

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Sweet Three, Inc. :  
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 3/1/76-8/31/79. :  
\_\_\_\_\_:

AFFIDAVIT OF MAILING

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 21st day of March, 1984, he served the within notice of Decision by certified mail upon Sweet Three, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sweet Three, Inc.  
626 E. 80th Street  
Brooklyn, NY 11236

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  
21st day of March, 1984.

David Parchuck

James A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Sweet Three, Inc.	: : : : : :	: : : : : :
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 3/1/76-8/31/79.		AFFIDAVIT OF MAILING

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 21st day of March, 1984, he served the within notice of Decision by certified mail upon David Alster, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Alster  
2271 80th St.  
Brooklyn, NY 11214

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  
21st day of March, 1984.

David Parchuck

Cornelia A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

State of New York }  
County of Albany } ss.:

M. J. Schutz  
122 E. 42nd St.  
New York, NY 10017

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.

Daniel Paruch

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

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

March 21, 1984

Sweet Three, Inc.  
626 E. 80th Street  
Brooklyn, NY 11236

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  
David Alster  
2271 80th St.  
Brooklyn, NY 11214  
AND  
M. J. Schutz  
122 E. 42nd St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SWEET THREE, INC.	:	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, 1976	:	
through August 31, 1979.	:	

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Petitioner, Sweet Three, Inc., 206 B. 116th Street, Rockaway Park, New York, New York 11694, c/o Myron Langer, 626 East 80th Street, Brooklyn, New York 11236, 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, 1976 through August 31, 1979 (File No. 30618).

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 July 20, 1983 at 9:15 A.M. Petitioner appeared by M.J. Schutz, Esq. and David Alster, CPA. The Audit Division appeared by John P. Dugan, Esq., (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against petitioner should be cancelled as a result of the Law Bureau's failure to serve an answer to the perfected petition within the time limitations prescribed under Rule 601.6(a)(1) of the State Tax Commission's Rules of Practice and Procedure.

II. Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioner, Sweet Three, Inc., operated an ice cream and candy store located at 206B 116th Street, Rockaway Beach, New York. Petitioner also sold cigars, cigarettes and a limited number of food items such as coffee, donuts and rolls.

2. On May 27, 1980, 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 petitioner covering the period March 1, 1976 through August 31, 1979 for taxes due of \$21,343.28, plus interest of \$4,279.73, for a total of \$25,623.01.

On the same date a notice was also issued to M. Langer individually as president of petitioner corporation for taxes due of \$21,219.12, plus interest. M. Langer was not held personally liable for use taxes of \$124.16 found due on audit.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1976 through February 28, 1979 to June 20, 1980.

4. The Tax Appeals Bureau received petitioner's perfected petition on February 2, 1982. The Department of Taxation and Finance served its answer to the perfected petition on May 12, 1982.

Petitioner argued that it was entitled to a determination on default because the answer was not served within sixty days from receipt of the perfected petition.

5. Petitioner provided the following books and records for audit; cash receipts and disbursements journal, purchase invoices, sales tax returns and federal and state income tax returns.

On audit, the Audit Division accepted the accuracy of the gross sales reported based on a reconciliation of such sales from the books and records to sales tax returns and income tax returns. The auditor examined current cash register tapes and found that they did not identify the specific item sold. Without such information, the auditor could not verify if sales tax was charged on all taxable items. In order to verify taxable sales, the auditor analyzed purchase invoices for the period September 1, 1978 through November 30, 1978 to determine purchases of items that would result in a taxable sale when resold. The purchases were categorized as follows: food - \$2,204.37, taxable ice cream - \$1,612.90, candy - \$5,099.21, miscellaneous taxable - \$6,317.33, cigarettes - \$11,054.45. The nontaxable purchases were \$46,868.78 or 64 percent of total purchases for the period examined. Markup percentages were computed for each category of purchases (except for food and ice cream) based on costs and selling prices in effect at the time of the audit. The food and ice cream markups were estimated based on the auditors experience.

Total purchases determined for the audit period of \$1,034,482.00 were allocated to the above taxable categories in the same proportion as each category was to total purchases analyzed for the test months. The individual markups computed above were applied to the taxable purchases by category to determine taxable sales of \$477,847.00. Petitioner reported taxable sales of \$212,608.00, leaving additional taxable sales of \$265,239.00 and taxes due thereon of \$21,219.12.

The audit also disclosed use taxes due of \$124.16. This amount, however, was not in dispute at the hearing.

6. The Audit Division conceded that nontaxable ice cream sales should be increased to 31 percent resulting in a tax reduction of \$752.96.

7. Petitioner argued that the audit did not give consideration to the following factors:

- (a) 10 percent discount given to senior citizens. Petitioner estimated such discounts amounted to \$1,500.00 per year.
- (b) Employee consumption. Petitioner employed students part-time who were allowed to consume products while working. Petitioner estimated that employee consumption was approximately \$30.00 per week for each employee.
- (c) Give aways or "treating" customers was estimated to be \$5,500.00 for the audit period.
- (d) Spoilage. Petitioner estimated spoilage at \$1,000.00 a year.
- (e) Robberies. Petitioner testified that three robberies occurred during the audit period.
- (f) Cigars sold by the box which resulted in a lower markup percentage.

