

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Stop Food Stores, Inc.
Leo Wilson & Natalie Wilson : 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 6/1/74-11/30/77.

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 15th day of June, 1984, he served the within notice of Decision by certified mail upon Stop Food Stores, Inc., Leo Wilson & Natalie Wilson the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stop Food Stores, Inc.
Leo Wilson & Natalie Wilson
c/o Lloyd D. Feld
919 Third Ave.
New York, NY 10022

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
15th day of June, 1984.

David Parchuck

William P. Huppert
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stop Food Stores, Inc. :
Leo Wilson & Natalie Wilson :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 6/1/74-11/30/77.

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 15th day of June, 1984, he served the within notice of Decision by certified mail upon Lloyd D. Feld, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

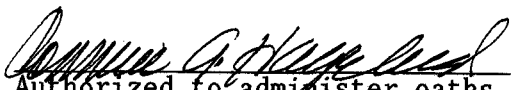
Lloyd D. Feld
919 Third Ave.
New York, NY 10022

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
15th day of June, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

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

June 15, 1984

Stop Food Stores, Inc.
Leo Wilson & Natalie Wilson
c/o Lloyd D. Feld
919 Third Ave.
New York, NY 10022

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
Lloyd D. Feld
919 Third Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
STOP FOOD STORES, INC.,	:	DECISION
LEO WILSON AND NATALIE WILSON	:	
	:	
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 June 1, 1974	:	
through November 30, 1977.	:	

Petitioner Stop Food Stores, Inc., c/o Lloyd D. Feld, 919 Third Avenue, New York, New York 10022, and petitioners Leo Wilson and Natalie Wilson, 72 Libby Place, Middletown, New Jersey 07748, filed petitions 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 June 1, 1974 through November 30, 1977 (File Nos. 28049, 28050 and 28051).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 17, 1983 at 1:45 P.M. and continued to conclusion at the same location on July 11, 1983 at 1:30 P.M., with all briefs to be submitted by September 23, 1983. Petitioners appeared by Lloyd D. Feld, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas C. Sacca, Esq., of counsel) at the hearing on January 17, 1983 and by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel) at the continued hearing on July 11, 1983.

ISSUES

I. Whether petitioner Natalie Wilson was personally liable for any sales and use tax due from Stop Food Stores, Inc.

II. Whether the Audit Division timely issued notices of determination and demand for payment of sales and use taxes due against petitioners.

III. Whether the Audit Division was authorized to use a "test period" and markup audit as a basis for determining additional sales tax due.

FINDINGS OF FACT

1. On June 19, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Stop Food Stores, Inc. alleging tax due of \$75,032.22 plus penalty and interest. On the same date, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Leo Wilson alleging tax due of \$78,308.22¹ plus penalty and interest on the basis that, as an officer of Stop Food Stores, Inc., he was personally liable under Tax Law §1131(1) for the taxes claimed due. A similar notice was also issued on June 19, 1978 against petitioner Natalie Wilson alleging tax due of \$78,308.22, plus penalty and interest, on the basis that, as an officer of Stop Food Stores, Inc., she, like her husband, was personally liable for the taxes claimed due.

2. On September 2, 1977, Leo Wilson, as president of Stop Food Stores, Inc., executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1974 through May 31, 1977 until June 20, 1978.

3. The Audit Division alleged that the following sales and use taxes were due in accordance with Tax Law §1138:

¹ The Audit Division's representative could not explain why the tax alleged due against each of the petitioners Leo Wilson and Natalie Wilson of \$78,308.22 was greater than the amount alleged due against the corporation of \$75,032.22. He contended, however, that the audit supported the larger amount.

<u>Period Ended</u>	<u>Tax Due From Stop Food Stores, Inc.</u>	<u>Tax Due From Each of the Petitioners, Leo Wilson and Natalie Wilson</u>
8/31/74	\$4,327.77	\$4,691.77
11/30/74	5,345.35	5,709.35
2/28/75	7,721.67	8,085.67
5/31/75	6,271.28	6,635.28
8/31/75	6,119.12	6,483.12
11/30/75	6,457.69	6,821.69
2/29/76	6,314.32	6,678.32
5/31/76	7,810.79	8,174.79
8/31/76	9,047.33	9,411.33
11/30/76	4,486.50	4,486.50
2/28/77	3,886.16	3,886.16
5/31/77	3,505.87	3,505.87
8/31/77	2,407.79	2,407.79
11/30/77	1,330.58	1,330.58
Total	\$75,032.22	\$78,308.32

