

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Milt Levin, Ltd. :

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 9/1/77-5/31/84.  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

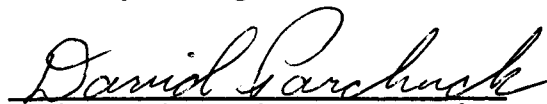
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 27th day of August, 1987, he/she served the within notice of Decision by certified mail upon Milt Levin, Ltd. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

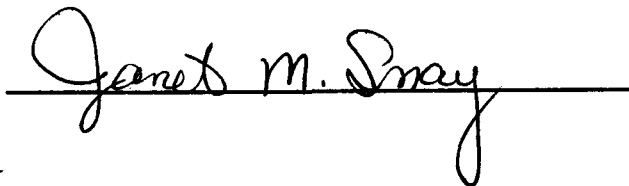
Milt Levin, Ltd.  
35 East 8th St.  
New York, NY 10003

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  
27th day of August, 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 :  
of  
Milt Levin, Ltd. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
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under Article(s) 28 & 29 of the Tax Law for the :  
Period 9/1/77-5/31/84.  
\_\_\_\_\_ :

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 27th day of August, 1987, he served the within notice of Decision by certified mail upon Melvin M. Steier, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin M. Steier  
Rt. 45, Northside Plaza  
Pomona, NY 10970

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  
27th day of August, 1987.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

August 27, 1987

Milt Levin, Ltd.  
35 East 8th St.  
New York, NY 10003

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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Melvin M. Steier  
Rt. 45, Northside Plaza  
Pomona, NY 10970

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
MILT LEVIN, LTD.	:	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, 1977	:	
through May 31, 1984.	:	

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Petitioner, Milt Levin, Ltd., 35 East 8th Street, New York, New York 10003, 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, 1977 through May 31, 1984 (File No. 61261).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1987 at 1:15 P.M. Petitioner appeared by Melvin M. Steier, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's sales tax liability for the audit period.

FINDINGS OF FACT

1. During the audit period, petitioner, Milt Levin, Ltd., operated a retail men's clothing store.
2. On February 20, 1985, as the result of a field audit, the Audit Division issued against petitioner two notices of determination and demands for payment of sales and use taxes due pursuant to Articles 28 and 29 of the Tax Law. The first notice covered the periods: September 1, 1977 through November 30,

1977; June 1, 1978 through November 30, 1978; March 1, 1979 through February 29, 1980; June 1, 1980 through August 31, 1980. It asserted a total tax due for those periods of \$33,637.12 plus penalty and interest. The second notice was for the period December 1, 1980 through May 31, 1984 and asserted a total tax due of \$36,877.92 plus penalty and interest.

3. Petitioner, by its president, executed two consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. Together, they extended the period of limitation for the taxable period December 1, 1980 through February 28, 1982 to June 20, 1985.

4. At the commencement of the audit, the auditor was told by petitioner's representative that no books or records were available because they had been subpoenaed by the "General Corporation Tax Unit" (also referred to as the "enforcement unit"). When the auditor contacted the enforcement unit, she was informed that the subpoenaed records consisted of 60 days worth of cash register tapes and sales receipts generated by cash and credit card sales. No other records had been obtained pursuant to the subpoena.

5. Since the auditor was unable to obtain adequate books and records to verify petitioner's reported sales, she estimated taxable sales on the basis of information available, in this case, information supplied by the enforcement unit. The 60 day period for which sales receipts were available consisted of 60 non-consecutive days, primarily in 1979 and 1980, but a few receipts from 1978, 1981 and 1982 were also included. The gross receipts for these 60 days totalled \$43,764.49. Adjusting for sales tax included in the gross figure, the auditor calculated average daily taxable sales of \$673.82. This figure was used to calculate taxable sales for the period December 1, 1980 through May 31, 1984 of \$743,292.48. Reported taxable sales were subtracted from this amount

to calculate additional taxable sales of \$450,997.00, with a tax due on that amount of \$36,877.92. At the same time, it was determined that sales and use tax returns had not been filed for eight sales tax quarters in 1977, 1978, 1979 and 1980. The results of the audit were used to determine sales taxes due for these eight quarters as well.

6. At a Tax Appeals Bureau conference, petitioner established that sales tax returns had been filed for all periods assessed, except those quarters ending November 30, 1978 and February 29, 1980. As a consequence, the Audit Division agreed to cancel assessments for the following periods; September 1, 1977 through November 30, 1977; June 1, 1978 through August 31, 1978; March 1, 1979 through November 30, 1979 and June 1, 1980 through August 31, 1980. In addition, the Audit Division conceded that total tax due for the periods September 1, 1978 through November 30, 1978 and December 1, 1979 through February 29, 1980 should be reduced to \$6,207.12.

7. At hearing, petitioner offered no evidence. It protested the modified assessment on the ground that records of sales from a random sixty day period could not accurately reflect taxable sales for a three year audit period.

#### CONCLUSIONS OF LAW

A. That under section 1135 of the Tax Law, every person required to collect tax is also required to keep records of every sale and of all the amounts paid, charged or due on that sale and of the tax payable on that sale. Such records are to be available for inspection and examination upon demand by the Tax Commission and to be preserved for a period of three years (Tax Law §1135). Where such records are not made available, or where, upon examination, the records are deemed insufficient to verify taxable sales, the Audit Division is empowered by Tax Law § 1138(a)(1) to determine the amount of tax due from

such information as may be available; where necessary, the tax may be estimated on the basis of external indices. In the absence of the records required to be kept under section 1135, the Audit Division may select any audit methodology reasonably calculated to reflect sales taxes due, and the taxpayer must then show the method of audit or amount of tax assessed was erroneous (Matter of Carmine Restaurant, Inc. v. State Tax Commn, 99 AD2d 581). Exactness is not required from the audit where petitioner's own faulty recordkeeping has prevented it (Matter of Micheli Contracting Corp. v. New York State Tax Commn, 109 AD2d 957). Inasmuch as petitioner presented no evidence of its sales for the period December 1, 1980 through May 31, 1984, the assessment for that period must be upheld.


B. That the Audit Division has conceded that the assessment for the period September 1, 1977 through August 31, 1980 should be reduced to \$6,207.12 (see Finding of Fact "6").

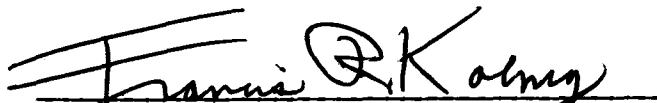
C. That the petition of Milt Levin, Ltd. is granted to the extent indicated by Conclusion of Law "B"; that the notices of determination and demands for payment of sales and use taxes due issued on February 20, 1985 shall be modified accordingly; and that in all respects, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER