

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harold Langdon : AFFIDAVIT OF MAILING
d/b/a Langdon's Grocery :
:
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 3/1/79-2/28/82. :

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 3rd day of July, 1986, he/she served the within notice of Decision by certified mail upon Harold Langdon, d/b/a Langdon's Grocery the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold Langdon
d/b/a Langdon's Grocery
Route 78
Bliss, NY 14024

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
3rd day of July, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 3, 1986

Harold Langdon
d/b/a Langdon's Grocery
Route 78
Bliss, NY 14024

Dear Mr. Langdon:

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HAROLD LANGDON	:	DECISION
d/b/a LANGDON'S GROCERY	:	
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, 1979	:	
through February 28, 1982.	:	

Petitioner, Harold Langdon d/b/a Langdon's Grocery, Route 78, Bliss, New York 14024, 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, 1979 through February 28, 1982 (File No. 48333).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, Part V, State Office Building, 65 Court Street, Buffalo, New York on December 5, 1985 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, 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, Harold Langdon, operates a general store under the name "Landgon's Grocery" in Bliss, New York. He sells groceries, clothing, candy, cigarettes, books, beverages and other items in the store and sells gasoline from two self-service pumps located in front of the store.

2. A field audit of petitioner's books and records was conducted by the Audit Division between August 1982 and March 1983. The following books and records were available: sales tax returns, federal and state income tax returns and related worksheets, depreciation schedules, a check register, purchase invoices and a calendar day book containing only hand written entries of dollar amounts of sales per day. Petitioner did not have cash register tapes and had no purchases or disbursements journals. The auditor concluded that the books and records were inadequate and decided to estimate taxable sales by the use of a test period and markup.

3. The sample period of January 1981 through December 1981 was used to calculate a taxable ratio. Taxable purchases (excluding gasoline) were found to equal 38.4 percent of total purchases (excluding gasoline). The auditor took the cost of goods sold figure from petitioner's accountant's year-end workpapers (which had been used to prepare the federal returns) and multiplied that figure by 38.4 percent and found taxable cost of goods sold (non-gasoline) of \$288,984.30. A markup of 27.4 percent above cost on the taxable items was calculated and multiplied by taxable cost of goods sold to result in taxable sales of store goods per audit of \$368,165.99. The 27.4 percent markup was computed from the test month of October, 1982.

4. Gasoline purchases were not verifiable through purchase invoices. Accordingly, the auditor obtained third party verification from petitioner's supplier, Green Bros. The total gallons reported by the supplier were multiplied by the Audit Division's average State-wide selling price of \$1.249 per gallon. After deducting taxes, the resulting taxable gasoline sales were found to be \$341,298.17.

5. Total taxable sales of \$709,464.16 determined through the audit (\$368,165.99 store goods plus \$341,298.17 gasoline) were reduced by documented

thefts and an additional 5 percent theft allowance on store goods, to \$684,269.86. This amount was divided by taxable sales reported to calculate an error rate of 60.6 percent. The error rate was multiplied by taxable sales reported of \$425,944.85 resulting in additional taxable sales of \$258,122.58 and additional tax due of \$13,127.50.

6. Petitioner executed consents extending the period of limitation for assessment to December 20, 1983.

7. On June 27, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner in the amount of \$13,127.50 in additional tax due for the period March 1, 1979 through February 28, 1982. No penalty was assessed and only minimum interest was imposed, as petitioner had an excellent filing record and the additional taxes appeared to be the result of an honest mistake or a lack of knowledge, rather than willfulness.

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 petitioner's records were clearly incomplete and inadequate. Accordingly, it was proper for the Audit Division to perform a test period audit resulting in the assessment which was issued on June 27, 1983. Petitioner did not sustain his burden of proof to show that either the method of audit or the amount of tax assessed was erroneous.

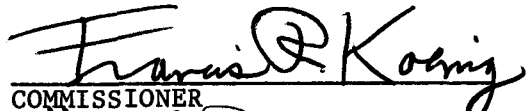
D. That the petition of Harold Langdon d/b/a Langdon's Grocery is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 27, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 372 882

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	
Harold Langdon	
Street and No. Langdon's Grocery	
Route 78	
P.O., State and ZIP Code	
Bliss, N.Y. 14024	
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	