

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Du Hyon Pak : AFFIDAVIT OF MAILING  
d/b/a Pak Fish Market :  
:  
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 8/31/81 - 2/28/83. :

---

State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 4th day of April, 1986, he/she served the within notice of Decision by certified mail upon Du Hyon Pak, d/b/a Pak Fish Market the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Du Hyon Pak  
d/b/a Pak Fish Market  
75-17 41st Avenue, Apt. 3D  
Elmhurst, NY 11373

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  
4th day of April, 1986.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Du Hyon Pak : AFFIDAVIT OF MAILING  
d/b/a Pak Fish Market :  
:   
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 8/31/81 - 2/28/83. :

---

State of New York :  
ss.:  
County of Albany :

David Parchuck/Connie Hagelund, 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 4th day of April, 1986, he served the within notice of Decision by certified mail upon Kevin Lee, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kevin Lee  
1201 Broadway, Room #903  
New York, NY 10001

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  
4th day of April, 1986.

David Parchuck

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

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

April 4, 1986

Du Hyon Pak  
d/b/a Pak Fish Market  
75-17 41st Avenue, Apt. 3D  
Elmhurst, NY 11373

Dear Mr. Pak:

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

Petitioner's Representative:  
Kevin Lee  
1201 Broadway, Room #903  
New York, NY 10001

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
DU HYON PAK	:	DECISION
D/B/A PAK FISH MARKET	:	
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 April 1, 1981	:	
through February 28, 1983.	:	

---

Petitioner, Du Hyon Pak d/b/a Pak Fish Market, 75-17 41st Avenue, Apt. 3D, Elmhurst, New York 11373, 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 April 1, 1981 through February 28, 1983 (File No. 46062).

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 October 8, 1985 at 9:15 A.M., with all briefs to be submitted by December 8, 1985. Petitioner appeared by Kevin Lee, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

#### ISSUE

Whether the audit method used to determine additional sales and use taxes due from petitioner was proper and correct.

#### FINDINGS OF FACT

1. On August 19, 1983, the Audit Division, as a result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period April 1, 1981 through February 28, 1983. Said Notice assessed additional sales and use taxes due of \$14,438.75, plus simple interest of \$2,188.17, for a total amount due of \$16,626.92.

2. Petitioner was in the business of selling fresh (raw) fish and also cooked fish and soda. Petitioner's records included sales tax returns, federal and state income tax returns, depreciation schedules, sales journal and cancelled checks. Mr. Pak did not have cash register tapes, guest checks or any other records that could be used to verify the accuracy of reported taxable sales. Petitioner estimated the taxable sales reported on his sales tax returns.

3. Since petitioner's books and records were inadequate, the Audit Division resorted to the use of an observation test to verify the accuracy of reported taxable sales. The auditor assigned to the case recorded petitioner's taxable sales for a three (3) day period and projected the results of said three (3) day observation test over the entire audit period. The following table details the manner in which additional taxable sales of \$139,874.42 were computed:

Taxable sales for days observed		
Monday, May 9, 1983	\$234.81	
Tuesday, May 10, 1983	212.65	
Friday, May 27, 1983	<u>373.35</u>	
Total for three (3) days		\$ 820.81
Multiplied by 2 to compute weekly sales		x 2
Total for six (6) day week		<u>1,641.62</u>
Multiplied by 13 weeks per quarter		x 13
Taxable sales per quarter		<u>21,341.06</u>
Multiplied by seven (7) quarters		x 7
Taxable sales for audit period		<u>149,387.42</u>
Less reported taxable sales		<u>9,513.00</u>
Additional taxable sales		<u>\$139,874.42</u>

The Audit Division's assertion of additional taxable sales of \$139,874.42 produced a sales tax deficiency of \$11,491.83.

4. In addition to the aforementioned sales tax deficiency, the Audit Division also determined a use tax deficiency of \$2,946.92. Sometime in April of 1981, petitioner rented a vacant store and thereafter made certain leasehold improvements and purchases of machinery totalling some \$42,700.00. The sales

tax auditor requested that petitioner submit evidence to prove that sales tax had been paid on said leasehold improvements and machinery. Petitioner was able to produce purchase invoices which showed that sales tax had been paid on only \$5,863.56. No invoices were submitted for the balance of \$36,836.44 and a use tax deficiency of \$2,946.92 was therefore assessed ( $\$42,700.00 - \$5,863.56 \times .08$ ).

5. Petitioner argued that his business was seasonal and that the Audit Division's three (3) day observation test was conducted during his busiest season, therefore producing a distorted result. No credible documentary or other evidence was adduced at the hearing to support this contention. Furthermore, petitioner presented no evidence to show that sales tax had been paid on the balance of purchases of leasehold improvements and machinery totalling \$36,836.44.

#### 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, guest checks or any other documents which would serve as a verifiable record of taxable sales. Under the circumstances, the Audit Division's use of an observation test was proper in accordance with section 1138(a) of the Tax Law (Matter of Licata v. Chu, 64 N.Y.2d 873; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858).

C. That the petition of Du Hyon Pak d/b/a Pak Fish Market is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 19, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 314 373 621

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	Kevin Lee
Street and No	1201 Broadway, Rm #903
P.O. State and ZIP Code	New York, NY 10001
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 314 373 620

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	Du Hyan Pak d/b/a Pak Fish market
Street and No	75-17 41st Ave, Apt. 3D
P.O. State and ZIP Code	Elmhurst, NY 11373
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	