the income tax returns were not available, but that adequate and accurate books and records and supporting data, including the completed disbursements journal, purchase invoices, cash register tapes and daily and weekly income summaries taken from such tapes, check stubs and vouchers were available. Petitioner maintains that from these records it was possible to verify taxable sales receipts without resorting to test period audit procedures. Petitioner does not allege the destruction of relevant records by the flood, but asserts the flood delayed updating of such records.[2]

14. Sales receipts from the operation of petitioner's business, as reflected in cash receipts books, were all recorded by means of one electronic cash

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[2] At the hearing petitioner submitted the cash register summary sheets and the disbursement journal (including check disbursements) for 1974, as well as Schedules C, and "T" account structures for 1973, 1974 and 1975.

register used in the business. This register produced a detailed tape, which was given to the customer showing each transaction with sales tax where applicable, and a similar internal tape which recorded and ultimately summarized the on-going transactions. The internal tape was summarized at the end of each day's work, and a reconciliation was made between the tape and the cash in the register drawer. All transactions as they occurred were reflected on a lighted display area on the register which was visible to the customer.

15. The register tape's summary of information was the source for recording each day, on a summary sheet, petitioner's total sales, taxable sales, sales tax, register reading, paid outs, cash count and over/under. Each week, these summary sheets were sent to petitioner's accountant's office and were summarized and incorporated into the compilation of receipts used in preparing the "T" accounts and tax returns. The summary sheets were also the source for preparation of the quarterly sales tax returns. Originally, the register tapes were sent with the summary sheets to the accountant's office. This practice ceased sometime during the audit period (presumably due to lack of necessity).

16. The Audit Division asserts that it does not challenge petitioner's gross sales figures but rather only disputes the taxable percentage of such sales. The Audit Division notes that it is the register tapes and summaries compiled therefrom that lead to the entries in petitioner's records concerning sales and receipts, and the breakdown of taxable sales and sales tax collected. The Audit Division maintains that since the source documents (the tapes) do not identify specific items sold, verification of proper charging of sales tax could not be made and resort to test period procedures was required.

17. Sales tax was charged by the petitioner's employee's operating the cash register by punching a particular register key which caused the machine to

automatically calculate sales tax on the amount of the item entered. During the latter part of the audit period, price stickers affixed to the items for sale indicated those items which were taxable. Prior to this, the cash register clerk learned of which items were taxable from a list supplied by the state and from experience. If a question arose, the rule of thumb used was not to charge sales tax on items of "unadulterated" food.[2] The price stickers indicating taxable items, as used later in the audit period, were affixed by the clerk(s) stocking petitioner's shelves and taxability was apparently based on the same criteria as was followed by the cash register clerk(s).

18. In addition to contesting the use of test period auditing procedures, petitioner argued that the audit did not adequately provide for several additional items, including spoilage and outdating of merchandise, seasonal buying, merchandise returned for credit, price considerations accorded on large volume sales and accorded to certain organizations, and national averages (allowances) for pilferage. No evidence was presented by petitioner at the hearing with regard to these items. Petitioner also asserted several specific items allegedly not considered by the Audit Division, as follows:

a) vandalism/theft losses in the amounts of $171.20, occurring on October 12, 1976, and $124.45 with no date of occurrance specified. Both instances involved break-ins, with the former resulting in the theft of cigarettes, lighters and (unspecified) books, and the latter resulting in the destruction and/or theft of milk, frozen foods, six pairs of gloves and a box of .22 caliber bullets. Petitioner submitted insurance claim forms specifying items taken and their value. No evidence of any insurance recovery was provided;

[2] Petitioner used the term "unadulterated" food apparently with reference to food sold in the same form or condition as when purchased by petitioner.

b) theft of ten cases of beer per week at a value of $51.60 per week by two different employees occurring over a 45 week period in 1973 and a 26 week period in 1974. The alleged loss of taxable merchandise as claimed totalled $2,322.00 in 1973 and $1,341.60 in 1974;

c) annual sales of $4,071.00 to two industrial customers who assertedly paid their own sales tax. No records supporting the calculation of these annual sales were submitted by petitioner;

d) annual average sales of $21,533.33 to tax exempt organizations. Petitioner submitted several exempt organization certificates and a list summarizing dollar amounts of merchandise sold to such organizations. No documents in support of this summary were provided, nor was the method of calculation of this "average" of yearly exempt sales explained;

e) "loss leader" or "come-on" items sold at or near cost to attract customers into the store. Mr. Snyder testified that these items were determined by petitioner's suppliers and included Budweiser beer. Although not specified, the loss leaders included both taxable and non-taxable items. The auditors did include fifty-two cases of Budweiser beer as sold in the test quarter at three percent over invoice cost rather than at the regular mark-up determined (on audit) for beer;

f) an increase of one thousand square feet (approximately 25%) of store space allegedly occurring about the time of the test quarter. Petitioner asserts additional purchases needed to stock this area explains why purchases exceeded sales during the test quarter (<u>refer</u> to Finding of Fact "11"). This new store area held both taxable and non-taxable items, but no breakdown of such items was furnished by petitioner. Petitioner asserted the lack of any substantial increase in gross sales after this sizeable expansion was due to continued competition from larger grocery stores.

