

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Angela's Restaurant - Syzzi Food Corporation : AFFIDAVIT OF MAILING  
and Angela Cipriano, as Officer :  
:   
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales and Use :  
Tax under Article(s) 28 & 29 of the Tax Law :  
for the Period 9/1/81-8/31/84. :

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State of New York :

ss.:

County of Albany :

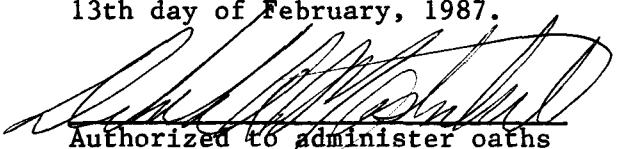
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of February, 1987, he/she served the within notice of Decision by certified mail upon Angela's Restaurant - Syzzi Food Corporation, and Angela Cipriano, as Officer the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

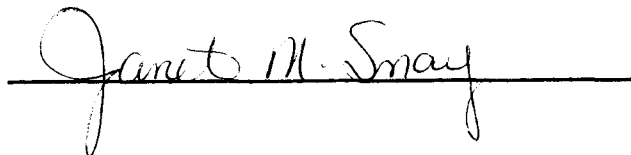
Angela's Restaurant - Syzzi Food Corporation  
and Angela Cipriano, as Officer  
57 Lyons Place  
Staten Island, NY 10314

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  
13th day of February, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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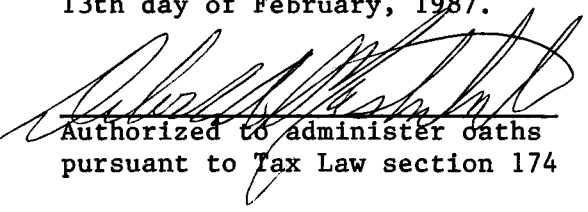
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of February, 1987, he served the within notice of Decision by certified mail upon Howard Bernstein, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

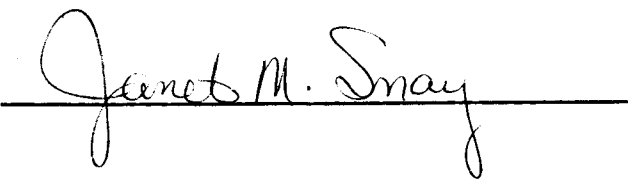
Howard Bernstein  
19 Azalea Court  
Staten Island, NY 10309

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  
13th day of February, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

February 13, 1987

Angela's Restaurant - Syzzi Food Corporation  
and Angela Cipriano, as Officer  
57 Lyons Place  
Staten Island, NY 10314

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:  
Howard Bernstein  
19 Azalea Court  
Staten Island, NY 10309

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions

of

ANGELA'S RESTAURANT - SYZZI FOOD CORPORATION,  
AND ANGELA CIPRIANO, AS OFFICER

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 September 1, 1981  
through August 31, 1984.

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Petitioners, Angela's Restaurant - Syzzi Food Corporation and Angela Cipriano, as officer, 57 Lyons Place, Staten Island, New York, 10314, 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, 1981 through August 31, 1984 (File Nos. 59196 and 59197).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 7, 1986 at 9:30 A.M., with additional evidence to be submitted by September 5, 1986. Petitioners appeared by Howard Bernstein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division correctly estimated petitioners' taxable sales for the period under consideration.

FINDINGS OF FACT

1. On December 20, 1984, the Audit Division issued against petitioner Angela's Restaurant - Syzzi Food Corporation ("Syzzi's"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1981 through August 31, 1984, asserting a tax due of \$32,706.00 plus penalty

and interest. On the same date, an identical notice was issued to Angela Cipriano, as officer of the corporation.

2. Syzzi's was selected for audit when a business files match revealed a wide discrepancy between taxable sales reported on its 1982 State sales tax returns and gross sales reported on its 1982 Federal income tax return.

3. Syzzi's owned and operated a restaurant which was out of business when the audit commenced in September 1984. Several telephone calls were made to the home of Angela Cipriano to arrange for an audit of the restaurant's books and records. On at least two occasions, the auditor spoke with Mrs. Cipriano who agreed to have her husband return the auditor's calls. However, the auditor never received a positive response to his requests to schedule an audit appointment.

