

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Joseph Ragusa
d/b/a Joe's Pizza

:

:

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 9/1/77-8/31/80.

:

:

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Joseph Ragusa, d/b/a Joe's Pizza the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Ragusa
d/b/a Joe's Pizza
1438 Hollywood Ave.
Bronx, NY 10461

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
6th day of February, 1985.

David Parchuck

Ann M. O'Haglund
Authorized to administer oaths

pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of

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d/b/a Joe's Pizza

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Period 9/1/77-8/31/80.

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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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Dominick N. D'Ambrozio, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dominick N. D'Ambrozio
462 South Broadway
Yonkers, NY 10705

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
6th day of February, 1985.

David Parchuck

Annunzio D. Hagelund

Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

Joseph Ragusa
d/b/a Joe's Pizza
1438 Hollywood Ave.
Bronx, NY 10461

Dear Mr. Ragusa:

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
Dominick N. D'Ambrozio
462 South Broadway
Yonkers, NY 10705
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOSEPH RAGUSA	:	DECISION
d/b/a JOE'S PIZZA	:	
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,	:	
1977 through August 31, 1980.	:	

Petitioner, Joseph Ragusa, d/b/a Joe's Pizza, 1438 Hollywood Avenue, Bronx, New York 10461, 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, 1977 through August 31, 1980 (File No. 33751).

A small claims 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 July 25, 1984, at 1:15 P.M. Petitioner appeared by Dominick N. D'Ambrozio, CPA. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Joseph Ragusa, d/b/a Joe's Pizza, operated a pizza and hero sandwich shop located at 290 East Kingsbridge Road, Bronx, New York. The store was divided into two sections. One side sold pizza and soda and the other sold cold cuts, hero sandwiches, soda and coffee. The store was destroyed by a fire on December 1, 1980.

2. On May 20, 1981, 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 covering the period September 1, 1977 through August 31, 1980 for taxes due of \$4,080.64, plus interest of \$687.80, for a total of \$4,768.44.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue to December 20, 1981.

4. The Audit Division had begun an audit of petitioner's books and records on October 23, 1980. The books and records made available for audit at that time were a day book of sales and purchases, federal income tax returns and sales tax returns. Petitioner did not retain any cash register tapes.

The Audit Division analyzed purchases for the months of March, April and May, 1980 and categorized the purchases as follows: cold cuts - 51.57%, pizza ingredients - 38.45%, soda - 05.89% and coffee - 04.09%. These percentages were used to determine total purchases by category for the audit period. The Audit Division had intended to perform a markup test based on current costs and selling prices and an observation test, however, the store was destroyed by fire before the next scheduled appointment. Consequently, the Audit Division estimated markup percentages for petitioner's business based on office experience with audits of similar businesses. The estimated markups were sandwiches - 125%, pizza - 250%, soda - 200% and coffee 200%. The markup percentages were applied to the purchases determined above to arrive at taxable sales of \$193,874.00. Petitioner reported taxable sales of \$142,866.00, leaving additional taxable sales of \$51,008.00 and tax due thereon of \$4,080.64.

The auditor observed a price list on the premises showing cold cuts sold by the pound, however, no allowance for nontaxable sales was made on audit because petitioner did not have the records to substantiate the extent of such sales. The sales tax returns filed by petitioner show nontaxable sales of approximately 10 percent of gross sales. Petitioner offered no testimony or documentary evidence at the hearing to establish the amount of nontaxable sales of cold cuts.

5. At a pre-hearing conference, petitioner submitted a cost breakdown of the individual ingredients used to make pizza and certain sandwiches, along with the applicable selling prices. The Audit Division representative at the conference used petitioner's figures to compute the following markup percentages:

<u>Product</u>	<u>1979</u>	<u>1980</u>
pizza	254%	246%
ham and cheese sandwich	84%	88%
turkey sandwich	73%	--
salami and provolone sandwich	70%	64%
liverwurst sandwich	128%	--

Listed below are the markup's computed by petitioner.

<u>Product</u>	<u>1979</u>	<u>1980</u>
pizza	92%	93%
ham and cheese sandwich	13%	loss
turkey sandwich	13%	--
salami and provolone sandwich	loss	loss
liverwurst sandwich	32%	--

The differences between the markups computed by the Audit Division and by petitioner is in the quantities of the ingredients used to make the particular item, e.g., 4 slices of meat per sandwich as compared to 9; $\frac{1}{2}$ lb. of cheese per pizza as compared to 1 lb.

The Audit Division did not revise its audit as a result of the conference since there was no significant change in the markups from the original estimates.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "(i)f necessary, the tax may be estimated on the basis of external indices".

Petitioner did not have cash register tapes or any other verifiable record of receipts available for audit. The failure to retain such documents as required by section 1135 of the Tax Law necessitated the use of markup percentages by the Audit Division to determine taxable sales (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D. 2d 947).

B. That since petitioner's books and records were incomplete and inadequate, the estimates used by the Audit Division based on office experience with similar businesses were reasonable and petitioner failed to demonstrate by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Skiadas v. State Tax Commission, 95 A.D. 2d 971).


C. That the petition of Joseph Ragusa, d/b/a Joe's Pizza is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>Robert Rogers</i>
Street and No.	<i>1438 Hollywood Ave</i>
P.O., State and ZIP Code	<i>Jersey NJ 07421</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

P 693 169 546

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>Dominick J. D'Ambrizio</i>
Street and No.	<i>462 S. Broadway</i>
P.O., State and ZIP Code	<i>Jersey NJ 07105</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