STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Anthony Sforza d/b/a West Brighton Italian Grocery	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 3/1/79 - 5/31/82.	

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 Anthony Sforza d/b/a West Brighton Italian Grocery, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony Sforza
d/b/a West Brighton Italian Grocery
1215 Castelton Ave.
Staten Island, NY 10310

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

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Anthony Sforza d/b/a West Brighton Italian Grocery	AFFIDAVIT OF MAILING
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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 30th day of October, 1985, he served the within notice of Decision by certified mail upon Richard Ruggiero, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard Ruggiero
1416 Forest Ave.
Staten Island, NY 10302

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

Authorized to administer oaths
pursuant to Tax Law section 174

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

October 30, 1985

Anthony Sforza
d/b/a West Brighton Italian Grocery
1215 Castelton Ave.
Staten Island, NY 10310

Dear Mr. Sforza:

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
Richard Ruggiero
1416 Forest Ave.
Staten Island, NY 10302
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of ANTHONY SFORZA D/B/A WEST BRIGHTON ITALIAN GROCERY 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 May 31, 1982.	DECISION

Petitioner, Anthony Sforza d/b/a West Brighton Italian Grocery, 1215 Castleton Avenue, Staten Island, New York 10310, 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 May 31, 1982 (File No. 44421).

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 1:15 P.M. Petitioner appeared by Richard Ruggiero. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the tax liability of Anthony Sforza d/b/a West Brighton Italian Grocery.

FINDINGS OF FACT

1. On February 25, 1983, the Audit Division issued to petitioner, Anthony Sforza, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period March 1, 1979 through May 31, 1982 for taxes due of

$33,993.36, plus penalty of $7,361.73 and interest of $8,832.23, for a total of $50,187.32.

2. Petitioner executed valid consents extending the period of limitation for assessment of sales and use taxes pursuant to which assessment of sales and use taxes for the period in question could be made on or before March 20, 1983.

3. Petitioner, Anthony Sforza, operated a grocery store/delicatessen called the "West Brighton Italian Grocery" located at 1215 Castleton Avenue, Staten Island, New York.

4. In January of 1981, the Audit Division commenced an audit of petitioner. Made available for audit were the accountant's worksheets for sales and purchases, the federal tax returns for years 1979 and 1980, cancelled checks and monthly bank statements. Petitioner did not have available for audit either purchase invoices or cash register tapes for the audit period. A "day book" was available but did not contain entries for every day.

5. Petitioner's purchase records were compiled from petitioner's check disbursement records. Petitioner's sales records were compiled from a monthly compilation of his receipts compared against his bank "deposits" statements. Petitioner's gross sales per his sales and use tax returns and his income tax returns were, with minor variances, in agreement with his "receipts" as taken from his bank deposit statements. Likewise, petitioner's purchases per his income tax returns were, with minor variances, in agreement with his "purchases" as determined from his check disbursements. Petitioner estimated that his taxable sales were one third of his gross sales and filed sales and use tax returns and computed and paid his sales tax liability on such basis.

6. Petitioner's manner of record keeping did not reflect purchases paid for in cash nor the receipts which generated the cash for such purchases. Yet, as disclosed by the audit and as conceded by petitioner at the hearing, some purchases were, in fact, paid from cash receipts. Petitioner also made purchases by check.

7. Because neither cash register tapes nor purchase invoices were available to check the accuracy of petitioner's purchases (see Finding of Fact "4"), gross sales and taxable sales, the Audit Division chose to test the calendar year 1980.

8. Petitioner's check disbursements reflecting purchases as recorded by petitioner for the year 1980 were analyzed.

9. Petitioner's suppliers were contacted for information concerning petitioner's purchases. While several suppliers responded to the Department's inquiries, only one, a beer distributor, provided useful information with regard to the year 1980. Other suppliers provided information which was neither relevant or useful with respect to the tested period. The information provided by the one "beer" supplier of petitioner showed that petitioner's actual purchases from said supplier for 1980 were 5.92437 times greater than petitioner's recorded purchases from said supplier.

10. Petitioner's purchase and selling prices for cigarettes were analyzed and a markup was determined.

11. On February 8, 1982, the Audit Division conducted an observation test at petitioner's store to determine sales of sandwiches. On that day, petitioner had gross sales (including sales tax) of sandwiches, coffee, rolls with butter and hot soup ("sandwiches") totalling $160.25, which, after excluding the sales tax, resulted in taxable sales of sandwiches totalling $148.04.

12. Total audited taxable sales for the year 1980 of $155,596.00 were determined by adding:

a) $4,540.00 of cigarette sales (determined by marking up petitioner's purchases of cigarettes per its check disbursements journal by the markup determined from petitioner's sales data [see Finding of Fact "10"] less cigarette stamp taxes) plus

b) $66,078.00 of beer sales (determined by multiplying petitioner's recorded purchases from beer distributors by the ratio of unrecorded cash purchases to recorded purchases [see Finding of Fact "9"] resulting in $37,759.00 in purchases marked up by a 75 percent audit experience markup) plus

c) $29,294.00 of soda sales (determined by marking up soda purchases [estimated per similar audits to be 51.92 percent of beer purchases] by a 50 percent audit experience markup) plus

d) $24,035.00 of taxable groceries (determined by multiplying taxable grocery purchases per petitioner's check disbursements ($3,042.30) by the ratio of unrecorded cash purchases to recorded purchases [see Finding of Fact "9"] less $2,000.00 to reflect taxable merchandise withdrawn from inventory for self use as reflected on petitioner's income tax returns and then marked up by a 50 percent audit experience markup) plus

e) $31,649.00 of sandwich sales (determined by multiplying daily sandwich sales determined per observation test [see Finding of Fact "11"] times 254 days [5 days per week x 52 weeks less 6 holidays] reduced by 9 percent inflation to reflect 1981 sales which were reduced by 9 percent inflation to reflect 1980 sales).

