

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Thomas J. Spinosa & Anthony DiPrima : 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 2/28/74 - 2/28/77. :

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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Thomas J. Spinosa & Anthony DiPrima, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas J. Spinosa & Anthony DiPrima
3289 East River Rd.
Rochester, NY 14623

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
15th day of February, 1985.

David Parchuck

Ann M. O'Day
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Thomas J. Spinosa & Anthony DiPrima :

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 2/28/74 - 2/28/77.

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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Max T. Stoner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Max T. Stoner
Gullace, Stoner, DeLuca & Weld
510 Crossroads Bldg.
Rochester, NY 14614

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
15th day of February, 1985.

David Parchuck

James A. Haggard
Authorized to administer oaths
pursuant to Tax Law section.174

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

February 15, 1985

Thomas J. Spinosa & Anthony DiPrima
3289 East River Rd.
Rochester, NY 14623

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
Max T. Stoner
Gullace, Stoner, DeLuca & Weld
510 Crossroads Bldg.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
THOMAS J. SPINOSA AND ANTHONY DiPRIMA	:	DECISION
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1973	:	
through February 28, 1977.	:	

Petitioners, Thomas J. Spinosa and Anthony DiPrima, 3289 East River Road, Rochester, New York 14623, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1973 through February 28, 1977 (File Nos. 21450, 21451 and 24868).

A formal hearing was commenced before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on December 7, 1982 at 9:15 A.M. and continued to conclusion before Daniel J. Ranalli, Hearing Officer, at the same offices, on May 31, 1984 at 10:00 A.M., with all briefs to be submitted by October 14, 1984. Petitioners appeared by Max T. Stoner, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division used proper audit procedures to determine petitioners' sales tax liability.

FINDINGS OF FACT

1. On September 13, 1977, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due against petitioners, Thomas J. Spinosa and Anthony DiPrima, in the amount of \$34,274.60, plus penalty and interest of \$16,223.77, for a total due of \$50,498.37 for the period December 1, 1973 through February 28, 1977.

The notice represented the tax liability for petitioners' store located on East River Road in Rochester, New York. On the same date, the Audit Division issued a second notice against petitioners in the amount of \$22,187.35, plus penalty and interest of \$10,789.73, for a total due of \$32,977.08 for the period December 1, 1973 through February 28, 1977. Said notice represented the tax liability for petitioners' store located on Fairport Road, Fairport, New York. On the same date, the Audit Division issued a third notice against petitioners in the amount of \$26,229.52, plus penalty and interest of \$12,232.38, for a total due of \$38,461.90 for the period December 1, 1973 through February 28, 1977. Said notice represented the tax liability for petitioners' store located on Ridge Road West, Rochester, New York. Identical notices for each of the three stores were also issued to each petitioner individually.

2. On March 31, 1977, petitioners had executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1973 through May 31, 1974 to September 20, 1977 for each of the three stores audited.

3. Petitioners are partners operating retail grocery stores under various names in the Rochester area. In setting prices for the goods sold in their stores, petitioners would have the general manager of the stores periodically check prices in other grocery stores in the areas around each of petitioners' stores. The general manager would then discuss his findings with petitioners. Petitioners and the general manager would then determine the appropriate profit margin for each category of item sold. These percentages were written down and

distributed to each store manager who would set prices accordingly. Thus, each of the three stores had the same profit margin as set by petitioners.

4. Each of the three stores maintained cash register tapes and receipts and disbursements records on a weekly basis. All of the records were brought to the bookkeeper at the main office who would do the weekly postings. The bookkeeper took the records, including the cash register tapes which were attached to the weekly invoices, and brought them to petitioners' accountant's office. The accountant prepared the sales tax returns from these records. The cash register tapes from petitioners' stores did not specifically identify each item that was sold, but showed only the price and whether tax was charged.

5. The Audit Division did a separate audit of each store. The auditor noted that the records for each store were well kept. The audit procedure utilized in each store was essentially the same. The auditor examined merchandise purchases during the three-month test period and derived a taxable ratio. This ratio was applied to reported purchases to determine taxable item purchases. A markup of taxable items was determined using selling prices and invoice costs from February, 1977. This markup was applied to taxable item purchases to arrive at audited taxable sales. Reported taxable sales were subtracted from audited taxable sales and multiplied by the tax rate to arrive at additional tax due. The additional tax due for the River Road store was \$34,038.21. The additional tax due for the Fairport Road store was \$21,939.48. The additional tax due for the Ridge Road store was \$26,108.91.¹

6. Petitioners argue that they maintained complete records including cash register tapes with which a complete audit could have been conducted and that

¹ Additional tax was also found to be due on expense purchases and capital purchases; however, these were minimal amounts and were not raised as an issue.

it was not necessary for the auditor to utilize a test period and purchase markup method of audit.