Petitioner produced no evidence to support its arguments.

8. In addition to the foregoing, petitioner argued that it maintained complete and adequate books and records and therefore, the audit procedures followed by the Audit Division to estimate taxable sales was improper.

#### CONCLUSIONS OF LAW

A. That the requirement of Regulation 601.6(a)(1) that the Law Bureau serve an answer on petitioner "within 60 days" from receipt of a perfected petition shall 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 Hamelburg v. James H. Tully, Albany County Special Term, Prior H., December 6, 1979). Moreover, the Law Bureau's delay did not prejudice or adversely affect petitioner's position in this matter.

B. That petitioner's books and records were inadequate for verifying taxable sales receipts in that from the cash register tapes the Audit Division



could not determine if sales tax was charged on all taxable items. Accordingly, the audit procedures and tests used to determine such sales were proper pursuant to section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

Moreover, the audit disclosed a significant variance with taxable sales reported (an increase of 124 percent) to conclude that sales tax was not properly charged on all items subject to tax. This discrepancy further established the inadequacy and unreliability of petitioner's books and records (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

C. That the Audit Division reasonably calculated the taxes due and petitioner has failed to overcome its burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

D. That in accordance with Finding of Fact "6", petitioner's liability is reduced by \$752.96

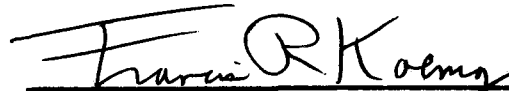
E. That the petition of Sweet Three, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 27, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAR 21 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 440 976 796

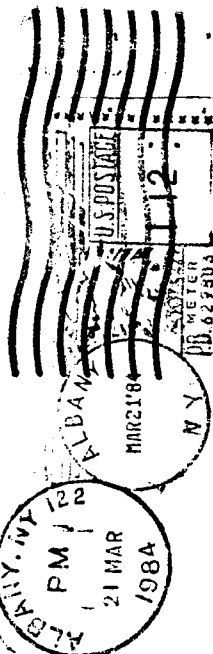
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>M. J. Schultz</i>	
Street and No. <i>122 E. 42nd St.</i>	
P.O., State and ZIP Code <i>NY, NY 10017</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 440 976 795

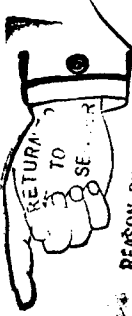
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>David Alster</i>	
Street and No. <i>2271 80th St.</i>	
P.O., State and ZIP Code <i>Brooklyn, NY 11214</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	

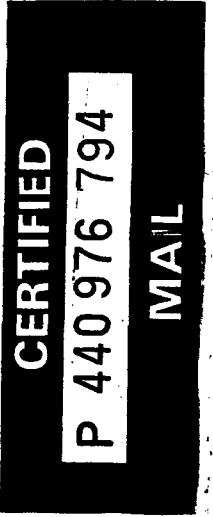
PS Form 3800, Feb. 1982



REASON FOR RETURN TO SENDER  
☒ Unclaimed  
☐ Addressee unknown  
☐ Insufficient Address  
☐ No such street number  
☐ No such office in state  
☐ Do not re-mail in this envelope

Sweet Three, Inc.  
626 E. 80th St.  
Brooklyn, NY 11236

TA 26 (9-79)  
STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227



P 440 976 794

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
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(See Reverse)

Sent to	
Sweet Three, Inc.	
Street and No.	
626 E. 80th St.	
P.O., State and ZIP Code	
Brooklyn, NY 11236	
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>
Postmark or Date	

PS Form 3800, Feb. 1982

TA 26 (9-79)

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227



REASON ONE RED

Unclaimed ☐ Refused ☐

Addressee unknown ☐

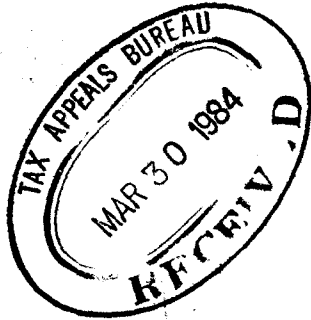
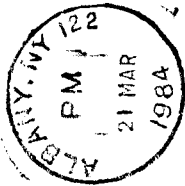
Insufficient Address ☐

No such street number ☐

No such office in state ☐

Do not refile in this envelope

Sweet Three, Inc.  
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Brooklyn, NY 11236



CERTIFIED

P 440 976 794

MA

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

March 21, 1984

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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  
David Alster  
2271 80th St.  
Brooklyn, NY 11214  
AND  
M. J. Schutz  
122 E. 42nd St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SWEET THREE, INC.	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
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C. That the Audit Division reasonably calculated the taxes due and petitioner has failed to overcome its burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

D. That in accordance with Finding of Fact "6", petitioner's liability is reduced by \$752.96

E. That the petition of Sweet Three, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 27, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAR 21 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER