

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

DAVID MARKOWITZ  
d/b/a CLOVER LEAF RESTAURANT

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY ~~(CERTIFIED)~~ MAIL

For a Redetermination of a Deficiency or  
a Refund of Sales and Use  
Taxes under Article(s) 28 and 29 of the  
Tax Law for the ~~Year(s)~~ Period 9/1/68 -  
8/31/71.

State of New York  
County of Albany

JANET MACK, being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 23rd day of May, 1975, she served the within  
Notice of Decision (or Determination) by ~~(certified)~~ mail upon DAVID MARKOWITZ

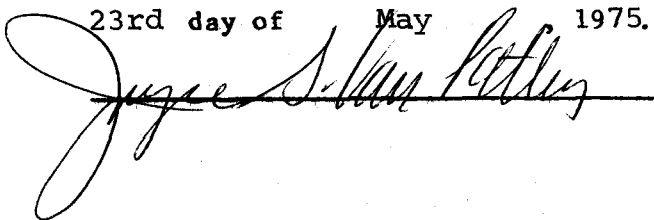
d/b/a CLOVER LEAF ~~(representative of)~~ the petitioner in the within  
RESTAURANT  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Mr. David Markowitz  
d/b/a Clover Leaf Restaurant  
Greenwich Avenue  
Goshen, New York

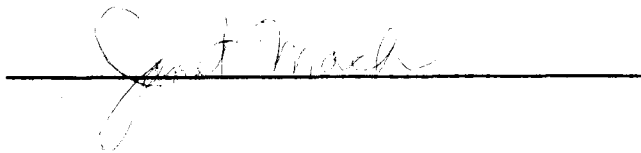
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the ~~(representative of)~~  
~~of~~ 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

23rd day of May 1975.







STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION  
HEARING UNIT

EDWARD ROOK  
SECRETARY TO  
COMMISSION

STATE TAX COMMISSION  
~~James H. Tully, Jr.~~  
MARIO A. PROCACCINO, PRESIDENT  
A. BRUCE MANLEY  
MILTON KOERNER

BUILDING 9, ROOM 214-A  
STATE CAMPUS  
ALBANY, N.Y. 12227

AREA CODE 518

ADDRESS YOUR REPLY TO

MR. WRIGHT 457-2655  
MR. LEISNER 457-2657  
MR. COBURN 457-2896

DATED: Albany, New York  
May 23, 1975

Mr. David Markowitz  
d/b/a Clover Leaf Restaurant  
Greenwich Avenue  
Goshen, New York

Dear Mr. Markowitz:

Please take notice of the **DETERMINATION**  
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to  
Section(s) **1138 and 1243** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from the date of this notice.

Any inquiries concerning the computation of tax  
due or refund allowed in accordance with this  
decision or concerning any other matter relative  
hereto may be addressed to the undersigned.  
These will be referred to the proper party for  
reply.

Very truly yours,

**Nigel G. Wright**  
HEARING OFFICER

Enc.

cc: ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~  
Law Bureau

## STATE TAX COMMISSION

The record of said hearing has been duly examined and considered.

ISSUES

The issues in this case are (A) the liability of applicant to pay over to the State the amount of tax collected from customers and (B) the proper estimate of applicant's nontaxable sales when applicant does not have proper records of such sales.

FINDINGS OF FACT

1. Applicant in partnership with his wife operates a restaurant in Goshen, New York.
2. Applicant had reported on his sales tax returns separate figures for gross and taxable sales. The nontaxable portion of gross sales amounted to \$86,948.00 for the three-year period under review or 22.1% of the gross sales reported.
3. The taxes amounting to \$1,462.98, asserted to be due, consist of \$161.88 as taxes accrued and unpaid on applicant's books and \$1,301.18 as the tax liability on both additional taxable purchases of \$2,655.00 and additional taxable sales of \$42,952.00.
4. The accrual of \$161.80 represents the difference between tax collections as recorded on applicant's books and the tax paid over to the State with returns. The tax paid over was computed as the total amount of gross sales multiplied by the statutory tax rate. The excess tax accrued represents the excess over the statutory rate collected from customers under the bracket schedules.

5. Applicant does not contest the tax due on purchases.

6. Applicants recorded all sales on guest checks and on a cash register tape. He has not retained his guest checks. Applicant had one cash register. He would ring up sales which he believed were taxable on "key 1" and the related tax on "key 2". The applicant would ring up sales which he thought were nontaxable on "key 3". The register provided a total for each transaction and it accumulated separate totals for taxable sales and tax paid.

7. Applicant found it impractical to issue separate guest checks to each person. He issued them to each table or group of persons. The waitress would note on the check the number of people being served. The person at the cash register would divide the total on the guest check by the number of people and if the result was under one dollar would consider the whole amount to be nontaxable. If the result was one dollar or more, the whole amount was considered taxable. No attempt was made to determine if any individual purchased items totaling one dollar or more.

8. Applicant had recorded sales of soft drinks as nontaxable. These, however, are not included in the determination of tax due.

9. Applicant asserts that he had recorded as taxable the full price of cigarettes sold, including the amount of excise tax thereon. This, however, was not raised at the hearing and

the substantiation of the claim is not apparent from the records in this case.

10. The auditor tested the cash register tape for one day, September 28, 1970. The auditor examined the day's cash register tape which listed 80 items. He did not further examine the 61 items under one dollar to determine if any could be for taxable items. He found 19 items of one dollar or more on this tape and considered them to be taxable sales. Of these, four items were one dollar even and three items were over two dollars. The nineteen items totaled \$13.00 and were 49.4% of the nontaxable sales of \$4.02 as recorded in applicant's cash receipts book. The auditor, for purposes of the determination of tax, disallowed nontaxable sales for the three year period to the extent of 49.4%.

#### CONCLUSIONS OF LAW

A. The applicant must pay over to the State all amounts collected as tax from customers even when that amount exceeds the statutory rate.

B. The applicant owes some tax. The audit herein, however, is only an aid in computing how much is due. It is certain that at least some of the sales included both in applicant's records and in the audit as taxable were, in fact, nontaxable sales of less than one dollar a person. The disallowance of nontaxable sales will be reduced from 49.4% to 30%.

STATE TAX COMMISSION

*A. Bruce Hancock*  
COMMISSIONER

Matthew Korman  
COMMISSIONER