

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Walter Willard, Sr. :
Officer of Willard's Steerburgers : AFFIDAVIT OF MAILING
:
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 :
3/1/79-5/31/82. :

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 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon Walter Willard, Sr., Officer of Willard's Steerburgers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter Willard, Sr.
Officer of Willard's Steerburgers
15 Ahern Ave.
Troy, NY 12180

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
28th day of January, 1986.

David Parchuck

Connie Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 28, 1986

Walter Willard, Sr.
Officer of Willard's Steerburgers
15 Ahern Ave.
Troy, NY 12180

Dear Mr. Willard:

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WALTER WILLARD, SR.	:	DECISION
OFFICER OF WILLARD'S STEERBURGERS, INC.	:	
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 May 31, 1982.	:	

Petitioner, Walter Willard, Sr., 11 Arnold Drive, Elnora, New York 12165, 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 May 31, 1982 (File No. 39295).

A formal hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on April 30, 1985 at 2:40 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from petitioner based on external indices of sales.

II. Whether penalty and interest in excess of the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. Willard's Steerburgers, Inc. (hereinafter "the corporation") operated a fast food restaurant located in a shopping mall in Clifton Park, New York. The restaurant sold primarily hamburgers, hot dogs, salads and non-alcoholic

beverages. Petitioner, Walter Willard, Sr., was the treasurer of the corporation and manager of the restaurant.

2. On July 16, 1982, the Audit Division issued to petitioner, as officer of the corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through May 31, 1982 asserting tax due in the amount of \$40,022.32, plus penalty of \$7,754.71 and interest of \$6,782.68, for a total of \$54,559.71. At the same time, an identical notice was issued against the corporation.

3. At the commencement of the audit, the auditor attempted to meet with petitioner in order to obtain and review available books and records. Three trips were made to the place of business for this purpose. When the petitioner failed to appear at a third audit appointment, the auditor requested sales records from employees of the corporation and received sales tax returns and related workpapers, federal and state income tax returns, a sales journal, a general journal and sales invoices. No purchase invoices were provided. Because these records were deemed inadequate for the purpose of verifying taxable sales, the Audit Division at first attempted verification through a markup of purchases. Purchase records were sought from three of the corporation's bakery suppliers. They informed the Audit Division that petitioner conducted some purchase transactions in cash and that the suppliers kept no records of such purchases. This practice precluded verification of sales on the basis of a markup of purchases.

4. Because insufficient recordkeeping prevented the Audit Division from verifying the accuracy of reported taxable sales, the Audit Division estimated taxable sales for the audit period through reference to external indices. Using information provided by the corporation's beverage suppliers and food

prices taken from the restaurant menu, the auditor calculated sales through the application of a formula which assumed two food items were sold for every drink sold. This procedure resulted in the assessment of \$40,022.32.

5. At a conference with petitioner held on February 22, 1983, the Audit Division agreed to recalculate taxable sales based on purchases of paper products. All purchases made in the calendar year 1981 were obtained from the corporation's only known supplier, Lusco Paper Co. The auditor then reconstructed taxable sales from paper purchases using the following procedure:

a) Paper products were categorized by type (cups, plates, bowls, etc.), size and number for purchases made during the period March 1, 1981 through November 31, 1981.

b) Each menu item was associated with the paper product used to serve it. For example, a large soda was served in a sixteen-ounce cold cup, a small soup was served in a four-ounce bowl and a Julienne salad was served in a twelve-ounce bowl. Where a particular paper product was used to serve a variety of menu items, an average selling price was calculated for all items served on or in that product. Using this method, a weighted selling price was assigned to each paper product as follows:

868 service cups	.25
16 ounce cold cups	.70
Dart cups	.45
4 ounce bowls	.55
6 inch bowls	1.22
12 inch bowls	2.25
hot dog trays	1.16
6 inch plates	1.22
7 inch plates	1.72
11 inch platters	2.45

The summary of prices shown on schedule C of the auditor's workpapers appears to state the selling price assigned to six-inch plates as \$2.25.

A review of all workpapers reveals that the actual price associated with six-inch plates was \$1.22, as stated above.

c) For each category of paper product, the number of such products purchased was multiplied by the average selling price shown above. No allowance was given for waste, doubling up of plates or defective products.

6. Use of the above procedure yielded total audited sales of \$91,938.00 which was divided by reported taxable sales for the test period of \$61,798.90 to calculate an error factor of 1.4877. Prior to the audit, petitioner had late filed four sales tax returns reporting taxable sales of \$70,044.38 and paying a tax of \$2,582.58. At the pre-hearing conference, petitioner submitted additional returns for the remainder of the audit period but remitted no taxes. For the entire period, petitioner reported \$263,947.27 in taxable sales. The calculated error factor was applied to these reported taxable sales to arrive at audited taxable sales of \$392,676.00 with a tax due thereon of \$15,707.04. Giving petitioner credit for taxes previously paid, the Audit Division conceded a tax due of \$13,124.46 plus penalty and interest.

7. Petitioner prepared the corporation's sales tax returns and was primarily responsible for maintenance of the books and records. The cash register used in the restaurant did not produce a tape. Although guest checks were utilized by the restaurant's employees and maintained by petitioner in sequential order, sales were rung up directly on the cash register, without resort to guest checks, when the restaurant was busy. Total cash on hand was counted and recorded in a general ledger at the end of each day. Petitioner relied on these figures as a record of sales and used them to calculate sales tax due. No attempt was made to reconcile guest checks to cash on hand. On the basis of these records, petitioner estimates his own tax liability to be "a little over \$9,000."

8. A random sample of guest checks submitted by the petitioner as evidence of prices charged demonstrates substantial agreement between the selling prices used by the Audit Division and prices actually charged.

9. Approximately 5 percent of the restaurant's paper products were defective, wasted, used to serve water or otherwise consumed in a manner not involving taxable sales.

10. Petitioner requested a cancellation of all penalty and interest.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that:

"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 the guest checks were useless for verifying reported taxable sales because each and every sale was not recorded on a guest check, and the petitioner himself did not use the guest checks to compute sales or tax due. Petitioner was not prejudiced by the auditor's failure to examine the guest checks since the checks were inadequate for audit purposes. Furthermore, petitioner's hand-recorded ledger entries of cash on hand for each day were not reliable records to satisfy the statutory requirement that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971).

C. That the audit procedures utilized disclosed a significant variance between reported taxable sales and audited taxable sales leading to the conclusion that petitioner understated sales and that available books and records were inadequate and unreliable. Under these circumstances, the Audit Division reasonably calculated petitioner's tax liability from external indices in

accordance with section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

D. That when records are not provided or are incomplete, the burden rests on the taxpayer to demonstrate that the method of audit or the amount of tax assessed is erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858). Petitioner has established that 5 percent of all paper products purchased were wasted, defective or otherwise used in a manner not involving a taxable sale. The Audit Division is directed to recompute taxable sales accordingly. In all other respects, petitioner has failed to carry his burden of proof.

E. That section 1145(a)(1) of the Tax Law authorizes the imposition of penalty and interest for failure to file a return or pay over any tax when due. The audit conducted revealed a significant understatement of taxable sales; moreover, petitioner has offered no explanation whatsoever for the corporation's failure to file returns or pay over sales taxes due in a timely fashion. The Audit Division properly imposed penalty and interest on the additional taxes found due for the period March 1, 1979 through May 31, 1982.

F. That additional tax due, as recalculated by the Audit Division, is \$13,124.46 (see Finding of Fact "6"); the Audit Division is directed to modify this assessment further as indicated in Conclusion of Law "D".


G. That the petition of Walter Willard, Sr., Officer of Willard's Steerburgers, Inc., is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is directed to modify the notices of determination and

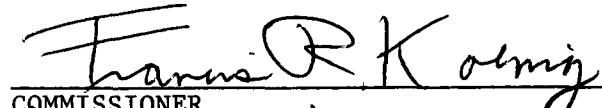
demand for payment of sales and use taxes due issued July 16, 1982 accordingly;
and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-26 (7/85)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
W. A. Harriman Campus
ALBANY, N.Y. 12227

CERTIFIED

P 684 313 252

MAIL

370050



REASON CHECKED
Unclassified
Attempted
Insufficient Address
No such street
Do not remain in this envelope

FEB 3 1986

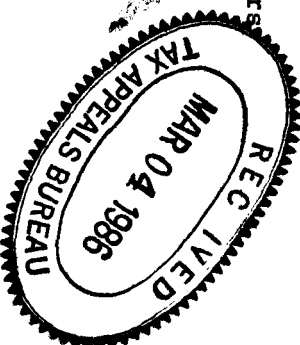
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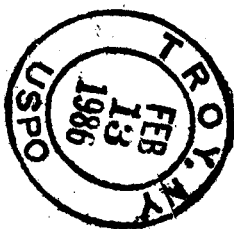
RETURN

Walter Willard, Sr.
Officer of Willard's Steerburgers

15 Atern Ave.

Brooklyn 12180





REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 3/7/86
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition Dec. 1/28/86
Name Walter Willard, Sr.	
Address Office of Willard's Steerbergers 15 Achen Ave Troy, N.Y. 12180	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	Unclaimed

Searched by DP	Section	Date of Search 3/7/86
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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

January 28, 1986

Walter Willard, Sr.
Officer of Willard's Steerburgers
15 Ahern Ave.
Troy, NY 12180

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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

STATE OF NEW YORK

STATE TAX COMMISSION

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of	:	
WALTER WILLARD, SR.	:	DECISION
OFFICER OF WILLARD'S STEERBURGERS, INC.	:	
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A review of all workpapers reveals that the actual price associated with six-inch plates was \$1.22, as stated above.

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CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that:

"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 the guest checks were useless for verifying reported taxable sales because each and every sale was not recorded on a guest check, and the petitioner himself did not use the guest checks to compute sales or tax due. Petitioner was not prejudiced by the auditor's failure to examine the guest checks since the checks were inadequate for audit purposes. Furthermore, petitioner's hand-recorded ledger entries of cash on hand for each day were not reliable records to satisfy the statutory requirement that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971).

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accordance with section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

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F. That additional tax due, as recalculated by the Audit Division, is \$13,124.46 (see Finding of Fact "6"); the Audit Division is directed to modify this assessment further as indicated in Conclusion of Law "D".

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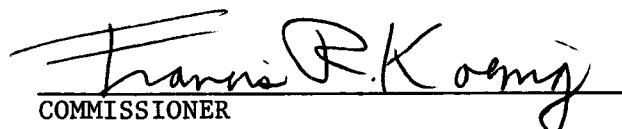
demand for payment of sales and use taxes due issued July 16, 1982 accordingly;
and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER