

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
City Dairy Bar :
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 12/1/79-11/30/82. :
_____:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

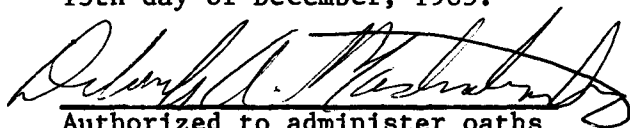
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon City Dairy Bar, the petitioner in the within proceeding,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

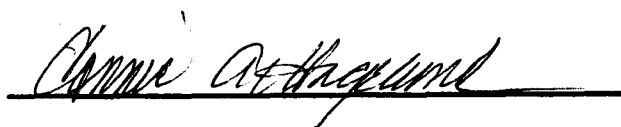
City Dairy Bar
269 Margaret St.
Plattsburgh, NY 12901

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
ALBANY, NEW YORK 12227

December 13, 1985

City Dairy Bar
269 Margaret St.
Plattsburgh, NY 12901

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CITY DAIRY BAR	:	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, 1979	:	
through November 30, 1982.	:	

Petitioner, City Dairy Bar, 269 Margaret Street, Plattsburgh, New York 12901, 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, 1979 through November 30, 1982 (File No. 45179).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on May 21, 1985 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the audit method used to determine additional sales taxes due from petitioner, City Dairy Bar, was proper and correct.

FINDINGS OF FACT

1. Petitioner, City Dairy Bar, is in the business of selling dairy items such as ice cream, milk and eggs, as well as sandwiches, cigarettes and soda.

2. On June 20, 1983, as a 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 December 1, 1979 through November 30,

1982 for taxes due of \$1,603.73, plus interest of \$387.63, for a total of \$1,991.36.

3. The petitioner's records included sales tax returns, federal and state income tax returns, depreciation schedules, sales journal, purchases journal, purchase invoices and cancelled checks. Because the petitioner did not have cash register tapes or any other record that could be used to verify the accuracy of reported taxable sales, the Audit Division employed a test period and a markup percentage audit for this purpose.

4. The test period selected for the audit was June through August, 1981. Petitioner's reported taxable sales for this period were divided by purchase costs to arrive at the following markups: 22.5 percent for soda; 3 percent for cigarettes; 79 percent for ice cream. In the same manner, a 50 percent markup was determined for sandwiches which were sold only prior to 1981. These markups were then applied to total purchases by category for the entire audit period to arrive at taxable sales of \$87,094.00. Petitioner reported taxable sales of \$64,171.00 for the same period leaving additional taxable sales of \$22,923.00 and tax due thereon of \$1,604.61. Using these figures, the auditor calculated a 35.7 percent error rate and applied that percentage to the reported tax paid in each of the applicable quarters to arrive at additional tax due of \$1,603.73.

5. Petitioner maintained that the application of markup percentages obtained from the three month test period to the entire audit period failed to reflect changes in purchase costs and selling prices and yielded inaccurate results. Petitioner offered no evidence to support this argument.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Petitioner did not have cash register tapes or any other documents that would serve as a verifiable record of taxable sales. Under the circumstances, the Audit Division's use of a test period and a markup percentage audit was proper in accordance with section 1138(a) of the Tax Law (Matter of Licata v. State Tax Commission, 64 N.Y.2d 873; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate that the audit method or the amount of tax assessed was erroneous (Matter of SurfaceLine Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

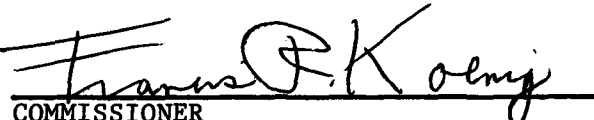
C. That the petition of City Dairy Bar is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 684 313 030

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>City Daily News</i>	
Street and No.	<i>269 Margaret St</i>	
P.O., State and ZIP Code	<i>Plattsburgh N.Y 12901</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		