

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Hugo German :
d/b/a German Coffee Shop : 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 :
6/1/79-2/28/82. :

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 18th day of January, 1985, he served the within notice of Decision by certified mail upon Hugo German d/b/a German Coffee Shop, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hugo German
d/b/a German Coffee Shop
c/o John W. Graci
167 E. 106th St.
New York, NY 10029

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
18th day of January, 1985.

David Parchuck

Samuel M. Hagelrud
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Hugo German	:	
d/b/a German Coffee Shop	:	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 6/1/79-2/28/82.	:	

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 18th day of January, 1985, he served the within notice of Decision by certified mail upon John W. Graci, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John W. Graci
167 E. 106th Street
New York, NY 10029

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
18th day of January, 1985.

David Parchuck

David R. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 18, 1985

Hugo German
d/b/a German Coffee Shop
c/o John W. Graci
167 E. 106th St.
New York, NY 10029

Dear Mr. German:

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
John W. Graci
167 E. 106th Street
New York, NY 10029
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HUGO GERMAN	:	DECISION
D/B/A GERMAN COFFEE SHOP	:	
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 June 1, 1979	:	
through February 28, 1982.	:	

Petitioner, Hugo German d/b/a German Coffee Shop, 100 West 21st Street, New York, New York 10021, 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 June 1, 1979 through February 28, 1982 (File No. 39755).

A formal hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 27, 1984, at 1:15 P.M. Petitioner appeared by John W. Graci. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period June 1, 1979 through February 28, 1982.

FINDINGS OF FACT

1. Petitioner, Hugo German d/b/a German Coffee Shop, operates a coffee shop in New York City. The majority of petitioner's sales are made through a window leading to the street. Additional sales are made at a counter with four stools inside the coffee shop. The business is open Monday through Friday from 7:00 A.M. to 3:00 P.M.

2. On September 10, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for tax due of \$62,953.95, plus penalty of \$13,100.77 and interest of \$14,026.72, for a total due of \$90,081.44 for the period June 1, 1979 through February 28, 1982.

3. On audit, the Audit Division's auditor compared petitioner's sales tax returns and Federal income tax returns with gross sales per records and found that these items were substantially in agreement. A review of petitioner's general ledger indicated that purchases were greater than sales for the following months: December 1979, February 1980, March 1980, May 1980, June 1980, July 1980, August 1980, September 1980, October 1980, November 1980, April 1981 and July 1981. No register tapes or guest checks were used by petitioner. Petitioner did not file payroll taxes as he reported no employees on its records. No wages or salaries appeared on the books or tax returns of petitioner. However, three relatives worked full time at the coffee shop.

Since petitioner did not maintain adequate books and records, it was determined that a full day observation test of customer volume be used to estimate sales. On April 22, 1982 two auditors made the observation test from 7:00 A.M. to 3:00 P.M. Mr. German knew the auditors were outside the business premises making the test and made no objection to it.

4. The one day, eight hour, observation test resulted in the following head count of persons at petitioner's business:

<u>Time</u>	<u>Outdoor Customers</u>	<u>Inside Customers</u>	<u>Total</u>
7:00 - 7:30 A.M.	36	5	41
7:30 - 8:00	86	10	96
8:00 - 8:30	86	10	96
8:30 - 9:00	68	11	79
9:00 - 9:30	30	0	30

<u>Time</u>	<u>Outdoor Customers</u>	<u>Inside Customers</u>	<u>Total</u>
9:30 - 10:00	42	30	72
10:00 - 10:30	28	0	28
10:30 - 11:00	22	4	26
11:00 - 12:00	27	2	29
12:00 - 12:30 P.M.	55	9	64
12:30 - 1:30	38	3	41
1:30 - 2:30	37	6	43
2:30 - 3:00	4	0	4
Total	559	90	649

5. Based on petitioner's menu prices it was estimated that each customer purchased a coffee plus a muffin or roll for breakfast at a cost of \$.60. For lunch it was estimated that each customer purchased a soda or coffee and a sandwich at a cost of \$1.65. Breakfast sales were considered to be between the hours of 7:00 A.M. and 10:30 A.M. and lunch sales were considered to be between the hours of 10:30 A.M. and 1:30 P.M. Petitioner also sold cigarettes and it was estimated that seven percent of the customers bought cigarettes. Excise tax was deducted from the purchase price of the cigarettes in determining the amount of taxable cigarette sales. During the hours of 1:30 P.M. and 3:00 P.M. the auditors were able to record individual sales and determined that the average sale per customer was \$1.00.

