

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Valley Supreme Supermarket, Inc. : AFFIDAVIT OF MAILING
and Arthur Moriano, as Officer :
:
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 9/1/79 - 5/31/83. :

State of New York :

ss.:

County of Albany :

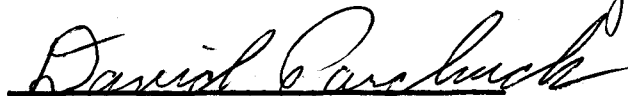
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of October, 1986, he/she served the within notice of Decision by certified mail upon Valley Supreme Supermarket, Inc., and Arthur Moriano, as Officer the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Valley Supreme Supermarket, Inc.
and Arthur Moriano, as Officer
Route 52
Pine Bush, New York 12566

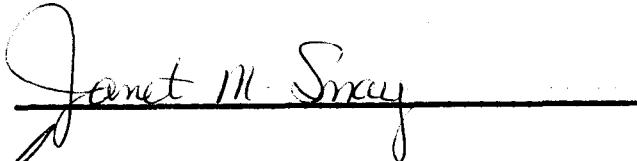
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
20th day of October, 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 :
Valley Supreme Supermarket, Inc. : AFFIDAVIT OF MAILING
and Arthur Moriano, as Officer :
:
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 :
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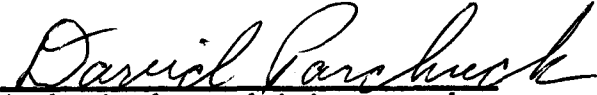
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of October, 1986, he served the within notice of Decision by certified mail upon Ronald J. Cohen, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ronald J. Cohen
Jacobowitz & Gubits
P.O. Box 367
Walden, NY 12586

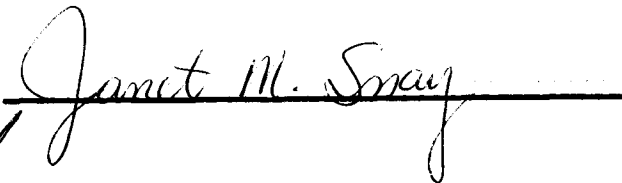
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
20th day of October, 1986.



Authorized to administer oaths
pursuant to Tax Law section 174



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

October 20, 1986

Valley Supreme Supermarket, Inc.
and Arthur Moriano, as Officer
Route 52
Pine Bush, New York 12566

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
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:
Ronald J. Cohen
Jacobowitz & Gubits
P.O. Box 367
Walden, NY 12586

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| VALLEY SUPREME SUPERMARKET, INC. | : | |
| and | : | DECISION |
| ARTHUR MORIANO, AS OFFICER | : | |
| 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, 1979 | : | |
| through May 31, 1983. | : | |

Petitioners, Valley Supreme Supermarket, Inc. and Arthur Moriano, as officer, Route 52, Pine Bush, New York 12566, 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, 1979 through May 31, 1983 (File Nos. 49434 and 49435).

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 February 4, 1986 at 9:45 A.M., with all briefs to be submitted by May 5, 1986. Petitioners appeared by Jacobowitz and Gubits (Ronald J. Cohen, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the records of petitioner Valley Supreme Supermarket, Inc. were complete and accurate.

II. Whether the audit conducted by the Audit Division properly determined additional tax.

FINDINGS OF FACT

1. Petitioner Valley Supreme Supermarket, Inc. operates a supermarket in Pine Bush, New York. Petitioner Arthur Moriano does not contest his responsibility for any sales taxes which may be owed by him as a person required to collect tax on behalf of the corporation, therefore all references to "petitioner" will refer to the corporation.

2. The Audit Division conducted an audit of petitioner's books and records for the period September 1, 1979 through May 31, 1983. As the result of its examination, the Audit Division, on November 30, 1983, issued the following notices of determination and demands for payment of sales and use taxes due:

| <u>ISSUED TO</u> | <u>PERIOD</u> | <u>TAX DUE</u> |
|----------------------------------|------------------|----------------|
| Valley Supreme Supermarket, Inc. | 9/1/79 - 2/28/83 | \$16,790.34 |
| Valley Supreme Supermarket, Inc. | 3/1/83 - 5/31/83 | \$ 1,726.91 |
| Arthur Moiano [sic], Officer | 9/1/79 - 2/28/83 | \$15,748.32 |
| Arthur Moiano [sic], Officer | 3/1/83 - 5/31/83 | \$ 1,726.91 |

The notice issued to Arthur Moriano for the period September 1, 1979 through February 28, 1983 is less than the notice issued to the corporate petitioner as it does not include \$1,042.02 of unpaid sales tax due on purchases of fixed assets.