13. A ratio of unreported sales to reported sales of 6.0390 was then determined for the year 1980 and applied to petitioner's taxable sales reported for the full audit period. The resultant total audited taxable sales were then multiplied by the applicable tax rate which, after subtracting sales tax paid, resulted in additional sales tax due of $33,509.90.

14. Additional use tax due of $483.46 was determined by multiplying annual taxable merchandise withdrawn for self use (see Finding of Fact "12[d]") by the three year audit period and applying the applicable rate of tax thereto.

15. Petitioner submitted evidence from five of its suppliers which, when compared to its check disbursements for the year 1980, reflect that all purchases from said suppliers in the total amount of $27,069.07 were recorded in petitioner's books and that there were no unrecorded cash purchases with respect to said suppliers.

16. Petitioner, during the audit period, purchased "soda" from the same suppliers it purchased "beer".

17. Evidence and testimony was submitted showing that at times petitioner routinely ran specials and sales on both taxable and nontaxable items. However, petitioner submitted no purchase invoices which could be compared against such sales prices to determine the markup and no evidence or testimony was submitted showing what effect, if any, such specials and sales would have regarding petitioner's taxable sales.

18. Petitioner also submitted evidence and testimony to the effect that: the area around his store was slowly physically and aesthetically improving; there was an increase in the number of people routinely shopping in the area; and in prior years his store hours were erratic.

19. Petitioner's testimony as to his suppliers, purchases, sales and manner of doing business was evasive and inconclusive.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain books and records as required by sections 1135 and 1142 of the Tax Law. Such records that petitioner did maintain were incomplete. Petitioner's records were inadequate for verifying taxable sales which sales petitioner admitted were reported merely as an estimate of his gross sales which admittedly were not accurately recorded.

When, as here, adequate records are not maintained, the Audit Division is authorized to determine the tax liability from such information as may be available and, if necessary, may resort to external indices (Tax Law §1138(a); Matter of George Korba v. New York State Tax Commission, 84 A.D.2d 655).

B. That petitioner showed, with respect to "taxable groceries", that his records adequately reflected purchases thereof for 1980.

Petitioner's audited sales of taxable groceries for 1980 are determined to be $4,563.00 (taxable purchases as marked up 50 percent) which reduces by $19,472.00 the $24,035.00 (Finding of Fact "12[d]") originally determined on audit for the year 1980.

C. That petitioner's audited "beer" purchases for the year 1980 included petitioner's "soda" purchases.

D. That petitioner's audited taxable sales for the year 1980 should therefore be reduced by deleting the $29,294.00 of sales determined to be "soda" sales (Finding of Fact "12[c]").

That petitioner's audited "beer" and "soda" sales for 1980 are thus redetermined to be $62,852.00, determined by allocating audited beer and soda purchases of $37,759.00 (Finding of Fact "12[c]; Conclusion of Law "C") to

purchases of beer and soda pursuant to the 51.92 percent ratio (Finding of Fact "12[c]") determined and marking up the beer purchases therefore determined ($24,854.52) by 75 percent and the soda purchases therefore determined ($12,904.47) by 50 percent.

E. That petitioner's audited taxable sales for the year 1980 are redetermined to be $103,604.00 consisting of:

$ 4,540.00 - cigarette sales (Finding of Fact "12[a]")
62,852.00 - soda and beer sales (Conclusion of Law "D")
4,563.00 - taxable groceries (Conclusion of Law "B")
31,649.00 - sandwich sales (Finding of Fact "12[e]")

F. That accordingly, petitioner's ratio for the year 1980 of unreported sales ($81,499.00) to reported sales ($22,105.00) is 3.6869.

G. That the Audit Division is directed to recompute petitioner's sales tax liability for the total audit period based upon the ratio of 3.6869 of unreported sales to reported sales.

H. That the deficiency asserted with respect to use tax is sustained.

I. That except as noted in Conclusions of Law "B" and "C", petitioner failed to overcome his burden to demonstrate that the method of audit or the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576).

J. That the petition of Anthony Sforza d/b/a West Brighton Italian Grocery is granted to the extent as noted in Conclusion of Law "G" and is in all other respects denied.

K. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 25, 1983 is to be recomputed in accordance with

Conclusion of Law "G" and is otherwise sustained, together with all applicable penalty and interest.

DATED: Albany, New York

OCT 30 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 153 387 623

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Anthony Sforza	
Street and No. 166 West Brighton	
P.O. State and ZIP Code Staten Island	
Postage 1975 Castleton Ave	$
Certified Fee Staten Island NY 10310	
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 ★ U.S.G.P.O. 1984-446-014

P 153 387 624

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Richard Ruggiero	
Street and No. 1976 Forest Ave	
P.O. State and ZIP Code Staten Island NY 10314	
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 ★ U.S.G.P.O. 1984-446-014