

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
Ellen Cubbin	:	
d/b/a Jericho Sandwich Shop	:	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 3/1/77 - 2/29/80.	:	

---

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 10th day of January, 1986, he served the within notice of Decision by certified mail upon Ellen Cubbin d/b/a Jericho Sandwich Shop the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ellen Cubbin  
d/b/a Jericho Sandwich Shop  
117 W. Jericho Tpke.  
Huntington Station, NY 11746

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  
10th day of January, 1986.

David Parchuck

Quinn A. Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
Ellen Cubbin	:	
d/b/a Jericho Sandwich Shop	:	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 3/1/77 - 2/29/80.	:	

---

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 10th day of January, 1986, he served the within notice of Decision by certified mail upon Michael D. Solomon, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael D. Solomon  
Pincus & Solomon  
2950 Hempstead Tpke.  
Levittown, NY 11756

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  
10th day of January, 1986.

David Parchuck

Francis P. Hagerman  
Authorized to administer oaths  
pursuant to Tax Law section 174



New York State Tax Commission

**TAX APPEALS BUREAU**

W.A. Harriman Campus  
Albany, New York 12227

January 10, 1986

Ms. Ellen Cubbin  
d/b/a Jericho Sandwich Shop  
117 West Jericho Turnpike  
Huntington Station, NY 11746

Re: Ellen Cubbin  
d/b/a Jericho Sandwich Shop

Dear Ms. Cubbin:

As you can see from the enclosed decision of the State Tax Commission, your petition has been denied.

I would like to point out to you that in addition to your right to appeal the decision through the court system, you may qualify for tax amnesty with respect to the penalty portion of the assessment if you act promptly.

The tax amnesty program is a one-time opportunity for taxpayers to pay their back taxes without penalty. In general, payment in full is required, but an amnesty installment plan is available under certain circumstances.

If you are interested in tax amnesty, telephone the following number: 1-800-CALL-TAX. Please note that tax amnesty ends January 31, 1986.

Very truly yours,

Robert F. Mulligan

RFM/dam

Enclosure

cc: Pincus & Solomon  
2950 Hempstead Turnpike  
Levittown, NY 11756

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

January 10, 1986

Ellen Cubbin  
d/b/a Jericho Sandwich Shop  
117 W. Jericho Tpke.  
Huntington Station, NY 11746

Dear Ms. Cubbin:

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  
Michael D. Solomon  
Pincus & Solomon  
2950 Hempstead Tpke.  
Levittown, NY 11756  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
ELLEN CUBBIN	:	DECISION
D/B/A JERICO SANDWICH SHOP	:	
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, 1977	:	
through February 29, 1980.	:	

---

Petitioner, Ellen Cubbin d/b/a Jericho Sandwich Shop, 117 West Jericho Turnpike, Huntington Station, New York 11746, 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, 1977 through February 29, 1980 (File No. 37948).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1985 at 1:30 P.M. Petitioner appeared by Pincus & Solomon (Michael D. Solomon, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division correctly determined the amount of sales and use taxes due from the petitioner.

II. Whether the Tax Commission is bound by misinformation given by employees of the Department of Taxation and Finance.

FINDINGS OF FACT

1. From 1976 until its sale in March, 1980, petitioner, Ellen Cubbin, was the sole owner and proprietor of Jericho Sandwich Shop, 117 West Jericho Turnpike, Huntington Station, New York 11746.

2. On March 20, 1980, Ms. Cubbin sold the sandwich shop to another party who continued to operate the business under the same name. The Department of Taxation and Finance was properly notified of the sale and consequently issued to Ms. Cubbin a Notice to Seller, dated March 20, 1980, instructing her to submit certain information including a bulk sale questionnaire.

3. On May 14, 1980, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1977 through February 29, 1980 in the amount of \$9,957.94, plus penalty of \$1,852.93 and statutory interest. The notice stated that because of petitioner's failure to submit the information requested, the Audit Division had estimated taxes due by treating 95 percent of the business's reported sales as taxable. It also stated:

"This notice is in addition to notice #94599541, 08/31/76; 94749601, 02/28/77; 94927436, 08/31/77; 95005510, 11/30/78; D7808294897, 02/28/78; D7901238187, 05/31/78; D7904072620, 08/31/78; S7908030707, 02/28/79; D7910238676; 05/31/79."