4. Because no other information was made available, the auditor estimated petitioners' tax liability on the basis of Syzzi's 1982 Federal income tax return, where it reported gross sales of \$140,000.00 for the fiscal year ended December 31, 1982. The auditor determined that, because of the nature of the business, 100 percent of Syzzi's gross sales were taxable. He estimated taxable sales per quarter of \$35,000.00 and total taxable sales for the audit period of \$420,000.00 with a tax due on that amount of \$34,650.00. For the same period, Syzzi's reported taxable sales of \$23,468.00 and remitted tax due on that amount of \$1,944.00. After giving Syzzi credit for tax paid, petitioner's total tax liability was determined to be \$32,706.00.

5. Statements of proposed audit adjustment were sent by certified mail to Syzzi's and to Angela Cipriano at her residential address. They were returned to the Audit Division marked "unclaimed."

6. An accountant, hired by petitioners in connection with the hearing, estimated Syzzi's tax liability, using an analysis of bank deposits as a source from which he determined taxable sales. He presented worksheets showing deposits made to two bank accounts in Syzzi's name. Total deposits were segregated into four categories: capital contributions, loans, taxable sales and rental income. On the basis of these deposits, the accountant calculated total taxable sales during the audit period of \$135,183.00, capital contributions of \$26,672.68 and rental income of \$10,600.00. Two bank statements offered to verify the bank deposits could not be reconciled to the accountant's worksheets.

7. Petitioners asserted that they intentionally overstated gross receipts on Syzzi's Federal income tax return in order to induce the Small Business Administration ("SBA") to provide loans to the business.

8. On December 4, 1979, the SBA made a loan to Syzzi's in the amount of \$105,000.00. The timetable for disbursement of the loan is not revealed by the record. Syzzi's defaulted on the loan prior to August 26, 1982.

9. The monies identified in the accountant's workpapers as capital contributions were actually loans made by family members to Angela Cipriano to be used to maintain Angela's Restaurant.

10. Syzzi's terminated its business operations on June 21, 1984.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) 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, ...scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That in light of the petitioners' failure to respond to the Audit Division's repeated requests for an audit appointment or to make available any

books and records, the Audit Division was warranted in estimating their tax liability on the basis of Syzzi's 1982 Federal income tax return.

C. That exactness is not required when the taxpayer's own failure to comply with the Tax Law renders it impossible (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Furthermore, where the method of audit is reasonably calculated to reflect the taxes due, 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 AD2d 858). The testimony of Syzzi's accountant, standing alone, is inadequate to establish that the summary of bank deposits accurately depicted Syzzi's taxable sales since records of bank deposits do not necessarily portray true sales. Consequently, both the summary and the fact that some of the deposits represented loans from family members were useless to show that the Audit Division's estimate of petitioner's tax liability was in error.


D. That Syzzi's terminated its business operations on June 21, 1984. Petitioners' tax liability will be modified accordingly.

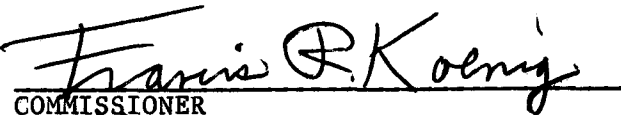
E. That the petitions of Angela's Restaurant - Syzzi Food Corporation, and Angela Cipriano, as officer, are granted to the extent indicated in Conclusion of Law "D"; that the notices of determination and demands for payment of sales and use taxes due issued on December 20, 1984 shall be modified accordingly; and that in all other respects, the petitions are denied.

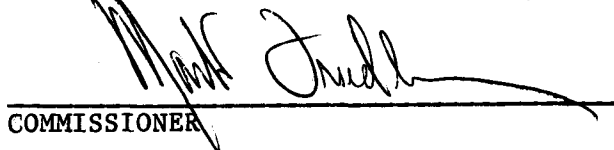
DATED: Albany, New York

STATE TAX COMMISSION

FEB 13 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER