

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Jack Vengrofsky :  
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 6/1/78 - 5/31/81. :  
:

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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

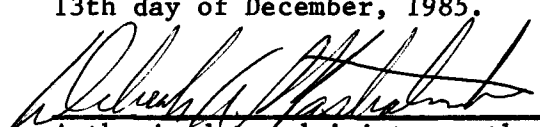
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Jack Vengrofsky, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Vengrofsky  
9007 31st Ave.  
Jackson Heights, NY 11372

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  
13th day of December, 1985.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

December 13, 1985

Jack Vengrofsky  
9007 31st Ave.  
Jackson Heights, NY 11372

Dear Mr. Vengrofsky:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
JACK VENGROFSKY : 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 June 1, 1978 :  
through May 31, 1981.

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Petitioner, Jack Vengrofsky, 90-07 31st Avenue, Jackson Heights, New York 11372, 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 June 1, 1978 through May 31, 1981 (File No. 41161).

A 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 July 23, 1985 at 9:25 A.M. with all briefs to be submitted by September 23, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

#### ISSUE

Whether based upon tests of books and records, the Audit Division properly determined additional sales tax due from petitioner for the period June 1, 1978 through May 31, 1981.

#### FINDINGS OF FACT

1. On March 1, 1982, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Jack Vengrofsky, assessing sales tax of \$6,780.64,

plus interest of \$1,429.13, for a total due of \$8,209.77 for the period June 1, 1978 through May 31, 1981. Mr. Vengrofsky executed consents extending the statute of limitations for issuing an assessment for sales and use taxes for the period June 1, 1978 through May 31, 1981 to March 20, 1982.

2. On May 24, 1982, the petitioner timely filed a petition for a hearing to review the notice of determination. Petitioner contends that his sales, as determined by the Audit Division, were incorrect and, further, that the liquor and wine markups which were utilized were excessive.

3. During the period at issue and at the present time, the petitioner operated a liquor store at 90-07 31st Avenue, Jackson Heights, New York. In or about June, 1981, the Audit Division initiated an audit of petitioner's books and records. Records requested and made available to the auditor included a sales journal, purchase invoices and cancelled checks. The auditor also requested a disbursements journal, however, none was made available. In order to verify purchases, the auditor analyzed cancelled checks and found that for the audit period purchases totalled \$225,485.00 whereas sales reported by the petitioner totalled \$184,586.00 a difference of \$40,826.00 which could not be explained by petitioner.

4. On July 30, 1981 the petitioner executed a consent agreeing to the use of a test period in performing the sales tax audit. The auditor first determined that liquor and wine represented 79% and 21% respectively of petitioner's purchases based on an analysis of purchase invoices for the months of September 1980 and May 1981. Said months were average and indicative of the petitioner's overall purchases. The auditor next computed markups on liquor and wine of 16.22% and 31.79% respectively based upon current costs and selling prices.

obtained from the shelves and supplied by petitioner. The auditor then applied the above percentages to purchases for the audit period and determined adjusted taxable sales of \$269,344.00 which when reduced by reported taxable sales of \$184,586.00 resulted in additional taxable sales of \$84,758.00, a margin of error of 45.92%. Lastly, the auditor computed additional sales taxes of \$6,780.64.

5. At the hearing the petitioner claimed that his books and records were sent to his accountant to prepare for the hearing and that they were apparently lost in the mail. Petitioner was given additional time after the close of the hearing to submit whatever evidence he desired to support his contentions, however, no such evidence has been received.

#### CONCLUSIONS OF LAW

A. That the failure of petitioner to produce a disbursements journal does not per se mean that his books and records were incomplete or inadequate; the Audit Division was able to determine his purchases from cancelled checks. However, since the petitioner executed a consent agreeing to the use of a test period, the Audit Division's use of test periods was proper.

B. That once it is established that the audit method is proper, the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 858). Petitioner has failed to overcome this burden of showing error.


C. That the petition of Jack Vengrofsky is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 1, 1982 is sustained.

DATED: Albany, New York

DEC 13 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 684 313 074

**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>Jack Vengrofsky</i>	
Street and No. <i>19007 31st St</i>	
P.O., State and ZIP Code <i>11435 Queens NY</i>	
Postage	<i>\$1.378</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	