

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
739 Food Corp.

:

: 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:
12/1/78-8/31/81. :

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 28th day of June, 1985, he served the within notice of Decision by certified mail upon 739 Food Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

739 Food Corp.
739 Nostrand Ave.
Brooklyn, NY 11216

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
28th day of June, 1985.

David Parchuck

Dennis D. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
739 Food Corp. :

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 12/1/78-8/31/81. :

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 28th day of June, 1985, he served the within notice of Decision by certified mail upon Lawrence Scharfman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence Scharfman
347 5th Avenue
New York, NY 10016

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
28th day of June, 1985.

David Parchuck

James J. McGovern
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 28, 1985

739 Food Corp.
739 Nostrand Ave.
Brooklyn, NY 11216

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
Lawrence Scharfman
347 5th Avenue
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
739 FOOD CORP.	:	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 December 1, 1978	:	
through August 31, 1981.	:	

Petitioner, 739 Food Corp., 739 Nostrand Avenue, Brooklyn, New York 11216, 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 December 1, 1978 through August 31, 1981 (File No. 37127).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 18, 1984 at 9:45 A.M. Petitioner appeared by Lawrence Scharfman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period December 1, 1978 through August 31, 1981.

FINDINGS OF FACT

1. On March 26, 1982, the Audit Division issued to petitioner, 739 Food Corp., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$49,873.89 plus interest for the period December 1, 1978 through August 31, 1981.

2. Petitioner operates a supermarket in Brooklyn, New York and is engaged in the retail sale of both taxable and non-taxable items.

3. The Audit Division commenced an audit of petitioner in September of 1981. Records available for review by the Audit Division were petitioner's actual sales tax returns, copies of petitioner's Federal and State income tax returns, a cash receipts journal, a check disbursements journal, a general ledger, a check register with cancelled checks, and monthly bank statements. During the course of the audit, upon the request of the Audit Division, purchase invoices were also made available for review.

4. Vendor had limited register tapes and those register tapes made available for review showed only a taxable key. The tapes did not itemize the items upon which tax was or was not charged.

5. The Audit Division chose the then current period of March 1, 1981 through May 31, 1981 to verify petitioner's sales of taxable items. Made available to the Audit Division were purchase invoices for that period and the cash disbursements journal. A review of the cash disbursements journal disclosed that the only disbursements recorded therein for that period were payments made by check. The journal did not reflect any purchases made by cash.

A review of the purchase invoices for the same period disclosed invoices paid in cash, which purchases were not reflected or recorded in the cash disbursements journal. Also noted was the lack of invoices reflecting purchases of items being sold by petitioner.

A review of petitioner's cash disbursements journal and petitioner's check disbursements journal for a prior period (quarter ended November 30, 1978) which reflected both cash and check disbursements showed that cash purchases were 5.98 percent of petitioner's purchases by check.

6. The Audit Division reviewed each of the invoices reflected in the cash disbursements journal which were paid by check and from said recorded invoices determined purchases of items having a taxable nature upon their sale in the amount of \$79,970.17. This amount was increased by 5.98 percent to reflect unrecorded cash purchases. These purchases were then marked up by 20 percent to reflect taxable sales. The use of a 20 percent markup was agreed to by petitioner.

Said purchases, as increased and marked up, indicated taxable sales for the test period of \$101,702.87 which, compared to petitioner's reported taxable sales of \$44,686.00 for the same period, reveal an error percentage of unreported taxable sales of 127.59448 percent.

Reported taxable sales for the entire audit period of December 1, 1978 through August 31, 1981 were then increased by the error percentage and multiplied by the applicable tax rate to determine audited sales tax due which, after giving credit for sales taxes actually paid, resulted in the additional sales taxes claimed due in the amount of \$49,873.89 for the entire audit period.

7. Petitioner's reported gross sales per its federal income tax returns were greater than its gross sales as reported on its sales tax returns.

8. In determining the amount of purchases to be marked up in arriving at the amount of taxable sales, no consideration was made by the Audit Division with respect to theft or pilferage of merchandise. Petitioner sustained losses attributable to pilferage at a rate of 2.25 percent of sales.

9. Petitioner also alleged having sustained robbery and burglary losses in excess of \$100,000.00 during the audit period. However, such cash and equipment losses have no effect upon the amount of petitioner's taxable sales.

10. The Audit Division determined \$4,275.13 in sales tax to be owing for the period ended February 28, 1979. At the hearing, the Audit Division conceded that it had not received any consents to extend the statute of limitations for assessment from petitioner and no evidence was presented that the return for such period was filed after the due date. In addition, the audit report states that "vendor filed all returns in a timely manner."

CONCLUSIONS OF LAW

A. That the quarterly return for the period ended February 28, 1979 was filed on or before March 20, 1979 and, in the absence of a written consent extending the period of limitation on assessment, any additional taxes with respect to such period were required to have been assessed on or before March 20, 1982. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 26, 1982 did not timely assess additional sales and use taxes for such period.

B. That although there is statutory authority for the use of a "test period" to determine the amount of tax due, resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). From the limited cash register tapes and other records maintained by the petitioner, the Audit Division could not determine if sales tax was charged on all taxable items. Therefore, such documents were inadequate for verifying taxable sales or ascertaining the exact amount of tax due.

C. That the audit procedures utilized, as described, disclosed a significant variance from taxable sales reported, thus justifying the conclusion that sales tax was not properly charged on all items subject to tax. Such a discrepancy

established the inadequacy and unreliability of petitioner's books and records (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655). Accordingly, the determination of additional taxes due was proper in accordance with the provisions of section 1138(a) of the Tax Law (Matter of Chartair, supra; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

D. That in accordance with Conclusion of Law "A" above, the Audit Division is directed to cancel that portion of the assessment relating to the quarterly period ended February 28, 1979.

E. That in accordance with Finding of Fact "8", supra, the Audit Division is directed to recompute petitioner's taxable sales (and the additional sales tax due thereon) after taking into account losses of merchandise due to theft and pilferage.

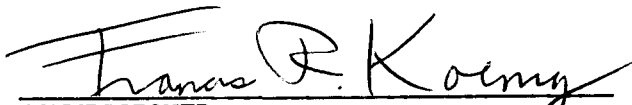
F. That except as noted in Conclusions of Law "D" and "E" above, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 26, 1982 is sustained and the petition of 739 Food Corp. is hereby denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 28 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

PS Form 3800, Feb. 1982

Sent to <i>739 Food Corp</i>	
Street and No. <i>739 East End Ave</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11216</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	

P 693 169 997

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Lawrence Scharfman</i>	
Street and No. <i>547 5th Ave</i>	
P.O., State and ZIP Code <i>New York, NY 10016</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	