

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Raymond Bartolomeo :
d/b/a Ray's Pizzeria : 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 12/1/78-8/31/81. :

State of New York :

ss.:

County of Albany :

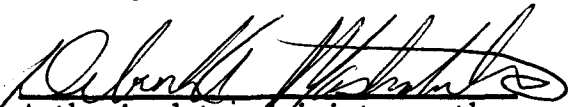
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Raymond Bartolomeo d/b/a Ray's Pizzeria, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

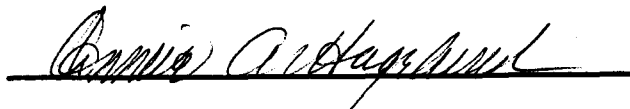
Raymond Bartolomeo
d/b/a Ray's Pizzeria
866 McDonald Avenue
Brooklyn, NY 11218

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
13th day of December, 1985.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Raymond Bartolomeo	:	
d/b/a Ray's Pizzeria	:	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	:	
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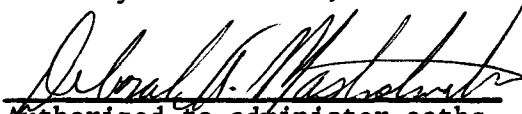
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Joseph C. Victor, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph C. Victor
16 Court St.
Brooklyn, NY 11241

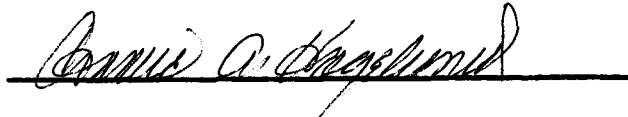
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
13th day of December, 1985.



Authorized to administer oaths
pursuant to Tax Law section 174



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

December 13, 1985

Raymond Bartolomeo
d/b/a Ray's Pizzeria
866 McDonald Avenue
Brooklyn, NY 11218

Dear Mr. Bartolomeo:

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
Joseph C. Victor
16 Court St.
Brooklyn, NY 11241
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RAYMOND BARTOLOMEO	:	DECISION
D/B/A RAY'S PIZZERIA	:	
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, 1978	:	
through August 31, 1981.	:	

Petitioner, Raymond Bartolomeo d/b/a Ray's Pizzeria, 866 McDonald Avenue, Brooklyn, New York 11218, 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, 1978 through August 31, 1981 (File No. 38236).

A hearing was commenced before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 23, 1984 at 10:45 A.M. and was continued to conclusion on May 7, 1985 at 9:15 A.M., with all briefs to be submitted by June 21, 1985. Petitioner appeared by Joseph Victor, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of a one-day observation test to determine petitioner's taxable sales was proper.

II. Whether the penalty and that portion of interest exceeding the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. Petitioner, Raymond Bartolomeo d/b/a Ray's Pizzeria, sold pizza, sandwiches, cold cuts and cheese.

2. On May 12, 1982, 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 for taxes due of \$3,128.54, plus penalty and interest of \$1,441.16, for a total of \$4,569.70. Said notice covered the period December 1, 1978 through August 31, 1981.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1978 through February 28, 1979 to June 20, 1982.

4. On audit, the Audit Division found that bank deposits agreed with gross sales reported on sales tax returns filed. However, petitioner did not have cash register tapes, guest checks or any other records that could be used to make an independent verification of taxable sales receipts. Moreover, petitioner did not have purchase records that would have enabled the Audit Division to reconstruct sales. Because of the incomplete books and records, the auditor performed an observation test on December 17, 1981. The auditor observed and prepared a list of all sales for that day (11:00 A.M. to 6:00 P.M.). Gross sales were \$110.75, of which \$105.55 were taxable sales. Sales tax was deducted from the taxable sales amount to arrive at net taxable sales of \$97.73. Taxable sales for the audit period were then estimated as follows:

	<u>Dec. 1978-Nov. 1979</u>	<u>Dec. 1979-Nov. 1980</u>	<u>Dec. 1980-Aug. 1981</u>
Daily taxable sales	\$ 97.73	\$ 97.73	\$ 97.73
Less: allowance for inflation	25.40 (26%)	12.70 (13%)	--
	<u>\$ 72.33</u>	<u>\$ 85.03</u>	<u>\$ 97.73</u>
Weekdays	5	5	5
Weekday sales	<u>\$ 361.65</u>	<u>\$ 425.15</u>	<u>\$ 488.65</u>
Saturday sales (25%)	54.25	63.77	73.30
Total weekly sales	<u>\$ 415.90</u>	<u>\$ 488.92</u>	<u>\$ 561.95</u>
Number of weeks	48	48	36
Total sales	<u>\$19,963.20</u>	<u>\$23,468.15</u>	<u>\$20,230.20</u>

The above taxable sales amounted to \$63,661.55 as compared to reported taxable sales of \$24,552.00, leaving additional taxable sales of \$39,109.55 and tax due thereon of \$3,128.76.

5. Petitioner's average daily sales based on returns filed were \$30.00. Petitioner testified at the hearing that his sales averaged approximately \$70.00 per day.

6. Petitioner argued that his sales tax returns were properly filed and reflect the actual sales of the business. Petitioner argued further that there was no basis for the Audit Division's use of the observation test.

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 by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

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 petitioner maintained inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of an observation test as a basis for determining petitioner's liability was proper pursuant to section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

C. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate by clear and convincing evidence that

the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

D. That the penalty and interest imposed by the Audit Division under section 1145(a) of the Tax Law is sustained, as petitioner has not established that reasonable cause for abatement exists.

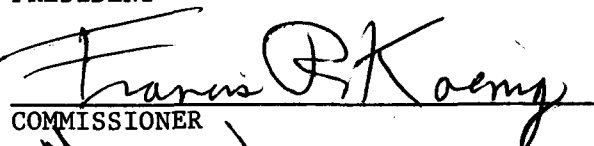
E. That the petition of Raymond Bartolomeo d/b/a Ray's Pizzeria is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 684 313 023

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Joseph C. Victor</i>	
Street and No. <i>16 Court St</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11241</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	

P 684 313 022

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Raymond Bartalome</i>	
Street and No. <i>Lay Pizzeria</i>	
P.O., State and ZIP Code <i>856 W 179th Street Apt</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	