4. Stop Food Stores, Inc. reported gross sales during the period at issue of \$3,767,378. Approximately twenty-six percent of such gross sales, or \$984,772, were reported as taxable sales. The Audit Division claims that the corporation had gross sales during the period at issue of \$3,783,222² and approximately fifty-six percent of such gross sales, or \$2,101,868,³ were taxable sales. The Audit Division also alleges that purchases by the corporation of fixtures and equipment in the amount of \$1,029.49 were subject to use tax of \$72.06 and that each of the petitioners is liable for sales tax due on the

² The Audit Division compared the corporation's gross sales per cash receipts journal to its sales tax returns and claimed an underreporting of \$15,844.00 in gross sales. The Audit Division concedes that gross sales per cash receipts journal were in substantial agreement with the tax returns.

³ This amount includes the book value of the fixed assets transferred in the bulk sale of the Medford store of \$17,667.00 in addition to the \$2,084,201 in taxable sales determined by the test period and markup audit as described herein.

bulk sale of fixed assets with book value of \$17,667.00 to the purchaser of the Medford store.⁴

5. Stop Food Stores, Inc. operated grocery stores at six locations in Nassau and Suffolk Counties. At the time of the audit, five stores had been sold by the corporation.

6. According to the audit report, Stop Food Stores, Inc. maintained all cash register tapes and determined sales tax due "per sales tax key on cash register". However, the register tapes did not specifically identify each item sold. The report also noted that the following books and records were available for audit:

"Weekly cash reports and monthly recap of such reports which constitute the sales journal, purchases journal, check disbursements journal, general ledger, income tax returns for period 4/1/75 - 3/31/77, sales tax returns and cancelled checks and purchase invoices were available for audit."

7. The auditor analyzed the corporation's purchase invoices for the month of May, 1976 to verify taxable sales. According to the audit report:

"Total purchases tested amounted to \$85,988.52. The taxable percentages by categories were as follows for the period 6/1/74 - 8/31/76: Beer, 10.32%; Soda, 8.09%; Miscellaneous, 8.54%; Candy, 4.65%; Tobacco, .52%; 'Stewart Sandwiches', .52%; Coffee purchases used to prepare hot coffee, .51%; and Cigarettes, 17.86%. For the period 9/1/76 - 11/30/77, the taxable percentage applied for miscellaneous items reduced to 7.56% inasmuch as certain medical equipment and supplies were no longer taxable."⁵

8. Petitioner Leo Wilson testified that the purchase invoices for May, 1976 were not representative of the purchase invoices for other months of the

⁴ Petitioners allege in their brief that James Ortity, the purchaser of the Medford store, paid sales tax on the bulk sale of fixed assets. However, no evidence was introduced at the hearing herein to support such allegation. The record does establish that the four purchasers of four other stores paid bulk sales tax.

⁵ The total of the taxable percentages for the period 6/1/74 - 8/31/76 was 51.01 percent; for the period 9/1/76 - 11/30/77, 50.03 percent.

year because in May, purchases for the summer months began, which meant disproportionate purchases of taxable items including soda, beer, sunglasses, suntan lotions, picnic items, etc. In addition, during May, 1976, beverage distributors ran promotions which also prompted petitioner Stop Food Stores, Inc. to make disproportionately large purchases of soda and beer.

9. The auditor determined the following markups based on selling prices and cost of goods at the time of the audit in January, 1978:

<u>ITEM</u>	<u>MARKUP</u>
Beer	58.15%
Soda	54.00
Miscellaneous	49.00
Candy	100.00
Tobacco	27.00
Sandwiches	37.00
Coffee	100.00
Cigarettes	55.70

Petitioners argue that these markups were higher than the markups on merchandise during the period at issue because in January, 1978, Stop Food Stores, Inc. had become a higher markup delicatessen type of operation instead of a chain of discount milk/grocery stores.⁶ As a discount milk/grocery store type operation, it sold more cigarette cartons and soda/beer packs (at a lesser markup) and fewer single packs of cigarettes and individual bottles and cans of soda/beer. This was reversed in January, 1978 because the one remaining store had evolved into a delicatessen-type business.

10. Additional taxable sales of \$876,891.88 and \$222,537.24 were determined for the period 6/1/74-8/31/76 and the period 9/1/76-11/30/77, respectively. The computation is described in detail in the Appendix attached herein.

⁶ At the time of the audit in January, 1978, Stop Food Stores, Inc. was operating only one store while in May, 1976 it was operating six stores.

11. Petitioner Leo Wilson estimated that Stop Food Stores, Inc. suffered shrinkage in merchandise of "close to three percent" as a result of vendors, who did not deliver all the goods that they billed for and shoplifting by customers and employees. The auditor did not consider such shrinkage in performing her markup test.

12. Petitioner Natalie Wilson testified that she was a full-time housewife during the period at issue. She was made secretary of Stop Food Stores, Inc. for the sole purpose of signing a corporate document at a real estate closing for one of the stores which was sold during the audit period. The only other duties she performed on behalf of the corporation were at the direction of her husband, petitioner Leo Wilson, and consisted of merely answering the telephone and some filing. She never received a salary from the corporation and never signed any tax returns on behalf of the corporation.

13. No auditor testified on behalf of the Audit Division because, according to its representative, "The auditor who performed this audit has since passed away, and there is no one who can testify as to how the audit was performed." According to petitioner Leo Wilson, the auditor was not interested in reviewing his entire records, which as noted in Finding of Fact "6", supra, were complete because the auditor, instead, was going to use the month of May, 1976 as a test period.

CONCLUSIONS OF LAW

A. That Tax Law §1133(a) imposes personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" under such article.

Section 1131(1) defines "(p)ersons required to collect tax", in part, as follows:

"Persons required to collect tax'...shall also include any officer or employee of a corporation...who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article..."

B. That pursuant to Finding of Fact "12", supra, personal liability may not be imposed on petitioner Natalie Wilson because she was never under any duty to act for Stop Food Stores, Inc. in complying with its sales and use tax liability. In particular, we note that she had no day-to-day responsibilities in the corporation, no involvement in and knowledge of the financial affairs of the corporation, never prepared or signed tax returns, and had no authority to sign checks. See Vogel v. Dept. of Taxation and Finance, 98 Misc.2d 222, 413 N.Y.S.2d 862.

C. That, as noted in Finding of Fact "2", supra, petitioner Leo Wilson, as president of Stop Food Stores, Inc., executed a consent extending the period within which additional tax due may be determined. By doing so, he also extended the limitation period as it pertained to his personal liability as a corporate officer required to collect tax under Tax Law §§1131(1) and 1133(a). Matter of Jack Galione, State Tax Commission, October 6, 1982.

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. v. State Tax Commission, 65 A.D.2d 44. From the cash register tapes retained by the petitioner corporation, the Audit Division could not determine if sales tax was charged on all taxable items because the tapes did not specifically identify each item sold. An audit of the tapes would not reveal (i) whether clerks improperly rang up taxable items as non-taxable items or (ii) whether sales were made off the cash register.

Therefore, such documents, were inadequate for verifying taxable sales or ascertaining the exact amount of tax due. Matter of Carl J. Licata, et al., State Tax Commission, July 13, 1983.

E. That the audit procedures set forth in Findings of Fact "7", "9", and "10", supra, and detailed in the Appendix attached hereto, disclosed a significant variance with taxable sales reported. In fact, even without applying a markup, purchases of items that would be taxable upon sale were estimated by the Audit Division as \$1,179,725.40 for the period 6/1/74-8/31/76, which is greater than the taxable sales reported of \$850,030.00 for such period. Such variance supports a conclusion that sales tax was not properly charged on all items subject to tax. Such discrepancy established the inadequacy and unreliability of petitioner's books and records. See Matter of George Korba v. State Tax Commission, 84 A.D.2d 655 and Matter of Carl J. Licata, et al., supra.

F. That pursuant to Finding of Fact "11", supra, the Audit Division is directed to make an allowance for shrinkage in merchandise of 2.75 percent by reducing the purchases available for sale by 2.75 percent. Furthermore, in light of the fact that the corporation sold more cigarette cartons and soda/beer packs at a lesser markup during the audit period as compared to January, 1978 when the audit herein was conducted, as noted in Finding of Fact "9", supra, the markups for cigarettes and soda and beer should be halved. In addition, the Audit Division is directed to recalculate its estimate of taxable sales of tobacco and sandwiches for the latter part of the period at issue in order to correct the arithmetic error noted in Footnotes "7" and "8" of the Appendix, infra.

G. That petitioner Leo Wilson's testimony, as noted in Finding of Fact "8", supra, was credible. However, there is no specific evidence herein concerning monthly purchases of beer, soda and miscellaneous merchandise for

any month other than May, 1976 which would support an adjustment to the percentages used by the Audit Division. We note that the burden of proof is upon petitioners, and that they have failed to sustain their burden of showing the monthly purchases of such items for other months during the period at issue. See Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929.

