

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Romar Deli, Inc. :  
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 3/1/79 - 2/19/82. :  
:

---

AFFIDAVIT OF MAILING

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 Romar Deli, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Romar Deli, Inc.  
c/o Murray Katz  
67-07 Myrtle Ave.  
Glendale, NY 11385

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 A. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Romar Deli, Inc. :  
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 3/1/79 - 2/19/82. :  
:

---

AFFIDAVIT OF MAILING

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 Murray Katz, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray Katz  
67-07 Myrtle Ave.  
Glendale, NY 11385

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

Anniv. D. Hoglund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 18, 1985

Romar Deli, Inc.  
c/o Murray Katz  
67-07 Myrtle Ave.  
Glendale, NY 11385

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: Petitioner's Representative  
Murray Katz  
67-07 Myrtle Ave.  
Glendale, NY 11385  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROMAR DELI, INC.	:	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 March 1, 1979	:	
through February 19, 1982.	:	

---

Petitioner, Romar Deli, Inc., c/o Murray Katz, 67-07 Myrtle Avenue, Glendale, New York 11385, 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 March 1, 1979 through February 19, 1982 (File No. 39151).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 29, 1984 at 10:30 A.M. Petitioner appeared by Murray Katz, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period March 1, 1979 through February 19, 1982.

FINDINGS OF FACT

1. Petitioner, Romar Deli, Inc., was a kosher delicatessen-restaurant in Cedarhurst, New York. The business was purchased in April, 1978 and was sold on February 19, 1982. No valuation of fixed assets was stated in the sales contract or closing statement for the February 19, 1982 sale. The purchaser had paid a tax on a valuation of \$5,000.00 for the bulk sale of fixed assets.

2. The auditor reviewed petitioner's available books and records. Sales per books agreed substantially with sales per federal income tax and sales tax returns filed. Purchases per books agreed substantially with purchases per federal income tax returns. However, petitioner's guest checks, cash register tapes, menus and purchase invoices were not available for audit. After reviewing the available records, the auditor determined that petitioner's markup on food of 54.95 percent was too low. Therefore, based on his audit experience, purchases for the audit period were marked up 125 percent to determine petitioner's gross sales. Although petitioner kept a record of its taxable sales, it computed taxable sales for sales tax purposes by estimating that 40 percent of the gross sales were taxable sales. Based on his audit experience, this percentage was deemed too low and the auditor determined that 85 percent of the audited gross sales were taxable sales. These adjustments resulted in additional taxable sales of \$681,964.68. Petitioner's books at the time of the sale indicated that the depreciated valuation of the fixed assets was in the amount of \$75,000.00. Since the purchaser paid tax on a valuation of \$5,000.00, fixed assets per bulk sale were assessed at an additional \$70,000.00.

3. On May 25, 1982, the Audit Division issued to petitioner, Romar Deli, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for tax due of \$53,060.33, plus penalty of \$10,098.99 and interest of \$10,273.43, for a total due of \$73,432.75 for the period March 1, 1979 through February 19, 1982.

4. Since the purchaser had continued the business in the same manner as petitioner, the Audit Division performed an observation test on June 25, 1982 from 8:45 A.M. to 8:30 P.M. Said test indicated that 79.3 percent of the gross

sales were taxable sales. However, the auditor did not adjust the taxable sales previously determined.

5. At the hearing, the ledger of Romar Deli, Inc. was submitted as evidence. The ledger contained the daily postings of sales, purchases and cash and check disbursements for the business from May, 1978 through February, 1982. However, no purchase invoices, guest checks or cash register tapes were submitted to substantiate the postings.

6. An analysis of the food sold by petitioner indicating the cost, sales price and the gross profit percentage for each food item for the months of May, 1980, July, 1981 and February, 1982 was submitted into evidence. The selling prices were allegedly taken from old menus and the costs were allegedly verified through the distributors. However, no menus or purchase invoices were submitted to substantiate the amounts shown in the analysis.

7. A portion of the document that related to the purchase of the business by petitioner in April, 1978 was also submitted as evidence. Said document indicated that fixtures were valued at \$5,000.00. However, the U.S. Corporation Income Tax Return, Form 1120, with an attached depreciation schedule, Form 4562, filed by petitioner for fiscal year ending March 31, 1980, indicated that the total cost of furniture, fixtures and equipment was \$121,014.29.

8. Petitioner did not raise the issue of penalty and interest at the hearing.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law authorizes the use of external indices to estimate tax due. Since petitioner did not have cash register tapes, guest checks or purchase invoices, the Audit Division could not verify

taxable sales or ascertain the exact amount of tax due. Therefore, the Audit Division's determination of tax due based on audit experience was proper.

B. 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 no reduction of the tax found to be due is warranted (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That since the observation test performed by the Audit Division indicated that 79.3 percent of the gross sales were taxable sales, the Audit Division is directed to recompute the taxable sales using said percentage.

D. That the petition of Romar Deli, Inc. is granted to the extent indicated in Conclusion of Law "C", supra, and in all other respects denied; and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 25, 1982, as modified by the Audit Division, is sustained.

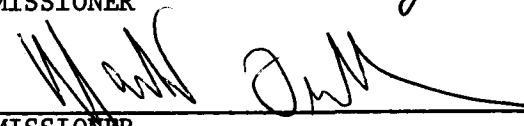
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 470 316 456

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Komar Deli Inc.</i>	
Street and No. <i>10 Murray Hwy</i>	
P.O., State and ZIP Code <i>67-07 Myrtle Ave</i>	
Postage <i>Shenandoe NY 11385</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 470 316 457

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Murray Hwy</i>	
Street and No. <i>67-07 Myrtle Ave</i>	
P.O., State and ZIP Code <i>Shenandoe N.Y. 11385</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