

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Connie's Delicatessen :

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 9/1/77 - 8/31/80.

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Connie's Delicatessen the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Connie's Delicatessen
c/o Margaret Fagan Hulbert
6447 107th Terrace
Pinellas Park, Florida 33565

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
18th day of February, 1986.

Doris E. Steinhardt

Jean Corry
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Connie's Delicatessen
c/o Margaret Fagan Hulbert
6447 107th Terrace
Pinellas Park, Florida 33565

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CONNIE'S DELICATESSEN	:	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, 1977	:	
through August 31, 1980.	:	

Petitioner, Connie's Delicatessen, c/o Margaret Fagan Hulbert, 6447 107th Terrace, Pinellas Park, Florida 33565, 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, 1977 through August 31, 1980 (File No. 60821).

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 December 2, 1985 at 2:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

- I. Whether petitioner timely filed a petition for a hearing with the State Tax Commission.
- II. Whether the Audit Division properly determined petitioner's additional sales tax due.

FINDINGS OF FACT

1. On November 20, 1980, 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 Blake Fagan and Margaret Fagan d/b/a Connie's

Delicatessen¹ in the amount of \$23,341.59, plus penalty of \$4,067.17 and interest of \$3,687.50, for a total due of \$31,096.26 for the period September 1, 1977 through August 31, 1980.

2. On February 26, 1981, petitioner wrote a protest letter to the Bronx District Office. This was the first correspondence from petitioner regarding the assessment. The Audit Division afforded petitioner the opportunity to resolve the matter at several conferences. Pursuant to additional information supplied by petitioner at the conferences, the assessment was reduced twice. A Notice of Assessment Review issued November 24, 1981 notified petitioner that the adjusted tax due was \$15,764.96, plus interest of \$3,601.79, for a total due of \$19,366.75. Petitioner disagreed with the revised assessment and filed a petition with the State Tax Commission on January 5, 1982.

3. The original notice of determination issued November 20, 1980 contained the following note in the upper left hand corner:

"NOTE: This determination shall be final unless an application for hearing is filed with the State Tax Commission within 90 days from the date of this notice or unless the Tax Commission shall redetermine the tax."

4. The Audit Division maintains that the petition was untimely and that accordingly petitioner has no right to a hearing. Petitioner argues that she was misled into believing that she still had time to file an appeal. Petitioner alleges that certain statements were made to her by Audit Division employees to the effect that she would not have to file an appeal until attempts at settlement had been exhausted. She also submitted letters which she maintains led her to

1 Blake and Margaret Fagan have since divorced and only Margaret, whose current married name is Hulbert, appeared at the hearing. For the sake of convenience, all references to petitioner will be to her.

conclude that, as of November 2, 1981, she still had time to appeal the assessment. One letter, dated June 23, 1981, from Stuart Hefter, Director, District Office Audit Bureau, stated, in part:

"In the event this conference does not result in a resolution which you feel is satisfactory, Mr. Meyers will be happy to explain to you what your appellate rights are and how you may proceed."

Another letter, dated November 2, 1981, from Boris Meyers, District Tax Supervisor, stated, in part:

"Enclosed are copies of the revised worksheets and I have also enclosed a copy of the booklet (TA-9) informing you of the procedures in resolving the matter at a higher level."

5. Petitioner operated a small grocery store in partnership with her husband. Her husband left her in April, 1978 and petitioner continued to operate the business as a sole proprietorship. The store sold soda, beer, sandwiches, cigarettes, salads and cold cuts by the pound. Petitioner's books and records were incomplete having no original sales documents and missing purchase invoices. As a result, the auditor resorted to a markup test utilizing a two month test period of January and June, 1980. Purchase invoices available for those months were compared to selling prices supplied by petitioner to compute markup percentages for various items. Applying the markups to total purchases, the auditor arrived at additional taxable sales. The additional taxable sales represented a 103.36 percent increase over taxable sales as reported on sales tax returns.

CONCLUSIONS OF LAW

A. That a notice of determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 90 days after giving of notice of such determination, shall apply to the State Tax Commission for a hearing. Tax Law §1138(a)(1). The burden of proving timely application for

such hearing is upon petitioner. The original notice of determination was issued November 20, 1980 and, pursuant to section 1138(a)(1), an application for a hearing should have been filed by February 20, 1981. The first written communication which could be construed as such an application was petitioner's letter of February 26, 1981 which was sent beyond the last date for filing a petition. It is unfortunate that petitioner may have received any misinformation regarding appeal rights, however, this Commission is not bound by misinterpretations of the law by Department of Taxation and Finance employees. Certainly, no Audit Division employee has the authority to orally extend the time period specified by law for filing an application for hearing. It should also be noted that neither of the written communications discussed in Finding of Fact "4" can be interpreted as extending the application date; they merely advised petitioner of ways to determine what appellate rights she had available. Petitioner's application for a hearing was, therefore, untimely.

B. That in view of the foregoing, it is unnecessary to rule on the second issue raised by petitioner.


C. That the petition of Connie's Delicatessen is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 20, 1980, as revised, is sustained.

DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 684 313 303

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>Chapman's Delicatessen</i>	
Street and No.	<i>4444 1st Ave</i>	
P.O., State and ZIP Code	<i>6444 1st Ave</i>	
Postage	<i>1.00</i>	
Certified Fee	<i>3.35</i>	
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		