4. On June 12, 1980, the Audit Division received from Ms. Cubbin a petition for revision of the above determination which asserted that she had never received the proper forms with which to provide the requested information. She also contested the Audit Division's use of an estimate to determine taxes due. As a result of correspondence between the Audit Division and Ms. Cubbin, a bulk sale questionnaire was sent to her on July 20, 1981. It was never returned. Based on additional information received after the issuance of the above notice, the Audit Division issued to petitioner a Notice of Assessment Review dated December 17, 1981 which showed an adjusted tax due of \$8,931.10, plus penalty

and interest of \$5,606.57, for a total of \$14,537.67. This notice also indicated that the taxes due were in addition to any taxes previously reported and paid. Enclosed was another bulk questionnaire with instructions for its completion and return. This questionnaire was returned stating that the business owned by Ms. Cubbin was operated as a sandwich shop selling only food and soda.

5. The questionnaire was sent to the Suffolk District Office in order to make a determination as to the accuracy of the assessment. An auditor visited the premises of Jericho Sandwich Shop. Based on her observations of the business as it was operated by the subsequent owner and the information contained in the bulk sale questionnaire, the Audit Division determined that 95 percent of petitioner's reported gross sales were properly treated as taxable.

6. Although the two businesses may not have been operated in an identical fashion, Ms. Cubbin ran the Jericho Sandwich Shop in a manner very similar to that of the subsequent owner.

7. Prior to the opening of the sandwich shop, Ms. Cubbin was a housewife with no previous business experience. Her husband handled all financial matters including the filing of tax returns. Before the business was sold, she became aware that not all sales taxes reported had been paid. Three subpoenas were issued against Ms. Cubbin on May 16, 1980; however, by November 23, 1981, she had paid all of the delinquent taxes and obtained satisfactions as evidence of this. Despite clear statements on the instant notice that the tax assessed was in addition to that reported, Ms. Cubbin, purportedly as a result of conversations with Tax Department employees, formed the belief that all of her outstanding tax liabilities were satisfied.

8. Approximately one year after the business was sold, all of its financial records were destroyed by Ms. Cubbin's husband. Ms. Cubbin believed the records were no longer necessary because at the time she paid the delinquent taxes she

was allegedly told by Tax Department employees, "You paid everything. You are settled with the State."

9. Ms. Cubbin contended that at the conclusion of a pre-hearing conference held on March 16, 1983, the Tax Appeals Bureau conferee stated that this assessment would be cancelled. However, the written report of the conference indicated that petitioner was advised that the matter would be forwarded to hearing.

#### CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon in such form as the Tax Commission may by regulation require. The Tax Commission requires that all records be preserved for a period of three years and "longer than three years, if their contents are material...in any action or proceeding pending before the Tax Commission." (20 NYCRR 533.2[3]).

B. That where no records are provided by the taxpayer, the State Tax Commission is authorized to select a method reasonably calculated to determine the sales and use taxes due (Carmine Restaurant, Inc. v. State Tax Commission, 99 A.D.2d 581). Exactness is not required where the taxpayer's own failure to maintain the proper records prevents it (Markowitz v. State Tax Commission, 54 A.D.2d 1023).

C. That Ms. Cubbin failed to preserve business records as required by statute or to present any credible evidence to demonstrate that the method of audit or amount of tax assessed was erroneous. Under the circumstances, the Audit Division's estimate of taxes due based on its observation of Jericho Sandwich Shop as it is now operated and the statements made by petitioner on the bulk sale questionnaire was reasonable.



D. That the Tax Commission is not bound by alleged misinformation given by employees of the Department of Taxation and Finance. It is unfortunate if Ms. Cubbin's conversations with employees of the Department led her to believe that her tax liabilities were entirely satisfied when that was not the case. In this instance, petitioner has not adduced written proof or any other substantiation of the purported erroneous information she claims to have relied on. Thus, even if receipt of misinformation could be a basis for relief, petitioner has failed to sustain her burden of proof as to such misguidance. The written notices and correspondence sent to petitioner unambiguously stated that the tax due was in addition to other taxes reported and paid by Ms. Cubbin. Furthermore, the conferee did not propose a resolution of the controversy in writing as provided in 20 NYCRR 601.4(c)(3), but rather forwarded the case for a hearing as indicated in his report.


E. That the petition of Ellen Cubbin d/b/a Jericho Sandwich Shop is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 14, 1980, as modified by the Notice of Assessment Review dated December 17, 1981, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 10 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 684 313 108

**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>Ellen Cooper / 4th</i>
Street and No.	<i>Perich Handwick Shop</i>
P.O., State and ZIP Code	<i>117 W. Perich Tpk</i>
Postage	<i>Washington Station, NY</i>
Certified Fee	<i>11746</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	

P 684 313 109

**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>Michael D. Solomon</i>
Street and No.	<i>Perich &amp; Solomon</i>
P.O., State and ZIP Code	<i>2950 Hampstead Tpke</i>
Postage	<i>Hampton NY 11752</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	