Alternatively, petitioners argue that, even if resort to a purchase markup test was warranted, the markups as computed were inaccurate because during the month selected as a test period by the auditor, petitioners were in the process of raising their price structure as suggested by their accountants. Petitioners performed their own markup test utilizing the profit margin sheets issued to each store manager during the audit period. This test, which involved months in 1974 and 1975, indicated markups lower than the auditor's by four to 25 percent. Petitioners also maintained that they incurred three to four percent losses due to spoilage and pilferage and that no allowance for such losses was given by the auditor.

7. Based on petitioners' tests the additional tax due should have been computed as follows:

	<u>River Road Store</u>				
	<u>Markup</u>	X	<u>Percent of Purchases</u>	=	<u>Weighted Markup</u>
Beer	1.299		.513		.666
Soda	1.299		.205		.266
Cigarettes	1.316		.131		.172
Candy	1.33		.035		.047
Other	1.401		.116		.162
<u>Total</u>					<u>1.313</u>

Taxable Purchases	\$574,401.11
Weighted Markup	X 1.313
Taxable Sales	<u>754,188.66</u>
Less Pilferage	- .03
	<u>731,563.00</u>
Reported Sales	<u>-289,755.75</u>
Additional Sales	<u>441,807.25</u>
Tax Rate	X .07
Additional Tax Due	<u>\$ 30,926.51</u>

<u>Fairport Road Store</u>					
	Markup	X	Percent of <u>Purchases</u>	=	<u>Weighted Markup</u>
Beer	1.299		.376		.488
Soda	1.299		.138		.179
Cigarettes	1.316		.344		.453
Candy	1.33		.087		.116
Other	1.401		.055		.077
<u>Total</u>					<u>1.313</u>

Taxable Purchases	\$415,533.16
Weighted Markup	X 1.313
Taxable Sales	<u>545,595.04</u>
Less Pilferage	<u>- .03</u>
	529,227.19
Reported Sales	<u>-276,635.95</u>
Additional Sales	252,591.24
Tax Rate	<u>.07</u>
Additional Tax Due	\$ 17,681.39

<u>Ridge Road Store</u>					
	Markup	X	Percent of <u>Purchases</u>	=	<u>Weighted Markup</u>
Beer	1.299		.571		.742
Soda	1.299		.195		.253
Cigarettes	1.316		.122		.161
Candy	1.33		.061		.081
Other	1.401		.051		.071
<u>Total</u>					<u>1.308</u>

Taxable Purchases	\$444,053.89
Weighted Markup	X 1.308
Taxable Sales	<u>580,822.49</u>
Less Pilferage	<u>- .03</u>
	563,397.81
Reported Sales	<u>-234,481.29</u>
Additional Sales	328,916.52
Tax Rate	X .07
Additional Tax Due	\$ 23,024.16

8. The Audit Division argues that, since each item sold was not specifically identified on the cash register tapes, the auditor could not determine if sales tax was charged on all taxable items. An audit of the cash register tapes would not have revealed whether taxable items were improperly rung up as nontaxable or whether sales were made off the cash register. The Audit Division

maintains that such tapes were inadequate for verifying taxable sales or ascertaining the exact amount of tax due.

CONCLUSIONS OF LAW

A. That section 1138(a) 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, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That although petitioners maintained all the register tapes for the audit period, each item sold was not specifically identified on the tapes and as a result the auditor could not determine if sales tax was charged on all taxable items. An audit of the cash register tapes would not have revealed whether taxable items were improperly rung up as nontaxable or whether sales were made off the cash register. The audit procedures utilized, even when based on petitioners' own figures, disclosed a significant variance with taxable sales reported indicating that sales tax was not properly charged on all items subject to tax.

C. That petitioner has proven that the audit findings were erroneous to the extent indicated in Finding of Fact "7" and accordingly the additional tax due is as follows:

River Road Store	\$30,926.51
Fairport Road Store	\$17,681.39
Ridge Road Store	\$23,024.16

D. That the petitions of Thomas J. Spinosa and Anthony DiPrima are granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to modify the notices of determination and demand for

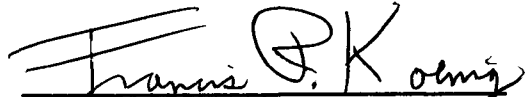
payment of sales and use taxes due issued September 13, 1977 accordingly; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 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	Thomas J. Spina A
	Street and No.	Michael DiPuma
	P.O., State and ZIP Code	3289 E. River Rd. Rochester NY 14623
	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		

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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	Max T. Stoner
	Street and No.	570 Crossroads Rd
	P.O., State and ZIP Code	Rochester NY 14614
	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		