

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
North East Seafood Trading, Inc. :
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 12/1/79-10/5/82. :

AFFIDAVIT OF MAILING

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 North East Seafood Trading, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

North East Seafood Trading, Inc.
c/o Maloney & Porcelli
225 Broadway
New York, NY 10007

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

John Connelley
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
North East Seafood Trading, Inc. :
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 12/1/79-10/5/82. :
:

AFFIDAVIT OF MAILING

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 served the within notice of Decision by certified mail upon William P. Maloney, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William P. Maloney
Maloney & Porcelli
225 Broadway
New York, NY 10007

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
18th day of February, 1986.

Doris E. Steinhardt

Sean Connelley
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

North East Seafood Trading, Inc.
c/o Maloney & Porcelli
225 Broadway
New York, NY 10007

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: Petitioner's Representative
William P. Maloney
Maloney & Porcelli
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
NORTH EAST SEAFOOD TRADING CO., 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 December 1, 1979 :
through October 5, 1982. :

Petitioner, North East Seafood Trading Co., Inc., c/o Maloney & Porcelli, 225 Broadway, New York, New York 10007, 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 December 1, 1979 through October 5, 1982 (File No. 42134).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 24, 1985 at 9:15 A.M. Petitioner appeared by Maloney & Porcelli (William P. Maloney, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether it was proper for the Audit Division to assess additional tax due based upon an estimate that 95 percent of reported gross sales were taxable sales.

FINDINGS OF FACT

1. On October 12, 1982, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from Golden Harvest Seafood, Inc. wherein it indicated that it had purchased petitioner's business on October 5, 1982. As the result of having received the aforementioned Notification, the Audit

Division, on October 25, 1982, sent a Bulk Sale Questionnaire to petitioner requesting information concerning petitioner's sales and purchases for the period at issue. As of January 6, 1983, the Audit Division had not received a reply to its Bulk Sale Questionnaire.

2. On January 6, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the period December 1, 1979 through October 5, 1982. Said Notice assessed additional sales tax due of \$25,430.14, plus penalty of \$4,584.78 and interest of \$4,419.42, for a total amount due of \$34,434.34. The Notice also contained the following explanation:

"As a result of a review of returns filed and you (sic) not sending information requested, 95% of your reported gross sales are held to be taxable."

3. Petitioner timely filed a protest in response to the aforementioned Notice and, as a result of said protest, the Audit Division assigned this case to one of its field auditors for further review. Said field auditor contacted petitioner's accountant and requested that petitioner's books and records, including such items as guest checks, cash register tapes, sales journal, purchase journal, sales invoices and purchase invoices, be made available for examination. No records were provided for examination and, accordingly, the field auditor recommended that the Notice dated January 6, 1983, be sustained.

4. Petitioner's facility was located in New York City and business activities consisted of the wholesale and retail sale of fresh (uncooked) fish and also the operation of a restaurant which served prepared meals for consumption both on and off the premises. Petitioner also sold soda and beer in its restaurant operation. Petitioner's wholesale activities were conducted in the early morning hours and lasted until approximately 9:00 A.M. Retail sale of

fresh fish occurred between 9:00 A.M. and 6:00 P.M., while the restaurant was open for business from 11:00 A.M. to 3:00 P.M.

5. At the hearing held herein petitioner submitted in evidence sales ledgers¹ which contained hand-recorded entries of gross sales for each day of operation. The sales ledgers contained separate columns for recording wholesale, retail and restaurant sales. With the exception of the aforementioned sales ledgers, petitioner offered no other books or records in evidence.

6. Petitioner also argued that the business was sold in March of 1982 and that it was thereafter operated by the purchaser, although said purchaser used petitioner's corporate name. On a bulk sale questionnaire petitioner's president indicated that the business was sold on "3/20/83 Closed 6/83". No credible evidence was presented to establish the date petitioner sold its business and ceased operations.

CONCLUSIONS OF LAW

A. That section 1135(a) 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 and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Petitioner did not have cash register tapes or any other record that would serve as a verifiable record of taxable sales. Hand-recorded entries in a ledger of gross sales figures for each day were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971). Accordingly, it was proper audit methodology

1 The sales ledgers encompassed only the period June 1, 1980 through January 31, 1982. The audit period in question herein encompassed the period December 1, 1979 through October 5, 1982.

for the Audit Division to estimate that 95 percent of petitioner's gross sales were taxable sales [Tax Law §1138(a)].

B. That in the instant matter petitioner's wholesale and retail sale of fresh fish were transactions exempt from sales tax; while the sale of prepared meals and beverages were taxable transactions. Section 1132(c) of the Tax Law provides, in pertinent part, that:

"...it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five... are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax..."

C. That the Audit Division accepted petitioner's reported gross sales, however, it asserted that 95 percent of said reported gross sales were taxable sales. The Audit Division, in effect, disallowed a substantial portion of petitioner's claimed non taxable sales. Petitioner has failed to sustain its burden of proof pursuant to Tax Law section 1132(c) to show that 95 percent of its gross sales were not taxable sales.

D. That petitioner has also failed to establish that it sold its business and ceased all operations effective March of 1982.

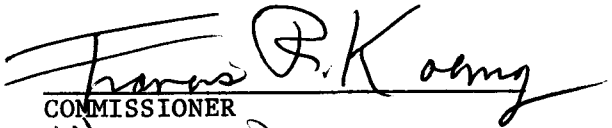
E. That the petition of North East Seafood Trading Co., Inc. is denied and the Notice dated January 6, 1983 is sustained.

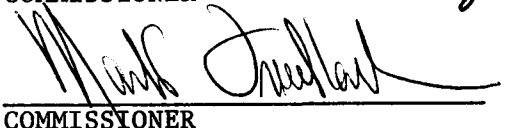
DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 373 537

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 WILLIAM P. MALONEY MALONEY & PORCELLI	
Street and No. 225 BROADWAY	
P.O., State and ZIP Code NEW YORK, NY 10007	
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 319 373 531

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 NORTH EAST SEAFOOD TRADING INC. c/o MALONEY & PORCELLI	
Street and No. 225 BROADWAY	
P.O., State and ZIP Code NEW YORK, NY 10007	
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	