

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
William & Mary Stepien :
d/b/a Stepien's Liquor Store :

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 9/1/78 - 8/31/81.

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 21st day of April, 1986, he/she served the within notice of decision by certified mail upon William & Mary Stepien, d/b/a Stepien's Liquor Store the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William & Mary Stepien
d/b/a Stepien's Liquor Store
770 Indian Church Road
West Seneca, NY

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
21st day of April, 1986.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

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of
William & Mary Stepien :
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for Redetermination of a Deficiency or Revision :
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under Article(s) 28 & 29 of the Tax Law :
for the Period 9/1/78 - 8/31/81.

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 21st day of April, 1986, he served the within notice of decision by certified mail upon Walter G. Goldstein, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter G. Goldstein
1060 Ellicott Square Bldg.
Buffalo, NY 14203

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
21st day of April, 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

April 21, 1986

William & Mary Stepien
d/b/a Stepien's Liquor Store
770 Indian Church Road
West Seneca, NY

Dear Mr. & Mrs. Stepien:

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

Petitioner's Representative:
Walter G. Goldstein
1060 Ellicott Square Bldg.
Buffalo, NY 14203

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM & MARY STEPIEN	:	DECISION
d/b/a STEPIEN'S LIQUOR STORE	:	
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, 1978	:	
through August 31, 1981.	:	

Petitioners, William and Mary Stepien, 770 Indian Church Road, West Seneca, New York 14092, 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, 1978 through August 31, 1981 (File No. 37953).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on June 19, 1985 at 9:15 A.M., with all briefs to be filed by September 16, 1985. Petitioners appeared by Walter G. Goldstein. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

Whether the Audit Division properly determined the tax liability of the petitioners.

FINDINGS OF FACT

1. On September 4, 1981, the Audit Division issued to petitioners, William and Mary Stepien, a Notice and Demand for Payment of Sales and Use Taxes Due Number S810626918 covering the periods ended November 30, 1978 through August 31, 1981 asserting taxes due of \$5,523.97 exclusive of interest.

On April 23, 1982, the Audit Division issued to petitioners William and Mary Stepien a Notice and Demand for Payment of Sales and Use Taxes Due Number S810626918E (said number being the same number as the notice dated September 4, 1981), for the same periods as stated in the notice dated September 4, 1981 and asserting additional taxes due of \$3,912.26 exclusive of interest to date of said notice.

The Notice of Determination and Demand dated April 23, 1982 inter alia, bore the following explanation:

"Assessment is revised to correct the tax and update the simple interest to April 22, 1982."

The petitioners filed a timely protest with respect to the asserted liability.

2. Petitioners operated a retail liquor store in Buffalo, New York under the business name "Stepien's Liquor Store" for approximately 14 years until June 1981 when the business was sold.

3. The Audit Division audited petitioners business for the period September 1, 1978 through the period ended August 31, 1981. Petitioners had available for audit: sales journals, purchase journals and federal income tax returns. Petitioners did not have available for audit: cash register tapes, purchase invoices or records of selling prices. Petitioners' federal returns reconciled with the information contained in the sales and purchase journals.

4. Because petitioners did not maintain adequate records to determine and verify sales, a markup audit was performed. Based upon previous audit experience, the Audit Division determined that petitioners purchases would be allocated 75% to liquor purchases and 25% to wine purchases. Based again upon previous audit experience, liquor was marked up 17.29% and wine was marked up 53.4% resulting in total audited sales of \$704,864.68. Subtracting petitioners reported sales of \$625,951.55 from audited sales results in \$78,913.13 of unreported taxable

sales which after application of the tax rate determines the \$5,523.97 in additional tax asserted due on the Notice dated September 4, 1981 (Finding of Fact "1").

5. Based upon the deregulation of wine prices, the markup on wine for the period beginning June 1, 1980 and thereafter was reduced to 24.0%. A theft allowance of 1% was also granted petitioners. These adjustments result in a determination of \$681,931.94 in taxable sales which when compared to petitioners' reported sales results in the \$3,912.26 revised additional tax asserted on the Notice dated April 23, 1982 (see Finding of Fact "1").

6. That petitioners federal return for the year 1978 showed an opening inventory of \$20,876.00, a closing inventory of approximately \$25,636.00 and a markup over costs of 13% after inventory adjustment. Petitioners' closing inventory decreased to \$20,567.00 in 1979, increased to \$24,678.00 in 1980 and in the six months of operation in 1981 prior to the sale of the business apparently increased to \$27,000.00.

Petitioners' markup over costs for the years 1979 and 1980 after inventory adjustment were approximately 10% and 11%, respectively.

After accounting for the supposed increase in inventory (which reduces petitioners' purchases subject to markup) petitioners showed a markup of 19% for the six months they operated in 1981.

7. That the petitioners on their "final return" for the year 1981 listed amount received for inventory as \$27,000.00 and cost of such inventory as \$27,000.00 incurring neither gain nor loss on said inventory sales as part of the sale of the business.

8. That in performing its purchase markup audit the Audit Division did not take into account opening and closing inventories.

9. Petitioners established that their purchases were allocated 84.2% to liquor and 15.8% to wine.

10. Petitioners allege (a) that they sustained greater theft losses than 1% and (b) that they sold at a lessor markup than used by the auditors.

CONCLUSIONS OF LAW

A. That petitioners failed to maintain adequate verifiable records of purchases, costs, sale prices and receipts. Where books and records are incomplete use of external indices is permissible. (Matter of Sakran v. S.T.C., 73 A.D.2d 989; Tax Law §1138(a)).

B. That although it generally is proper to "net" out inventory when performing a purchase markup audit, petitioners herein have not established the opening inventory of September 1, 1978 which amount may have been greater than or less than the closing inventory of \$25,636 as of December, 1978. Moreover petitioners' closing inventory of June 1981 appears somewhat suspect based upon the considerable variance over the short six month period to prior years in respect of petitioners' admitted markup. Thus, in addition to their failure to establish the amount of their opening inventory, it appears somewhat likely that petitioners' opening inventory on September 1, 1978 and their closing inventory of June 1981 would cancel each other out. It is therefore determined that there has not been shown by petitioners any error in respect of the Audit Division's refusal to otherwise adjust inventory.

C. That petitioners have substantiated (Finding of Fact "9") that the ratio of liquor purchases to wine purchases was different from that used by the Audit Division (Finding of Fact "4") and the Audit Division is directed to recompute petitioners' liability based upon the allocation of liquor purchases of 84.2% of total purchases and wine purchases as 15.8% of total purchases.

D. That petitioners have failed to sustain their burden of showing that the Audit Division's markup percentages were incorrect or erroneous.

E. That petitioners have failed to sustain their burden of showing that they sustained theft loss greater than the 1% allowance granted by the Audit Division.

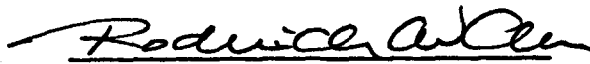
F. That the Audit Division is directed to recompute petitioners liability in accordance with Conclusion of Law "C" using the markup percentages it determined (Conclusion of Law "D", Findings of Fact "4" and "5") taking into account a 1% theft allowance (Findings of Fact "5").

G. The petition is granted to the extent noted in Conclusion of Law "F" and the Notice of Determination and Demand as revised is in all other respects sustained together with such interest as allowed by Law.

DATED: Albany, New York

APR 21 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER