

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
George Zocchi :
d/b/a George's Supermarket : 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 12/1/73-11/30/76 & 3/1/77-2/29/80. :

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 14th day of March, 1984, he served the within notice of Decision by certified mail upon George Zocchi, d/b/a George's Supermarket the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

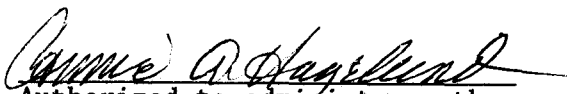
George Zocchi
d/b/a George's Supermarket
Clark Heights
Pleasant Valley, NY 12569

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
14th day of March, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
George Zocchi :
d/b/a George's Supermarket : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
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State of New York }
ss.:
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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 14th day of March, 1984, he served the within notice of Decision by certified mail upon Mark J. Metzger, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

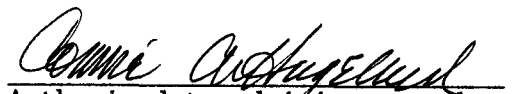
Mark J. Metzger
William J. O'Hare, P.C.
297 Mill St.
Poughkeepsie, NY 12601

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
14th day of March, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1984

George Zocchi
d/b/a George's Supermarket
Clark Heights
Pleasant Valley, NY 12569

Dear Mr. Zocchi:

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
Mark J. Metzger
William J. O'Hare, P.C.
297 Mill St.
Poughkeepsie, NY 12601
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GEORGE ZOCCHI	:	DECISION
d/b/a GEORGE'S SUPERMARKET	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods December 1, 1973	:	
through November 30, 1976 and March 1, 1977	:	
through February 29, 1980.	:	

Petitioner, George Zocchi, d/b/a George's Supermarket, Clark Heights, Pleasant Valley, New York 12569, 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 periods December 1, 1973 through November 30, 1976 and March 1, 1977 through February 29, 1980 (File No. 38789).

A formal hearing was held before John Watson, Hearing Officer, at the offices of the State Tax Commission, State Campus, Albany, New York, on July 25, 1983, at 1:30 P.M. with all briefs to be submitted by August 22, 1983. Petitioner appeared by William J. O'Hare, P.C. (Dennis McClure, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Notice and Demand issued on September 2, 1977 to petitioner was properly computed based upon the records available.

II. Whether petitioner timely filed a petition to a Notice of Determination and Demand issued on April 10, 1980.

III. Whether, assuming the petitioner has the right to contest such determination, the taxes assessed were properly computed based on the records available.

IV. Whether excess sales tax payments must be refunded or whether they may be applied to an outstanding New York State income tax liability.

FINDINGS OF FACT

1. On September 2, 1977, as the result of an audit, the Audit Division issued to petitioner, George Zocchi, d/b/a George's Supermarket, a Notice and Demand for Payment of Sales and Use Taxes Due. The notice asserted sales tax due of \$14,020.82 plus penalty and interest of \$6,326.94 for a total of \$20,347.76 for the period December 1, 1973 through November 30, 1976.

2. On March 1, 1977 petitioner had signed a consent extending the period of limitation for assessment of sales and use tax for the period December 1, 1973 through November 30, 1976 to any time before December 20, 1977.

3. On July 26, 1977 petitioner had signed a Consent to Fixing of Tax Not Previously Determined and Assessed for the period December 1, 1973 through November 30, 1976 in the amount of \$14,020.82.

4. During the audit of the period December 1, 1973 through November 30, 1976, the Audit Division decided that since only partial warehouse invoices were available, there were insufficient records on which to base any type of fair test of purchases. Therefore, purchase totals from petitioner's income tax returns would be used for audit. The Audit Division used a taxable ratio of 18.91 percent which was obtained from a prior audit of petitioner to determine purchases which would be taxable when resold. The Division applied a 20 percent mark-up to the resultant purchases to arrive at taxable sales.

After the appropriate tax rates were applied and credit given for tax remitted, petitioner was assessed additional tax due of \$14,020.82 plus penalties and interest.

