

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jill's Coffee Shop II, Inc. :
T/A Mr. Edd's 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 9/1/78-5/31/80. :

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Jill's Coffee Shop II, Inc. T/A Mr. Edd's Coffee Shop, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jill's Coffee Shop II, Inc.
T/A Mr. Edd's Coffee Shop
c/o Edward D'Argenio
890 Franklin Avenue
N. Valley Stream, NY 11580

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
7th day of November, 1985.

David Parchuck

Quinn R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Jill's Coffee Shop II, Inc.
T/A Mr. Edd's Coffee Shop
c/o Edward D'Argenio
890 Franklin Avenue
N. Valley Stream, NY 11580

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	:	
	:	DECISION
JILL'S COFFEE SHOP II, INC. T/A	:	
MR. EDD'S 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 September 1, 1978	:	
through May 31, 1980.	:	

Petitioner, Jill's Coffee Shop II, Inc. t/a Mr. Edd's Coffee Shop, 890 Franklin Avenue, North Valley Stream, New York 11580, 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, 1978 through May 31, 1980 (File No. 38525).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 9, 1985 at 9:15 A.M., with additional information to be submitted by July 15, 1985. Petitioner appeared by Edward D'Argenio. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales tax liability.

FINDINGS OF FACT

1. On December 7, 1981, 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, Jill's Coffee Shop II, Inc. t/a Mr. Edd's Coffee Shop, in the amount of \$5,209.64 plus interest of \$1,006.10 for a total due of \$6,215.74 for the period September 1, 1978 through May 31, 1980.

2. Petitioner operated a coffee shop with a seating capacity of approximately 100. Petitioner's owners, Edward and Lynne D'Argenio, along with their son, worked at the coffee shop on a full-time basis. Petitioner also employed a part-time waitress. During the period in issue, the coffee shop was open five days a week from 7:00 A.M. to 4:00 P.M. serving breakfast and lunch items including eggs, rolls, coffee, hamburgers, french fries and sandwiches. On March 11, 1980 the stock of petitioner was transferred from Mr. and Mrs. D'Argenio to Vinod Patel for approximately \$34,000.00.

3. On audit, the auditor requested that petitioner produce any books and records available. The only records petitioner supplied were Federal income tax returns for 1978 and 1979 and some related workpapers. There were no guest checks, bank statements, cancelled checks, purchase invoices or any other type of business record. The auditor, therefore, took the taxable sales of \$14,500.00 reported by the new owner for the first quarter of his operation and projected those sales per quarter over the entire audit period. Such sales resulted in sales tax due of \$7,763.08 less tax already paid of \$3,913.44 for additional tax due of \$3,849.64. The auditor also initially determined that there was a bulk transfer of the assets of the business which was subject to tax of \$1,360.00. At a pre-hearing conference, it was determined that since there was merely a

transfer of the stock of petitioner, no bulk sale took place and the Audit Division agreed that the assessment should be reduced to \$3,849.64 plus interest.

4. At the hearing petitioner showed that Mr. Patel operated the coffee shop seven days a week compared to the five days a week that Mr. and Mrs. D'Argenio operated the business. Thus, absolute use of the sales figures of the new owner would not accurately reflect the sales figures of the prior owners. Taxable sales of \$14,500.00 per quarter equated to daily sales of \$160.57 when the shop was operated seven days per week. If the shop was operated five days per week, daily sales of \$160.57 resulted in taxable sales per quarter of \$10,357.14.

There were other variables, such as personalities of the owners, which petitioner argued would affect the sales of the business; however, no evidence was produced indicating how much such variables would change the audit results.

CONCLUSIONS OF LAW

A. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684. It then becomes petitioner's burden to

show that the method of audit or the amount of tax assessed was erroneous.

B. That, other than two Federal income tax returns, petitioner maintained no business records from which the Audit Division could determine petitioner's sales tax liability and, therefore, resort to use of external indices, in this case sales tax returns of the new owner, was warranted. However, in utilizing the taxable sales of the new owner, account should have been taken of the difference in the number of days per week the business was operated. Thus, the proper taxable sales per quarter was \$10,357.14 as discussed in Finding of Fact "4". Additional sales tax due should thus be recomputed as follows:

Taxable sales per quarter	\$10,357.14
Tax rate	x.08
Tax per quarter	<u>828.57</u>
	x 6
Complete quarter	<u>4,971.42</u>
Plus partial quarter	
(\$828.57 divided by 13 weeks x 9 weeks)	+ 573.63
Tax due for audit period	<u>5,545.05</u>
Tax previously paid	- 3,913.44
Additional tax due	<u>\$ 1,631.61</u>

The tax due is, therefore, reduced to \$1,631.61 plus minimum interest. This amount takes into consideration the reduction in tax discussed in Finding of Fact "3". Petitioner has not proven that the audit was erroneous in any other respect.


C. That the petition of Jill's Coffee Shop II, Inc. t/a Mr. Edd's Coffee Shop is granted to the extent indicated in Conclusion of Law "B"; that the

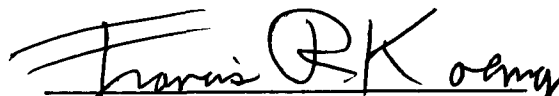
Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 7, 1981; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 153 387 657

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-448-014 PS Form 3800, Feb. 1982	Sent by	Jill's Coffee Shop & Inc.	
	Street and No.	714 W. Edisto Coffee Shop	
	City, State and ZIP Code	P.O. Box 1000, Virginia	
	Postage	890 Franklin Ave.	
	Certified Fee	11. Valley Stream NY	
	Special Delivery Fee	11580	
	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			