H. That although petitioners alleged in their brief that sales tax on the bulk sale of the Medford store fixed assets was paid by the purchaser, they failed to introduce any evidence to show such payment and that portion of the assessment is sustained.

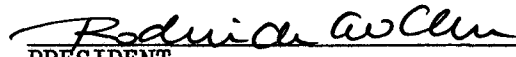
I. That there is nothing in the record showing that petitioner Stop Food Stores, Inc. and petitioner Leo Wilson intentionally failed to charge sales tax on all taxable items. Therefore, penalties are cancelled and interest is reduced to the statutory minimum.

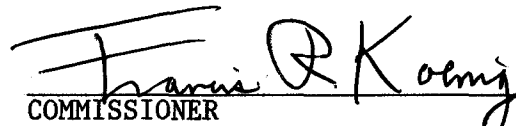
J. That the petitions of Stop Food Stores, Inc., Leo Wilson and Natalie Wilson are granted to the extent noted in Conclusions of Law "B", "F" and "I", but, in all other respects, are denied.

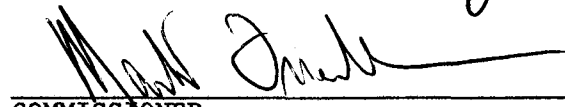
DATED: Albany, New York

STATE TAX COMMISSION

JUN 15 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

APPENDIX

<u>Period 6/1/74-8/31/76</u>	<u>BEER</u>	<u>SODA</u>	<u>MISC.</u>	<u>CANDY</u>	<u>TOBACCO</u>	<u>SANDWICHES</u>	<u>COFFEE</u>	<u>CIGARETTES</u>
Taxable percentage								
Total: 51.01%	10.32	8.09	8.54	4.65	.52	.52	.51	17.86
Purchases available for sale								
- \$2,312,733.74								
Taxable percentage applied to purchases available for sale								
Total taxable purchases	\$238,674.13	\$187,100.16	\$197,507.47	\$107,542.12	\$12,026.22	\$12,026.22	\$11,794.95	\$413,054.21
- \$1,179,725.40								
Markup percentage	58.15	54.00	49.00	100.00	27.00	37.00	100.00	55.70
Markup percentage applied to purchases	138,789.00	101,034.00	96,778.67	107,542.12	3,247.08	4,449.71	11,794.95	230,071.20
Audited taxable sales	\$377,463.13	\$288,134.16	\$294,286.14	\$215,084.24	\$15,273.30	\$16,475.93	\$23,589.90	\$643,125.41
Total audited taxable sales:	\$1,873,432.21							
Less: State tax on cigarettes	146,510.33							
Audited taxable sales	\$1,726,921.88							
Less: Taxable sales reported	850,030.00							
6/1/74-8/31/76	\$ 876,891.88							
Additional Taxable Sales								
<u>Period 9/1/76-11/30/77</u>								
Taxable percentage								
Total: 50.03%	10.32	8.09	7.56	4.65	.52	.52	.51	17.86
Purchases available for sale								
- \$486,637.35								
Taxable percentage applied to purchases available for sale								
Total taxable purchases	\$ 50,220.98	\$ 39,368.97	\$ 36,789.79	\$ 22,628.64	\$ 2,530.52	\$ 2,530.52	\$ 2,481.86	\$ 86,913.39
- \$243,464.67								
Markup percentage	58.15	54.00	49.00	100.00	27.00	37.00	100.00	55.70
Markup percentage applied to purchases	29,203.50	21,259.25	18,027.00	22,628.64	1,315.87 ⁸	1,315.88 ⁹	2,481.86	48,410.75
Audited taxable sales	\$ 79,424.48	\$ 60,628.22	\$ 54,816.79	\$ 45,257.28	\$ 3,846.39	\$ 3,846.40	\$ 4,963.72	\$135,324.14
Total audited taxable sales:	\$388,107.42							
Less: State tax on cigarettes	30,828.18							
Audited taxable sales	\$357,279.24							
Less: Taxable sales reported	\$134,742.00							
9/1/76-11/30/77	\$222,537.24							
Additional Taxable Sales								

⁷ The Audit Division, in fact, incorrectly applied a markup percentage of 52%.
⁸ Ibid.

P 440 977 279

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Alvin D. Feld</i>	
Street and No. <i>45 Alvin D. Feld</i>	
P.O., State and ZIP Code <i>919 Third Ave.</i>	
<i>New York, NY 10022</i>	
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 440 977 278

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Step. Fred. Strong, Inc.</i>	
Street and No. <i>919 Third Ave.</i>	
P.O., State and ZIP Code <i>New York, NY 10022</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