

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Giaris' Pizza & Sub Shop

:

:

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 9/1/80-5/31/83.

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State of New York :

ss.:

County of Albany :

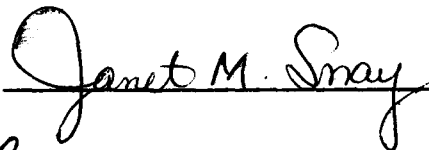
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he/she served the within notice of Decisions by certified mail upon Giaris Pizza & Sub Shop the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

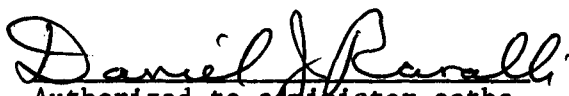
Giaris' Pizza & Sub Shop  
70 W. Main St.  
Cambridge, NY 12816

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  
12th day of June, 1986.

  
\_\_\_\_\_

  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of

Giari's Pizza & Sub Shop : 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 9/1/80-5/31/83.

\_\_\_\_\_  
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 12th day of June, 1986, he served the within notice of Decisions by certified mail upon Richard T. Saxton, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard T. Saxton  
454 Broadway, P.O. Box 817  
Saratoga Springs, NY 12866

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  
12th day of June, 1986.

Janet M. Snay

Daniel J. Ravalli  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

June 12, 1986

Giaris' Pizza & Sub Shop  
70 W. Main St.  
Cambridge, NY 12816

Gentlemen:

Please take notice of the Decisions 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:  
Richard T. Saxton  
454 Broadway, P.O. Box 817  
Saratoga Springs, NY 12866

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
GIARI'S PIZZA & SUB SHOP : 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, 1980 :  
through May 31, 1983.

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Petitioner, Giari's Pizza & Sub Shop, 70 West Main Street, Cambridge, New York 12816, 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, 1980 through May 31, 1983 (File No. 52872).

A hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Building 9, W.A. Harriman Campus, Albany, New York, on September 10, 1985 at 9:15 A.M. Petitioners appeared by Richard T. Saxton, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether a timely petition was filed for the audit period in issue.

FINDINGS OF FACT

1. Petitioner, Giari's Pizza & Sub Shop, is a restaurant located in Cambridge, New York. During the period in issue, Mr. A. Christopher Russo was the sole owner and proprietor of the restaurant.
2. On December 15, 1983, Mr. Russo signed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1980 through November 30, 1980 to March 20, 1984.

3. On March 20, 1984, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (No. S840326021A) asserting tax due of \$4,000.00 plus interest for the period September 1, 1980 through February 28, 1981.

4. Two months later, on May 15, 1984, the Audit Division issued to petitioner a Statement of Proposed Audit Adjustment asserting taxes due in the amount of \$18,499.39, plus interest, for the period September 1, 1980 through May 31, 1983. The following statement appears on the statement: "If you DISAGREE with this statement, return one copy of this adjustment with a precise explanation of your disagreement to this office within 30 days" (emphasis in original).

5. On or about May 29, 1984, a petition prepared by Mr. Russo was received in the Tax Appeals Bureau. The petition explicitly refers to the March 20 notice of determination, a copy of which was attached to the petition.

6. On June 14, 1984, approximately two weeks after the petition was filed, the Audit Division issued two more notices of determination and demands for payment of sales and use taxes due against the petitioner. One notice (No. S840326021A) was a revision of the March 20th notice and assessed a tax due of \$2,796.29, plus penalty of \$699.08 and interest of \$1,303.67, for a total amount due of \$4,799.04 for the period September 1, 1980 through February 28, 1981. The other notice (No. S840615016A) assessed a tax due of \$10,798.55, plus penalty of \$2,581.53 and interest of \$3,132.94, for a total amount due of \$16,513.02 for the period March 1, 1981 through May 31, 1983.

7. No petition was filed in response to the notices dated June 14, 1984. Mr. Russo was confused by the issuance of four seemingly duplicate documents in less than three months, and the similarity of the language used on the Statement of Proposed Audit Adjustment and the notices. He intended his original petition

to act as both an application for hearing and an explanation of his disagreement with the Statement of Proposed Audit Adjustment. The narrative portion of the petition addresses the audit methodology and findings as a whole and does not specifically refer to audit periods or amounts in issue. Petitioner asks that the petition of May 29, 1984 be deemed a timely application for a hearing covering the entire audit period.

8. It is the Audit Division's position that petitioner's failure to file a petition within 90 days of the June 14th notices finally and irrevocably fixes the tax determined to be due.

#### 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 ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing" (emphasis added) [Tax Law §1138(a)(1)]. The instant petition, filed on or about May 29, 1984, explicitly stated the challenged audit period as September 1, 1980 through February 28, 1981 and referred to notice number S840326021A. It cannot be deemed to be a timely application for a hearing to challenge notice number S840615016A, which covered a different audit period and was issued two weeks after the petition was filed. Furthermore, even if the petition is construed to be a protest of the statement of proposed audit adjustment, this fact would not serve to supplant the statutory requirement that a hearing be requested within 90 days after the Tax Commission's issuance of a notice of determination (West Mountain Corporation v. State of New York Department of Taxation and Finance, 105 A.D.2d 989).

B. That a proceeding before the State Tax Commission is commenced by the filing of a timely petition containing sufficient detail to indicate the action


or actions being protested [20 NYCRR 601.3(a) and (c)]. One of the notices issued June 14, 1984, No. S840326021A, merely revised an earlier notice. It could not deprive the State Tax Commission of jurisdiction to hear the underlying controversy once the proceedings before the Commission were commenced. Consequently, petitioner has a right to a hearing on the merits covering the period September 1, 1980 through February 28, 1981.

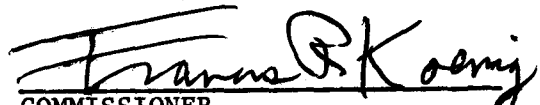
C. That the petition of Giari's Pizza & Sub Shop is granted to the extent indicated in Conclusion of Law "B" and is in every other respect denied.

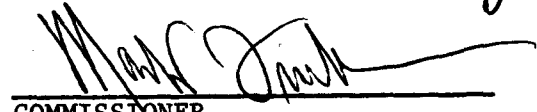
DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 319 372 718

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 <b>Richard T. Saxton</b>	
Street and No. <b>454 Broadway, P.O. Box 817</b>	
P.O. State and ZIP Code <b>Saratoga Springs NY 12866</b>	
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 319 372 717

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 <b>Glaris Pizza + Sub Shop</b>	
Street and No. <b>70 W. Main St.</b>	
P.O. State and ZIP Code <b>Cambridge, N.Y. 12816</b>	
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	