5. On April 10, 1980 as the result of a subsequent audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1977 through February 29, 1980 in the amount of \$43,498.10 in tax, plus penalty of \$6,633.78 and interest of \$6,281.45, for a total of \$56,413.33.

6. During the audit of the period March 1, 1977 through February 29, 1980, the petitioner had no records available. Petitioner at that time claimed that he owed \$60,000 to Bozzuto, Inc., one of its suppliers, and that this supplier also operated an accounting service which kept his books. Bozzuto, Inc.'s accounting service would not release petitioner's records because of petitioner's failure to pay for merchandise and accounting fees.

Petitioner was given additional time to obtain his records and was advised that if he could not, an estimated assessment would be issued. It was also discovered that petitioner was delinquent for the periods ending February 28, 1979, August 31, 1979, November 30, 1979 and February 29, 1980.

The assessment was arrived at by taking petitioner's reported gross sales and obtaining the quarterly average to reflect the unreported quarters. An estimated taxable ratio of 25% was applied to gross sales of \$5,181,327.00 to arrive at taxable sales of \$1,295,334.00. Tax due was found to be \$64,766.70 and credit for tax paid of \$21,268.60 was deducted to arrive at additional tax due of \$43,498.10.

7. Prior to June 22, 1981, petitioner had the following assessments outstanding:

Sales and Use Tax

<u>Assessment</u>	<u>Date of Issuance</u>	<u>Amount of Tax Due</u>	<u>Tax Period Covered</u>
- assessment S800410829A (Notice of Determination and Demand)	04/10/80	\$43,498.10	03/01/77 - 02/29/80
- assessment D803118939 (Notice and Demand)	11/03/80	1,494.30	09/01/79 - 11/30/79
- assessment D8006249740 (Notice and Demand)	11/03/80	1,348.40	12/01/79 - 02/29/80
- assessment D8203141796 (Notice and Demand)	12/21/81	624.02	09/01/81 - 11/30/81
- assessment S8111092883 (Notice and Demand)	12/14/81	655.30	06/01/81 - 08/31/81

Withholding Tax

- Deficiency W8106044306 (Notice and Demand)	06/04/81	\$ 2,460.14	1979
- Deficiency W8111183341 (Notice and Demand)	11/18/81	729.60	1980

8. On June 22, 1981, petitioner made payments as follows:

Payment Schedule

<u>Assessment</u>	<u>Tax plus Interest and Penalty</u>	<u>Payment</u>
assessment S800410829A	\$66,006.49	\$66,006.49
assessment D803118939	1,957.81	1,957.81
assessment D8006249740	1,686.29	1,686.29
assessment D8203141796	874.60	none
assessment S8111092883	954.43	none
Notice of Deficiency (withholding tax) W8106044306	4,893.25	none
Notice of Deficiency (withholding tax) W811183341	1,312.31	none

9. On August 14, 1981, petitioner submitted four applications for refund or credit of sales and use tax as scheduled below:

<u>Quarters</u>	<u>Tax</u>	<u>Penalty and Interest</u>	<u>Total</u>
05/77 - 02/80	\$43,498.00	\$22,172.00	\$65,670.00
02/74 - 11/76	14,020.00	12,534.00	26,554.00
11/79	1,494.00	553.00	2,047.00
02/80	1,348.00	418.00	1,766.00

10. On February 16, 1982 the Audit Division denied all four claims along with the following explanation:

"In response to your claims for refund of sales tax paid on assessment notices 90741498, S800410829A, D8003118939, and D8006249740, please be advised of the following:

Notice 90741498--your request for refund of the \$26,554.92 paid pursuant to this notice is denied in full. The tax assessed as a result of this audit was based on the available books and records in accordance with Section 1138 of the Tax Law. The method of determining the tax due as well as the final findings, were agreed to by the vendor. Taxpayer has failed to submit any evidence to substantiate that our determination is in error.

Our determination denying this portion of your claim shall become final unless a hearing is applied for within ninety (90) days of the date of this letter in accordance with the provisions of Section 1139(b) of the Tax Law.

