

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Louise T. Swartout :

d/b/a Frank's Corner Store :

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 :
9/1/74-11/30/77. :

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 31st day of July, 1984, he served the within notice of Decision by certified mail upon Louise T. Swartout d/b/a Frank's Corner Store, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louise T. Swartout
d/b/a Frank's Corner Store
c/o David Duncan
Lyons & Duncan, 100 State St.
Albany, NY 12207

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 July, 1984.

David Parchuck

James P. Haggerty
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Louise T. Swartout	:	
d/b/a Frank's Corner Store	:	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 9/1/74-11/30/77.	:	

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 31st day of July, 1984, he served the within notice of Decision by certified mail upon E. David Duncan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

E. David Duncan
Lyons & Duncan
100 State St.
Albany, NY 12207

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
31st day of July, 1984.

David Parchuck

James A. Hayes
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Louise T. Swartout
d/b/a Frank's Corner Store
c/o David Duncan
Lyons & Duncan, 100 State St.
Albany, NY 12207

Dear Mrs. Swartout:

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
E. David Duncan
Lyons & Duncan
100 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LOUISE T. SWARTOUT	:	DECISION
D/B/A FRANK'S CORNER STORE	:	
	:	
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, 1974	:	
through November 30, 1977.	:	

Petitioner, Louise T. Swartout d/b/a Frank's Corner Store, c/o E. David Duncan, Esq., Lyons & Duncan, Esqs., 100 State Street, Albany, New York 12207, 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, 1974 through November 30, 1977 (File No 28059).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on October 21, 1983 at 9:15 A.M., with all briefs to be filed by December 22, 1983. Petitioner appeared by Lyons & Duncan, Esqs. (E. David Duncan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

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

II. Whether penalties and interest in excess of the minimum statutory rates should be abated.

FINDINGS OF FACT

1. Petitioner, Louise L. Swartout d/b/a Frank's Corner Store, operated a small grocery store located in New Baltimore, New York. The store was operated seven days per week by Mrs. Swartout as a sole proprietorship, with no employees, from the beginning of the audit period through October 1, 1977, at which time Mrs. Swartout ceased business and rented the store to her son and daughter-in-law.

2. On December 19, 1977, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period September 1, 1974 through November 30, 1977, assessing tax due in the amount of \$2,576.03, plus penalty and interest.¹

3. Petitioner maintained and made available for audit the following books and records: sales tax returns, Federal income tax returns (for 1975 and 1976), sales journal, purchases journal, cash disbursements journal and purchase invoices. Petitioner also had cash register tapes for the entire audit period. The cash register tapes did not identify each specific item sold, but rather recorded only amounts with the letters "tx" next to those amounts charged as sales tax.

4. The Audit Division's auditor reviewed petitioner's sales tax returns and Federal income tax returns, and determined that total sales reported per each of these returns agreed. The sales tax returns reflected 22.7 percent of such total sales as taxable sales.

¹ Notwithstanding the November 30, 1977 indicated ending date of the audit period, the audit and assessment actually extends only until September 30, 1977 due to the noted cessation of business as of the end of September, 1977.

5. The auditor reviewed petitioner's purchase invoices for the months of February, May, August and November of 1976, recording taxable purchases in six categories of items, specifically beer, soda, cigarettes and tobacco, candy, miscellaneous, and gasoline. Taxable purchases for these months totalled \$5,770.66, out of total purchases for the same months in the amount of \$11,229.83, or a taxable purchase ratio of 51.39 percent. Markup percentages were computed for each category of taxable item purchased based on costs and selling prices in effect during the month of September, 1977, the last month of operation. The resultant markups were applied to the noted categories of taxable purchases to determine a weighted average markup of 28.27 percent.

6. The auditor applied the taxable purchase percentage (51.39%) to total purchases for the entire audit period, arriving at total taxable purchases of \$58,850.89. The weighted average markup percentage (28.27%) was applied to this total taxable purchases figure resulting in audited taxable sales of \$75,488.04 for the audit period. Tax due on audited taxable sales totalled \$4,525.11 which, after reduction for tax in the amount of \$1,949.08 as reported on petitioner's returns, resulted in the additional tax due (as assessed) of \$2,576.03.

7. Petitioner asserts that the books and records maintained, including the cash register tapes, were complete and adequate, and that from such records it was possible to verify taxable sales receipts without resorting to test period audit procedures.

8. The Audit Division asserts, by contrast, that the cash register tapes did not identify the specific items sold and, therefore, the auditor was unable to verify that sales tax was properly charged on taxable items, thus necessitating the use of tests to verify taxable sales.

9. Petitioner asserts, in the event the assessment is upheld, that penalties should be abated. Petitioner has, at all times, acted in good faith.

CONCLUSIONS OF LAW

A. 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).

B. That from the records maintained by petitioner, including the cash register tapes, 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. The audit procedures, as set forth in Findings of Fact "4" through "6", disclosed a significant variance from taxable sales as reported, (i.e. 51.39% of purchases tested represented taxable purchases whereas only 22.7% of sales were reported as taxable sales), thus supporting the conclusion that sales tax was not properly charged on all items subject to tax. Such a discrepancy established the inadequacy and unreliability of petitioner's 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). Petitioner, in turn, has not shown or substantiated errors in the methodology or result of the audit and thus no reduction of the tax found to be due is warranted (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That penalties and interest in excess of the minimum statutory rate are cancelled.

D. That the petition of Louise T. Swartout d/b/a Frank's Corner Store is granted to the extent indicated in Conclusion of Law "C", but is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984

Rodolph W. Cline
PRESIDENT

Francis R. Kolmy
COMMISSIONER

Mark J. Dineen
COMMISSIONER

P 440 977 370

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>E. David Durcan</i>	
Street and No. <i>100 State St.</i>	
P.O., State and ZIP Code <i>Albany, NY 12207</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

P 440 977 369

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Louise T. Swartz</i>	
Street and No. <i>100 State St.</i>	
P.O., State and ZIP Code <i>Albany, NY 12207</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