

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sutton Sweets & Treats, Inc. :
& Harold Cohen, as Officer :

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 :
9/1/78-8/31/81. :

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Sutton Sweets & Treats, Inc. & Harold Cohen, as Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sutton Sweets & Treats, Inc.
& Harold Cohen, as Officer
1101 First Ave.
New York, NY 10021

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
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

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

December 31, 1984

Sutton Sweets & Treats, Inc.
& Harold Cohen, as Officer
1101 First Ave.
New York, NY 10021

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: Taxing Bureau's Representative

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
ALBANY, NEW YORK 12224

Page 87

State of New York
Office of the Attorney General
Albany, New York 12224

Page 88

State of New York
Office of the Attorney General
Albany, New York 12224

State of New York
Office of the Attorney General
Albany, New York 12224

State of New York
Office of the Attorney General
Albany, New York 12224

State of New York
Office of the Attorney General
Albany, New York 12224

Page 89

State of New York

State of New York

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SUTTON SWEETS AND TREATS, INC. AND	:	DECISION
HAROLD COHEN, AS OFFICER	:	
	:	
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 August 31, 1981.	:	

Petitioners, Sutton Sweets and Treats, Inc. and Harold Cohen, as officer, 1101 First Avenue, New York, New York 10021, 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 August 31, 1981 (File No. 36707).

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 March 14, 1984, at 2:45 p.m., with additional evidence to be submitted by April 15, 1984. Petitioner Sutton Sweets and Treats, Inc. appeared by its president, Harold Cohen, and petitioner Harold Cohen appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use taxes due from petitioners based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner Sutton Sweets and Treats, Inc. (Sutton) operated a candy and ice cream shop located at 228 East 59th Street, New York, New York. Sutton sold candy, nuts, dried fruits, cookies and ice cream.

2. On February 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 Sutton covering the period September 1, 1978 through August 31, 1981 for taxes due of \$19,440.14, plus penalty and interest of \$8,056.45, for a total of \$27,496.59.

On the same date, a notice was also issued to petitioner Harold Cohen, as an officer of Sutton, for taxes due of \$19,024.61 plus penalty and interest. (Mr. Cohen was not held personally liable for use tax of \$415.53.)

3. Petitioner Harold Cohen executed a consent on behalf of Sutton extending the period of limitations for assessment of sales and use taxes for the period September 1, 1978 through August 31, 1979 to September 20, 1982.

4. On audit, the Audit Division found that Sutton did not maintain register tapes or other verifiable records of individual sales. Sutton had cash registers which produced a tape showing the taxable transactions and sales tax collected; however, the tapes were disposed of after the totals were recorded in the cash receipts journal.

The Audit Division compared reported taxable sales with gross sales for the audit period, which comparison revealed a taxable ratio of 32 percent. The percentage appeared low for the nature of the business. Consequently, the Audit Division analyzed purchase invoices for October, 1979 to determine the purchases that would result in taxable sales when resold. The analysis disclosed that 74 percent of the purchases were taxable. A markup test for the taxable

items was performed using costs and selling prices in effect on October 17, 1980 which resulted in an overall average markup of 94 percent. The markup was applied to taxable purchases for the audit period of \$206,821.68 (total purchases of \$279,489.03 X 74%) to arrive at taxable sales of \$403,095.84. This amount was adjusted to \$396,041.67 to allow 1 3/4 percent for pilferage. Sutton reported taxable sales of \$158,234.00, leaving additional taxable sales of \$237,807.67 with tax due thereon of \$19,024.61.

Use tax of \$415.53 found due on expense purchases is not in dispute.

5. Sutton estimated that approximately 65 to 70 percent of its sales were nontaxable rather than taxable. This estimate was based on petitioner Harold Cohen's experience with the business operation. Mr. Cohen testified that Sutton sold large quantities of ice cream. Mr. Cohen considered ice cream cones and ice cream sold in a cup as nontaxable sales.

6. Petitioners acted in good faith at all times.

7. Petitioner Harold Cohen did not contest his personal liability as officer of Sutton for any taxes determined due from Sutton.

CONCLUSIONS OF LAW

A. That Sutton's failure to maintain records of individual sales receipts as required by section 1135 of the Tax Law permitted the Audit Division to utilize a test period method of audit and markup percentages to determine taxable sales (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D.2d 947; Matter of McClusky's Steak House, Inc. v. State Tax Commission, 80 A.D.2d 713). Without verifiable records of receipts, the Audit Division could not determine if sales tax was properly charged on all taxable items.

The audit procedures set forth in Finding of Fact "4" are used to verify the accuracy of reported taxable sales. Such procedures disclosed a

significant discrepancy with reported taxable sales so as to conclude that sales tax was not properly charged on all taxable items. These procedures further established the inadequacy and unreliability of petitioner's books and records (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655).

Accordingly, the determination of additional taxes due was proper pursuant to section 1138(a) of the Tax Law.

B. That the Audit Division reasonably calculated Sutton's tax liability and Sutton has not overcome its burden of showing error (Matter of Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That petitioner Harold Cohen is personally liable for the sales tax due in accordance with sections 1131(1) and 1133(a) of the Tax Law.


D. That Sutton's underreporting of taxable sales was due to reasonable cause and not due to willful neglect and therefore the penalty and that portion of interest exceeding the statutory minimum are remitted as provided in section 1145(a)(1)(ii) of the Tax Law.

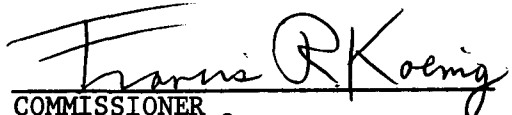
E. That the petition of Sutton Sweets and Treats, Inc. and Harold Cohen is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued February 19, 1982; and that, except as so granted, the petitions are in all other respects denied.

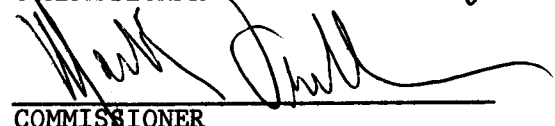
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 327

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
J. Edgar Hoover	
Street and No.	
400 ...	
P.O., State and ZIP Code	
1101 ...	
Postage	
New York, NY 10021	
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