Notices, D8003118939 & D8006249740-- monies paid on these notices (\$1957.81 & \$1686.29 respectively) are eligible for refund since the taxing quarters involved were also included and assessed in our audit assessment S800410829A. However, we cannot release a check to the taxpayer if there are other tax liabilities. Our records indicate another sales tax liability for the quarter ended 8/31/81 and three outstanding withholding tax liabilities. The \$3644.10 may be applied to one of these assessments.

Notice S800410829A--amounts held due pursuant to this notice were determined in accordance with Section 1138 of the Tax Law. Since Mr. Zocchi did not avail himself to his right to protest this assessment within the time limit provided by that section, then under the provisions of Section 1139(c) he is now not entitled to make any claim for refund. Although there are no rights for appeal under the law, we are holding our final determination on this issue in abeyance until we review this matter further."

11. At the hearing, petitioner argued that he was not represented during the 1980 audit and that his taxable ratio was between 15% and 20%, not the 25% estimated by the Audit Division. He also argued that the Audit Division's use of a 20% mark-up during the 1977 audit was too high. However, petitioner submitted no books or records to substantiate his arguments.

12. The petition of George Zocchi was dated May 10, 1982 and covered the period December 1, 1973 through November 30, 1976. When petitioner perfected his petition on March 23, 1983 he included the period March 1, 1977 through February 29, 1980 in addition to the period December 1, 1973 through November 30, 1976.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in part, that "...such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing..."

B. That section 1139(c) of the Tax Law provides, in part, that:

"...a person filing with the tax commission a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivision (a) or (b) of this section, as long as such application is made within the time limitation set forth in such subdivision (a) or within two years of the date of payment of the amount assessed in accordance with the consent filed, whichever is later, but said application shall be limited to the amount of such payment."

C. That section 1139(b) of the Tax Law provides, in part, that:

"If an application for refund or credit is filed with the tax commission as provided in subdivision (a) of this section, the tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall within

ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing."

D. That petitioner, with regard to the Notice of Determination and Demand issued on April 10, 1980, did not file a petition for hearing within 90 days for a revision of the determination, nor did he timely file a petition within 90 days from February 16, 1982 for a hearing for a redetermination of the refund denial.

E. That where a taxpayer maintains and makes available to the Audit Division records from which the exact amount of sales and use taxes due can be determined, he has the right to expect they will be used to determine his ultimate tax liability. Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44. Where records are not provided or are incomplete and insufficient, resort may be had to estimate procedures, such as the use of ratios obtained from prior audits of the same vendor (i.e., the 18.91 percent referred to in Finding of Fact "4"), so long as the methodology employed is reasonably calculated to reflect the taxes due. Tax Law section 1138(a)(1); Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858. Petitioner did not maintain records from which the exact amount of tax could be determined.

F. That petitioner did erroneously pay tax twice for the same sales tax quarters (Finding of Fact "10") and is entitled to a refund of such taxes. However, because petitioner has outstanding sales and withholding tax liabilities, such refund is to be applied to them (Matter of Guido Lombardo, State Tax Commission, September 15, 1976). Moreover, "...it is usually true that where two persons have mutual claims against each other and one becomes insolvent, the other may set off any debt due him from the insolvent and account for the balance only..." (Canale v. Dept. of Taxation, 84 Misc.2d 786).

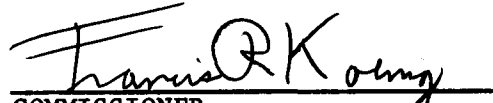
G. That the petition of George Zocchi, d/b/a George's Supermarket is granted to the extent indicated in Conclusion of Law "F" and that except as so granted, is in all other respects denied.

DATED: Albany, New York

MAR 14 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 516

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
George Zepke	
Street and No.	
4th Street Supermarket	
P.O., State and ZIP Code	
Clark Heights	
Postage	Seasonal Delivery NY
Certified Fee	1256
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 470 315 517

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Mark J. McEgan	
Street and No.	
William J. O'Hare	
P.O., State and ZIP Code	
297 Main St	
Postage	Paugh & Sons NY
Certified Fee	1260
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