19. Petitioner also filed, on January 18, 1979, an "answer to the Audit Division's (Law Bureau's) answer" (referred to herein as petitioner's "reply"), wherein petitioner alleged the Audit Division's answer violated the Commission's Rules of Practice and Procedure (the "Rules") in its form and as to the time within which it was served, as follows:

a) petitoner's perfected petition was acknowledged as received (date stamped) on September 12, 1978. The Audit Division's answer thereto is dated November 28, 1978, and thus petitioner argues the answer was untimely as served seventeen days beyond the sixty day period contained at part 601.6(a)(1) of the Rules [20 NYCRR 601.6(a)(1)]; Petitioner further alleges actual receipt of the answer was not until December 19, 1978.

b) petitioner alleges the Audit Division's answer did not contain numbered paragraphs corresponding to the perfected petition, did not completely advise the Commission and the petitioner of the (Audit Division's) defense, did not contain a specific admission or denial of each material allegation of fact contained in the petition and did not contain a statement of additional facts to be proven, and thus failed to conform with the requirements of part 601.6(a)(2)(A) and (B) of the Rules [20 NYCRR 601.6(a)(2)(A) and (B)].

20. The Audit Division's answer to the perfected petition contained numbered paragraphs responding to the allegations made in the perfected petition by denying all of such allegations, and further by affirmatively asserting (against contrary assertions contained in the petition) the timeliness of the assessments, the non-substantiation of allowances sought by petitioner, a lack of selling price and income records and a brief description of the audit method.

CONCLUSIONS OF LAW

A. That in view of the consent allowing sales and use taxes due for the period December 1, 1972 through May 31, 1973 to be assessed on or before September 20, 1976 (see Finding of Fact "2"), the August 12, 1976 assessment of such taxes for the periods ended February 28, 1973 and May 31, 1973 was not barred by operation of the statute of limitations.

B. That the State Tax Commission's Rules of Practice and Procedure in pertinent part provide:

> "[t]he Law Bureau shall serve an answer on the petitioner or petitioner's representative, if any, within 60 days from the date the Secretary (to the State Tax Commission) acknowledged receipt of an acceptable perfected petition." [20 NYCRR 601.6(a)(1)].

The Rules further provide:

> "[w]here the Law Bureau fails to answer within the prescribed time, petitioner may make a motion to the Commission on notice to the Law Bureau, for a determination on default. Commission shall either grant that motion and issue a default decision or shall determine such other appropriate relief that it deems is warranted." [20 NYCRR 601.6(a)(4)].

Finally, said Rules provide that:

> "[t]he petitioner may serve a reply on the Secretary in response to the answer, within 20 days after service of the answer..." [20 NYCRR 601.6(b)].

C. That as detailed at Finding of Fact "20", the Audit Division's (Law Bureau's) answer to the perfected petition was sufficiently clear and detailed, was not lacking as to the requisite form specified by 20 NYCRR 601.6(a)(2)(A) and (B) and thus was acceptable in this regard. Furthermore, "...the requirement of Regulation 601.6(a)(1) that the Law Bureau of the Department of Taxation and Finance filed an answer 'within 60 days' from a specified date should not be regarded as mandatory but is directory only. (Matter of Santoro v. State Tax Commission, Albany County Special Term, Conway, J., January 4, 1979)". Matter of Jay S. and Rita G. Hamelburg v. State Tax Commission, Albany County Special Term, Prior, J., December 6, 1979. Accordingly, cancellation of the assessment at issue herein upon the basis of untimeliness and insufficiency of the answer is not warranted.

D. That although there is statutory authority for the use of a "test period" to determine the amount of tax due, resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. State Tax Commission, 65 A.D.2d 44). From the income records as described and maintained, including the cash register tapes and summary sheets compiled therefrom, 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.

E. That the audit procedures utilized, as described, disclosed a significant variance from taxable sales reported, thus justifying the conclusion that sales tax was not properly charged on all items subject to tax. Such a discrepancy established the inadequacy and unreliability of petitioners' books and records (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655). Accordingly, the determination of additional taxes due was proper in accordance with the provisions of section 1138(a) of the Tax Law (Matter of Chartair, supra, Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

F. That the petitioners failed to sustain their burden of showing or substantiating error. Neither adequate documents or explanation was supplied by petitioner in order to allow adjustments to be made with regard to those claims specified at items "b" through "f" of Finding of Fact "18". Furthermore, the alleged October 12, 1976 loss by vandalism/theft noted in item "a" of Finding of Fact "18" occurred after the period at issue herein, while the second similar loss specified at item "a" of said Finding was not specified as to date of occurrence and appears to have involved, in part, items not subject to sales tax.

G. That the petition of John A. Snyder, d/b/a Snyder's Grocery is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 12, 1976 is sustained.

DATED: Albany, New York

JAN 20 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 230 844 483

RECEIPT FOR CERTIFIED MAIL

**NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL**
(See Reverse)

SENT TO Walter R. Conler				
STREET AND NO. 523 E. High St				
P.O., STATE AND ZIP CODE P.O. Box 1386 Corning NY 14830				
POSTAGE				$
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE			¢
	OPTIONAL SERVICES	SPECIAL DELIVERY		¢
		RESTRICTED DELIVERY		¢
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
			SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES				$
POSTMARK OR DATE				

PS Form 3800, Apr. 1976

P 481 208 498

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to John A. Snyder, John Snyder Agency	
Street and No. 523 E. High St	
P.O., State and ZIP Code Painted Post NY 14870	
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