

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William G. Miley, Jr. :
d/b/a Honest Bills : 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 :
Periods Ended 8/31/80-8/27/82. :

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 30th day of October, 1985, he served the within notice of Decision by certified mail upon William G. Miley, Jr. d/b/a Honest Bills, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William G. Miley, Jr.
d/b/a Honest Bills
116 Sampson St.
Jamestown, NY 14701

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
30th day of October, 1985.

David Parchuck

Conrad P. Hegeman
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of	:	
William G. Miley, Jr.	:	
d/b/a Honest Bills	:	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	:	
Periods Ended 8/31/80-8/27/82.	:	

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 30th day of October, 1985, he served the within notice of Decision by certified mail upon John L. La Mancuso, 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 L. La Mancuso
Lodestro & Bailey
111 West Second Street
Jamestown, NY 14701

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
30th day of October, 1985.

David Parchuck

William A. Vigilante
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 30, 1985

William G. Miley, Jr.
d/b/a Honest Bills
116 Sampson St.
Jamestown, NY 14701

Dear Mr. Miley:

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 L. La Mancuso
Lodestro & Bailey
111 West Second Street
Jamestown, NY 14701
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

WILLIAM G. MILEY, JR.
D/B/A HONEST BILL'S

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 periods ended August 31,
1980 through August 27, 1982.

Petitioner, William G. Miley, Jr., d/b/a Honest Bill's, 116 Sampson Street, Jamestown, New York 14701, 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 ended August 31, 1980 through August 27, 1982 (File No. 40969).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York on March 13, 1985 at 10:45 A.M. Petitioner appeared by Lodesto & Bailey, Esqs. (John L. LaMancuso, Esq. of counsel). The Audit Division appeared by John P. Dugan Esq. (Deborah J. Dwyer, Esq. of counsel).

ISSUE

Whether the Audit Division properly determined additional taxes due from petitioner.

FINDINGS OF FACT

1. During the periods at issue, William G. Miley, Jr. d/b/a Honest Bill's operated a take-out pizza and submarine sandwich shop. He sold pizzas, submarine sandwiches, chicken wings and soda for off-premises consumption. The only

table in the shop was for the convenience of patrons waiting for their orders. Food was not sold for on-premises consumption.

2. On September 8, 1982 the Department of Taxation and Finance received a "Notification of Sale, Transfer or Assignment in Bulk" (Form ST-274) from the prospective purchasers of the business.

3. On September 24, 1982 the Audit Division sent a letter to petitioner requesting copies of petitioner's federal returns for the years 1980 and 1981, a copy of the sales contract and the completion of a Bulk Sale Questionnaire (Form AU-196.8). Neither a completed Bulk Sale Questionnaire nor a copy of the contract of sale was received by the Audit Division in response to that request.

4. On December 3, 1982, the Audit Division issued to petitioner, William G. Miley, Jr. d/b/a Honest Bill's a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$1,764.62 plus penalty and interest for the periods ended August 31, 1980 through August 27, 1982. Said notice explained:

"As a result of a review of returns filed and you not sending information requested, your reported taxable sales have been increased by 25%. The following taxes are determined to be due in accordance with section 1138 of the Sales Tax Law."

CONCLUSIONS OF LAW

A. Section 1138(a)(1) 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That although a vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), the State, when conducting an audit, must

determine the amount of tax due from such information as may be available and, if necessary, the tax may be estimated on the basis of external indicies (Tax Law, §1138, subd. [a]; Matter of George Korba v. New York State Tax Comm., et al., 84 A.D.2d 655). However, the audit method adopted must be reasonably calculated to relect the taxes due (W. T. Grant Co. v. Lazarus, 2 N.Y.2d 196).

C. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to petitioner herein was not "determined from such information as may be available," nor was it "estimated on the basis of external indices such as stock on hand, purchases, rents or charges, comparable rents or charges, types of accomdations and services, number of employees or other factors."

D. That in accordance with Conclusion of Law "C", the petition of William G. Miley, Jr., d/b/a Honest Bill's is granted and Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 3, 1982 is cancelled.

DATED: Albany, NY

STATE TAX COMMISSION

OCT 30 1985

Rodwin W. Clem
PRESIDENT

Francis R. Koony
COMMISSIONER

Mark J. Smith
COMMISSIONER

P 153 387 612

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

Sent to <i>William H. Meloy Jr.</i>	
Street and No. <i>100 Sunset Blvd</i>	
P.O., State and ZIP Code <i>40 Samsen St</i>	
Postage <i>Postmaster NY 14701</i>	
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

P 153 387 613

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

Sent to <i>John S. La Monica</i>	
Street and No. <i>Robertson & Bailey</i>	
P.O., State and ZIP Code <i>14 W. 2nd St</i>	
Postage <i>Postmaster NY 14701</i>	
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