

STATE TAX COMMISSION

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

Eugene N. Turk
1796 E. 29th St.
Brooklyn, NY 11229

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.

David Paruchuk

Amur R. Dapkin
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Martin Velazquez
URB. Valle Verde 3
Calle Praderas DA-4
Bayamon, Puerto Rico 00619

Dear Mr. Velazquez:

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
Eugene N. Turk
1796 E. 29th St.
Brooklyn, NY 11229
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| MARTIN VELAZQUEZ | : | 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 December 1, 1974 | : | |
| through November 30, 1977. | : | |

Petitioner, Martin Velazquez, URB Valle Verde 3, Calle Praderas DA-4, Bayamon, Puerto Rico 00619, 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 December 1, 1974 through November 30, 1977 (File No. 25452).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 17, 1982 at 9:15 A.M. Petitioner appeared by Eugene N. Turk, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the consent extending the period for limitation of assessment of sales and use taxes, which petitioner signed, is void because petitioner did not understand the nature of his consent.

II. Whether the Audit Division's failure to provide petitioner with a copy of the audit worksheets warrants cancelling the asserted sales and use tax liability.

III. Whether petitioner was provided with a pre-hearing conference, and, if not, whether the failure to have a pre-hearing conference warrants cancelling the asserted sales and use tax liability.

IV. Whether the Audit Division, in the absence of adequate records, properly determined petitioner's taxable sales based upon a field audit of petitioner's grocery store.

FINDINGS OF FACT

1. During the period in issue, petitioner, Martin Velazquez, operated a retail grocery store known as the Velazquez Martin Grocery Store in a low-income residential area in Brooklyn, New York.

2. On March 14, 1978, petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1974 through November 30, 1977 to February 20, 1979. Prior to the time the consent was executed, petitioner, who spoke with a spanish accent, was provided with an explanation of the effect of signing the document.

3. On November 13, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1974 through November 30, 1977 for taxes due of \$30,743.36, plus penalty of \$7,086.09 and interest of \$8,264.93, for a total amount of \$46,094.38.

4. At the time of the audit, the only records which petitioner could produce were cancelled checks for the audit period and purchase invoices for March, 1978. The Audit Division determined that petitioner's records were incomplete for audit procedures. Therefore, it conducted an observation test of sales made by the Velazquez Martin Grocery Store. On March 28, 1978 two auditors went to the grocery store and stood adjacent to the cash register from 10:00 A.M. to 4:00 P.M. During this period, the auditors observed total taxable sales of \$138.73. This amount was broken down into beer sales of \$35.65, soda sales of \$28.47, cigarette sales of \$28.00, and other sales of \$46.61. The cigarette and other sales were doubled and the beer and soda sales

were tripled to account for the period from 4:00 P.M. when the auditors left the store to 11:30 P.M. when the store closed. The beer and soda sales were tripled based on the assumption that these items were sold in greater quantities during the evening than during the day. The foregoing computations resulted in a total day's taxable sales of \$341.58. This amount was multiplied by seven to obtain weekly taxable sales, since the grocery store was open seven days a week. The weekly taxable sales were then multiplied by thirteen to derive quarterly taxable sales. The auditors also assumed that beer and soda sales were greater during the summer months. Therefore, in order to obtain taxable sales for the summer quarter, beer and soda sales were doubled. Each of the quarterly taxable sales were then added together. This amount was then reduced by one-third of the amount of cigarette sales, to account for cigarette tax, in order to obtain taxable sales for a year. This amounted to \$135,044.48. This sum was then multiplied by three to obtain taxable sales for the audit period which resulted in an amount of \$405,134.64. Since the vendor previously reported taxable sales of \$20,881.00, he was taxed on the additional \$384,255.00.

5. While the observation audit was being conducted there was at least one auditor watching the cash register at all times.

6. On February 20, 1980 petitioner's representative, an auditor, and a Tax Appeals Bureau conferee met at the Brooklyn District Office of the Department of Taxation and Finance for the purpose of conducting a pre-hearing conference. At this conference, petitioner's representative agreed to present books and records to the auditor.

7. On May 5, 1980 petitioner's representative had a meeting with one of the auditors who conducted the audit. Petitioner's representative offered the auditor the federal income tax returns filed during the period in issue. The

auditor declined to utilize these returns because they did not contain a fixed asset schedule. Petitioner's representative did not present any books and records and, therefore, a re-audit was not conducted.

8. Petitioner's representative maintained that he did not have an opportunity to review the audit report prior to the hearing, although a copy thereof was requested in the petition. Petitioner's representative, however, did not make a motion for discovery to obtain the audit report.

9. At the hearing, petitioner's representative asserted that the audit procedure was defective because it did not take into account the level of price increases over the period. No evidence was presented, however, on the extent to which the prices of the items sold by petitioner were affected by inflation. Petitioner also argued that the results of the audit were erroneous since the audit failed to take into account the fact that the store may have been closed because of inclement weather or because petitioner was on vacation. Nevertheless, petitioner presented no evidence as to when the store may have been closed either because of inclement weather or because petitioner was on vacation.

CONCLUSIONS OF LAW

A. That petitioner has failed to present any evidence that would warrant a finding that petitioner had not given a valid consent to the extension of the period for assessment of sales and use taxes due. Therefore, it is hereby found that the consent extending the period for assessment of sales and use tax is binding upon petitioner.

B. That where a petitioner is unable to obtain discovery through a pre-hearing conference, a motion should be made pursuant to 20 NYCRR 601.10. Since petitioner did not utilize the discovery procedures available to him, the argument that the asserted deficiency should be dismissed because of failure to be provided with a copy of the audit report is rejected.

C. That in view of Finding of Fact "6", petitioner was provided with a pre-hearing conference. It is noted that a pre-hearing conference is scheduled where it appears that such a conference would be of assistance in narrowing disagreement as to facts, defining legal issues, or resolving the controversy (see 20 NYCRR 601.4(c)). Therefore, even if petitioner did not have a pre-hearing conference, the lack of an opportunity to participate in a pre-hearing conference is no bar to the propriety of the assessment and does not warrant cancellation of the asserted deficiency.


D. That petitioner failed to keep the records required by section 1135 of the Tax Law. Therefore, the Audit Division properly utilized such external indices as were available (Tax Law §1138(a)). The Audit Division, however, erred in its projection of the test results by increasing the beer and soda sales for the evening hours and the summer months. A more reasonable reflection of petitioner's business activities is reached by extending the half-day test to a full day which results in taxable sales of \$282,601.22 for the period December 1, 1974 through November 30, 1977.

E. That the petition of Martin Velazquez is granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 13, 1978; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

JAN 18 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 717

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to | |
| Eugene D. Turk | |
| Street and No. | |
| 1796 E. 29th St. | |
| P.O., State and ZIP Code | |
| Brooklyn, NY 11229 | |
| 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 440 976 716

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to | |
| Martin Valazquez | |
| Street and No. | |
| Calle Pradeds 94-4 | |
| P.O., State and ZIP Code | |
| Bayamon, Puerto Rico | |
| Postage | \$ |
| Certified Fee | |
| Special Delivery Fee | |
| Restricted Delivery Fee | |
| Return Receipt Showing to whom and Date Delivered | |
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| TOTAL Postage and Fees | \$ |
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PS Form 3800, Feb. 1982