

## STATE TAX COMMISSION

Barbara A. Haglund Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ZEV WACHTEL : DECISION  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 & 29 :  
of the Tax Law for the Period September 1, 1974 :  
through November 30, 1976.

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Petitioner, Zev Wachtel, c/o Chaya Ziv, 81-20 Chevy Chase Street, Jamaica, New York 11432, 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, 1976 (File No. 27317).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1983, at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated the percentage of petitioner's gross sales which were taxable resulting in the determination of additional sales tax due.

FINDINGS OF FACT

1. Petitioner operated a delicatessen known as Arcade Delicatessen located at 55 West 42nd Street, New York City. Petitioner sold the business operation on January 6, 1977 for \$40,000.00, \$6,000.00 of which constituted the sale of furniture and fixtures.

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

January 20, 1984

Zev Wachtell  
c/o Chaya & Mordechai Ziv  
81-20 Chevy Chase St.  
Jamaica, NY 11432

Dear Mr. Wachtell:

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

On or about January 12, 1977, petitioner notified the Tax Commission of the aforesaid sale and remitted the sales tax collected on the furniture and fixtures sold in the amount of \$480.00.

2. On April 8, 1977, the Audit Division requested information from petitioner in the form of a Bulk Sale Questionnaire. No response was received from petitioner.

3. On November 18, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Zev Wachtell [sic] d/b/a Arcade Delicatessen covering the period September 1, 1974 through November 30, 1976 with the following explanation:

"As a result of a review of returns filed and your failure to submit information requested, 45% of your reported gross sales are held to be taxable. The following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law."

The Notice asserted additional sales tax due of \$2,552.43 plus penalty and interest of \$1,136.34 for a total of \$3,688.77.

4. The Audit Division's auditor testified that the 45 percent used in determining petitioner's taxable sales was based on industry standards for this type of business. Petitioner reported 15.59 percent of his gross sales as taxable on sales and use tax returns filed.

At meetings held with petitioner on August 16, 1978 and August 28, 1978, the following records were submitted: ST-100's (sales and use tax returns), Federal income tax return, check disbursement, bank statements, register tapes. The auditor testified that sufficient records were not maintained in which to warrant a reduction to the taxable sales percentage previously determined. The auditor found, based on review of purchases made for the period September through November, 1976, that no purchases were made which

would be taxable when resold other than beer, soda and cigarettes. Sufficient sales records; however, were not maintained to show the type of sales being made. The area of question was whether petitioner sold prepared sandwiches and coffee through his operation. It was found that petitioner purchased bread from a supplier who ordinarily sold to restaurants and luncheonettes. The auditor visited the premises of the new owner but "apparently the operation was changed since it was sold." The Audit Division therefore made no reduction to the Notice issued.

5. Petitioner reported taxable sales on sales and use tax returns filed based on purchases made during the respective period of beer, soda and cigarettes. Petitioner added the following markups to his purchases:

	<u>Markup</u>
Beer	20%
Soda	30%
Cigarettes	9%

Petitioner thereby determined his taxable sales for the reporting period.

6. Petitioner testified that he ran a one-man operation and thus could not manage to sell any prepared foods. Petitioner contended that deli sales were made by scale (1/8 - 1/4 - 1/2 lb. portions) and that bread was sold in serving portions (2 slices). Petitioner also argued that coffee was sold only in cans for which he provided free urns, cups and stirrers for use by office personnel in their own preparation. Petitioner testified that he did this as an incentive for his customers to purchase coffee grounds, sugar and a few packages of chocolate (mix).

7. Petitioner argued that he prepaid his sales tax based on his method of reporting and that, in fact, his sales tax was overpaid due to the sale of inventory in the bulk sale of the business.

8. Petitioner's sales records indicated total cash receipts and cash payouts on a daily basis. No breakdown was made of taxable sales.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases or other factors. That the Audit Division requested certain information from petitioner in order to determine if the returns filed were correct. That because of the lack of response by petitioner, the Audit Division properly resorted to the use of industry standards in determining petitioner's taxable sales.

That once it is established that the Audit Division's determination was permissible, the burden of proof is upon petitioner to show that the Audit Division's determination should be overturned. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.)

B. That petitioner made available at meetings held with the Audit Division books and records of the business operation. Those records disclosed no purchases being made of any items which would be taxable upon resale other than beer, soda and cigarettes. That petitioner reported taxable sales by marking up purchases which were taxable when sold, a method extensively used by the Audit Division in verifying taxable sales receipts. That petitioner has shown that the sales taxes reported on sales and use tax returns filed on these sales were sufficient.

C. That section 1105(d)(i) of the Tax Law imposes tax upon the receipts from every sale of food and drink of any nature or of food alone when sold in or by restaurants or other establishments: (3) in those instances where the

sale is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

That based on petitioner's own testimony, bread was sold in serving portions, a form, condition, quantity and packaging not similar to a food store in which the sale would be excluded from tax. That petitioner failed to sustain the burden of proof to show that no sandwiches were sold through his business operation.


D. That the petition of Zev Wachtel is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 18, 1977 is sustained.


DATED: Albany, New York

JAN 20 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 440 976 767

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Zee Wachtell	
Street and No.	
81-20 Cherry Chase St.	
P.O., State and ZIP Code	
Jamaica, NY 11432	
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