

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Allen Parker of Astoria, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 9/1/78-5/31/82.  
:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he/she served the within notice of Decision by certified mail upon Allen Parker of Astoria, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allen Parker of Astoria, Inc.  
22-24 31st St.  
Astoria, NY 11102

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 September, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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of  
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:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 15th day of September, 1986, he served the within notice of Decision by certified mail upon Samuel E. Kezsbom, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel E. Kezsbom  
930 Ditmas Ave.  
Brooklyn, NY 11218

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 September, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

September 15, 1986

Allen Parker of Astoria, Inc.  
22-24 31st St.  
Astoria, NY 11102

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Samuel E. Kezsom  
930 Ditmas Ave.  
Brooklyn, NY 11218

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ALLEN PARKER OF ASTORIA, 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 September 1, 1978 :  
through May 31, 1982.

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Petitioner, Allen Parker of Astoria, Inc., 22-24 31st Street, Astoria, New York 11102, 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 September 1, 1978 through May 31, 1982 (File No. 43304).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 29, 1986 at 1:30 P.M. Petitioner appeared by Samuel E. Kezsbom, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether additional sales tax was properly assessed against petitioner pursuant to a sales tax markup audit.

FINDINGS OF FACT

1. Petitioner, Allen Parker of Astoria, Inc., operates a retail men's clothing business at three locations in Queens, New York.
2. The Audit Division conducted a sales tax field audit of petitioner's books and records for the periods at issue. The records were deemed by the examiner to be incomplete because: a) petitioner did not retain cash register tapes; b) petitioner could not produce credit memoranda to support claimed

returned purchases; c) petitioner's books did not have journal entries showing adjustments for returned merchandise; and d) petitioner did not have police reports for merchandise which was allegedly stolen.

3. Because the records were found to be inadequate, the examiner conducted a weighted markup test of petitioner's purchases of merchandise. After discussion with petitioner's representatives, the examiner calculated a full price markup of 107.66 percent and applied it to sales in the months of September through December and April through June. The examiner then computed a substantially lower markup of 13.15 percent for sales in the months of January through March and July and August to reflect special sales to move out-of-season merchandise. The two markups were applied to purchases as per the books of \$2,108,476.00 and resulted in taxable sales of \$3,785,796.00. Petitioner had reported taxable sales of \$2,383,671.00. Additional taxable sales of \$1,402,125.00 were determined resulting in additional sales tax due of \$112,786.97.

4. Petitioner claimed returned merchandise of approximately \$340,000.00. The examiner, however, found that petitioner did not submit documentation (such as credit memoranda) from suppliers to prove the returns; moreover, petitioner's books and records did not show adjustments made to reduce the purchases by the claimed returns.

5. Based on the audit, on February 18, 1983 the Audit Division issued notices of determination and demands for payment of sales and use taxes due against petitioner for the following periods and in the following amounts: a) September 1, 1978 through February 28, 1982, \$105,991.36 in tax and \$25,143.38 in penalty, plus interest; b) March 1, 1982 through May 31, 1982, \$6,795.61 in tax and \$815.47 in penalty, plus interest.

6. At the hearing, petitioner's president testified in very general terms to the effect that merchandise had been stolen from the stores and that other merchandise had been returned to the manufacturer with deductions made by petitioner on the face of the invoice. The testimony was vague and no details were specified. No documentation was offered to support the testimony.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, as follows:

"If a return required by this article is not filed, or 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 where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. Surface Line Operators Fraternal Organization, Inc., v. Tully, 85 AD2d 858.

C. That in the instant case, petitioner's records were incomplete in that there were no cash register tapes or documentation as to returned or stolen merchandise. Accordingly, it was proper for the Audit Division to perform a test period audit resulting in the assessments which were issued on February 18, 1983. Petitioner did not sustain its burden of proof to show that either the method of audit or the amount of tax assessed was erroneous.

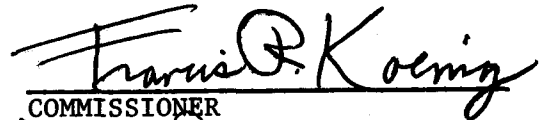
D. That the petition of Allen Parker of Astoria, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due issued February 18, 1983 are sustained.

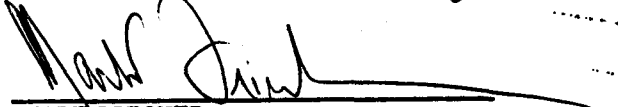
DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 319 372 944

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent To	
Samuel E. Kezsbom	
Street and No.	
930 Ditmas Ave	
P.O., State, and ZIP Code	
Brooklyn, NY 11218	
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 319 372 943

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent To	
Allen Parker of Astoria Inc.	
Street and No.	
22-24 31st St	
P.O., State, and ZIP Code	
Astoria, N.Y. 11102	
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	