

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

Arthur R. Speaker :

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 3/1/79-2/28/82.

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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 Arthur R. Speaker, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur R. Speaker  
36-20 Bowne St.  
Flushing, NY 11354

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

James A. Delaney

Authorized to administer oaths  
pursuant to Tax Law section 174

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

December 14, 1984

John R. Kaefer  
d/b/a Jack's Texaco  
2085 E. Oakfield Rd.  
Grand Island, NY 14072

Dear Mr. Kaefer:

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

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|---|---|----------|
| In the Matter of the Petition                   | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| ARTHUR R. SPEAKER                               | : | DECISION |
|   | : |          |
| 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 March 1, 1979     | : |          |
| through February 28, 1982.                      | : |          |

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Petitioner, Arthur R. Speaker, 36-20 Bowne Street, Flushing, New York 11354, 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 March 1, 1979 through February 28, 1982 (File No. 39572).

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 21, 1984 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's tax liability on the basis of external indices.

FINDINGS OF FACT

1. Petitioner, Arthur R. Speaker, sold gold, silver and costume jewelry at the Busy Flea Market located in Woodside, New York. The flea market operated year-round.

2. On May 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1979 through February 28, 1982 for taxes due of \$5,748.41,

plus interest of \$925.54, for a total of \$6,673.95. The taxes due according to said notice were estimated because petitioner did not maintain any books and records for his business operations.

3. Petitioner advised the Audit Division that his rent at the flea market was \$50.00 per weekend. The Audit Division estimated sales based on Dunn and Bradstreet statistics which showed that retail sales should be ten times the rent paid. Estimated sales for the audit period amounted to \$72,000.00 (\$600.00 rent per quarter x 10 = \$6,000.00 x 12 quarters). Petitioner reported taxable sales of \$574.00, leaving additional taxable sales of \$71,426.00 and tax due thereon of \$5,748.41.

4. Petitioner's sales area at the flea market was approximately ten feet in length. The flea market was open on Fridays from 5 P.M. to 10 P.M. and on Saturdays and Sundays from 10 A.M. to 8 P.M.

Petitioner testified that sales for an average weekend were \$350.00. The value of inventory on hand on any given weekend was between \$800.00 and \$1,000.00. Many of the more expensive gold pieces were taken by petitioner on consignment.

5. Petitioner argued that the assessment was excessive but offered no evidence to show that the amount of tax assessed was erroneous.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "(i)f necessary, the tax may be estimated on the basis of external indices . . ."

Petitioner failed to maintain books and records as required by section 1135 of the Tax Law and, therefore, the Audit Division properly used external

indices to estimate petitioner's liability (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That under the circumstances herein, the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to overcome his burden of showing error (Matter of Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That the petition of Arthur R. Speaker is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1982 is sustained.

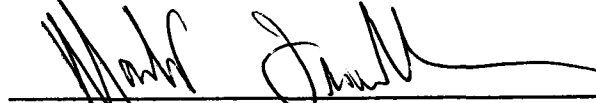
DATED: Albany, New York

DEC 14 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 470 316 294  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

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| 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 |  |           |
| <b>TOTAL Postage and Fees</b>                                 |  | <b>\$</b> |

PS Form 3800, Feb. 1982

Postmark or Date