6. In computing the taxable sales, the auditor estimated that each breakfast and lunch customer made a multiple purchase. He, therefore, multiplied each breakfast and lunch purchase by a factor of two (\$1.20 and \$3.30 respectively). However, no record was kept by the auditor of the actual number of customers who made such multiple purchases. In fact, most customers did not make multiple purchases.

7. Total taxable sales observed and estimated as a result of the observation test consisted of \$530.40 of breakfast sales, \$528.00 of lunch sales, \$47.00 of after lunch sales and \$23.94 of cigarette sales for a total of \$1,129.34 of

daily taxable sales. The daily taxable sales were multiplied by 5 workdays per week resulting in weekly taxable sales of \$5,647.00. The weekly taxable sales were multiplied by 13 weeks per quarter resulting in quarterly taxable sales of \$73,411.00. The quarterly taxable sales were multiplied by the 11 quarters in the audit period resulting in \$807,521.00 of audited taxable sales. The audited taxable sales were multiplied by the tax rate for a tax due of \$64,968.72, less the sales tax paid per petitioner's sales tax returns of \$2,014.79, for an additional tax due of \$62,953.95.

8. A summary of petitioner's sales tax returns filed for the audit period indicated total gross sales of \$32,492.00, taxable sales of \$25,413.00 for a total tax paid of \$2,014.79.

9. At the hearing petitioner's representative claimed that the business premises were physically too small to generate the amount of taxable sales determined by the auditor. To substantiate this he submitted four photographs of the inside and outside of the premises. He stated that the establishment was located in an "offbeat" area and that since other luncheonettes in the area were more visible to people, they would really have to go out of their way to come there. He also stated that Mr. German may have other interests to supplement his business income and support his style of living. No other evidence or documentary material was submitted.

10. Petitioner did not raise the issue of penalty and interest.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law authorizes the use of external indicies to estimate tax due. Resort to the use of a test as a method of computing tax liability must be founded upon an insufficiency of record keeping

which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That petitioner did not use cash register tapes or guest checks. Therefore, in the absence of such documents, the Audit Division could not verify taxable sales or ascertain the exact amount of tax due. The observation test was properly adopted by the Audit Division to determine taxable sales and tax due.

C. That exactness is not required where it is the petitioner's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Markowitz v. State Tax Commission, 54 A.D.2d 1003, aff'd 44 N.Y.2d 684). However, since most customers did not make multiple purchases, the Audit Division is directed to recompute each breakfast and each lunch by using \$.60 and \$1.65 respectively.

D. That it is incumbent upon petitioner to show that the additional taxes due as determined by the Audit Division were incorrect. Petitioner has not shown or substantiated errors in the methodology or result of the audit and thus, except as noted in Conclusion of Law "C", above, no reduction of the tax found to be due is warranted (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

E. That the petition of Hugo German d/b/a German Coffee Shop is granted to the extent indicated in Conclusion of Law "C", above, and is in all other respects denied; and the Notice of Determination and Demand for Payment of


Sales and Use Taxes Due issued September 10, 1982, as to be modified by the
Audit Division in accordance with this decision, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 444

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Miguel Permon</i>	
Street and No. <i>414 E. 106th St</i>	
P.O., State and ZIP Code <i>41 John W. Price</i>	
Postage <i>167 E. 106th St</i>	\$
Certified Fee <i>New York, N.Y. 10029</i>	
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 470 316 445

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>John W. Price</i>	
Street and No. <i>167 E. 106th St</i>	
P.O., State and ZIP Code <i>New York NY 10029</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	

PS Form 3800, Feb. 1982