3. On January 27, 1984, notices of assessment review were issued reducing two¹ of the notices of determination and demands for payment of sales and use taxes as follows:

¹ It would appear that notices of assessment review may have or should have been issued with respect to the other assessments as well. However these documents are not in the record.

| <u>ISSUED TO</u> | <u>PERIOD</u> | <u>AMOUNT ASSESSED</u> | <u>ADJUSTED TAX DUE</u> |
|----------------------------------|------------------|----------------------------|-----------------------------|
| Valley Supreme Supermarket, Inc. | 9/1/79 - 2/28/83 | \$16,790.34 | \$13,441.49 |
| Arthur Moiano [sic], Officer | 3/1/83 - 5/31/83 | \$ 1,726.91 | \$ 1,612.66 |

4. Records available for audit included sales tax returns, Federal income tax returns, cash receipts journal, check disbursements journal, purchase invoices, monthly bank statements and cash register tapes.

5. The auditor who conducted the audit had left the Department of Taxation and Finance prior to the hearing and did not testify. No reason was stated in the field audit report, or in the testimony of the auditor's supervisor as to why petitioner's books and records had been determined to be inadequate.

6. Gross sales per books were reconciled with sales shown on the sales tax returns and petitioner's Federal income tax returns. Both reconciliations were in substantial agreement. The auditor calculated that the markup per the books was 21% which percentage he considered to be low for the industry, and consequently decided to perform markup tests.

7. The auditor selected the months of December 1981, January 1982 and February 1982 for a taxable ratio test, the results of which were as follows:

| <u>CATEGORY</u> | <u>PERCENTAGE OF PURCHASES</u> |
|-----------------|------------------------------------|
| Non-taxable | 63.777% ² |
| Taxable Grocery | 3.445% |
| Health & Beauty | .322% |
| Soda | 4.164% ³ |
| Beer | 3.613% |
| Sundry | 18.461% |
| Cigarettes | 6.218% |

8. The auditor then performed a markup test with current prices for the taxable categories, with the following results:

-
- 2 Incorrectly reported in the field audit report as 3.495%.
 - 3 Incorrectly reported in the field audit report as 6.613%.

| <u>CATEGORY</u> | <u>MARKUP OVER COST</u> |
|-----------------|-----------------------------|
| Taxable Grocery | 35.85% |
| Health & Beauty | 32.8% |
| Soda | 17.597% |
| Beer | 15.749% |
| Sundry | 21.74% |
| Cigarettes | 15.385% |

9. The markup percentages were applied against purchases in the respective categories for the entire audit period, resulting in audited taxable sales of \$4,739,024.90, which amount was \$323,838.19 greater than taxable sales reported by petitioner. Tax due on the additional taxable sales, as revised pursuant to the notices of assessment review, was calculated at \$14,012.13, with unpaid sales tax on fixed assets of \$1,042.02.

10. On or about April 30, 1982 petitioner installed optical scanners to scan universal pricing codes affixed to most items sold in the store. The auditors were told that the scanners did not print in detail until July 23, 1983. While the audit was being conducted, the scanning system was fully operational. It was capable of printing all taxable and nontaxable store inventory. The auditors, however, never requested this information.

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 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 the Audit Division has not shown that petitioner's books and records were incomplete or inadequate. The mere fact that the auditor believed petitioner's markup was too low is not enough to justify a test period audit. In view of this, there is no need to consider Issue II.


D. That the petition of Arthur Moriano, as officer, is granted and the notices of determination and demands for payment of sales and use taxes due issued November 30, 1983 are hereby cancelled.

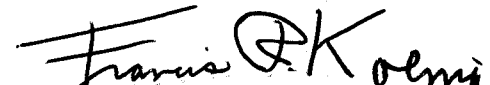
E. That except with respect to the unpaid sales tax on purchases of fixed assets in the amount of \$1,042.02, which was not at issue, the petition of Valley Supreme Supermarket, Inc. is granted and the notices of determination and demands for payment of sales and use taxes due issued to said corporation are to be reduced accordingly.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER