

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

FLAME LOUNGE, INC. and RUSSELL P. CESTARE;  
SR., Individually and as an Officer  
For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund  
of Sales and Use :  
Taxes under Article(s) 28 & 29 of the :  
Tax Law for the Year(s) or Period(s) June :  
1, 1971 through August 31, 1975.

AFFIDAVIT OF MAILING

State of New York  
County of Albany

John Huhn , 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 11 day of October , 1977 , she served the within

Notice of Determination by ~~(certified)~~ mail upon Russell P. Cestare, Sr.,  
Flame Lounge, Inc. and

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Flame Lounge, Inc. and Russell P. Cestare, Sr.

Individually and as an Officer

162 Noell Street

Levittown, New York 11756

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 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

11 day of October , 1977.

John Huhn

Janet Mack

STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
FLAME LOUNGE, INC. and RUSSELL P. CESTARE, :  
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Notice of Determination by (certified) ~~xxxxxxxx~~ mail upon Russell P. Cestare, Jr.

(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Russell P. Cestare, Jr.  
162 Noell Street  
Levittown, New York

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Janet Mack

John Huhn

STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
FLAME LOUNGE, INC. and RUSSELL P. CESTARE, :  
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For a Redetermination of a Deficiency or :  
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AFFIDAVIT OF MAILING

State of New York  
County of Albany

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she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 11 day of October , 19 77, she served the within  
Notice of Determination by (~~certified~~) mail upon Monroe Fink, Esq.

(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Monroe Fink, Esq.  
147 Glen Street  
Glen Cove, New York 11542

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 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

11 day of October , 1977.

Janet Nach

John Huhn



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

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

October 11, 1977

**Flame Lounge, Inc. and Russell P. Gestare, Sr.**  
**Individually and as an Officer**  
**162 Noell Street**  
**Levittown, New York 11756**

**Gentlemen:**

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1138 & 1243** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**Joseph Chyrywaty**  
**Hearing Examiner**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
FLAME LOUNGE, INC. and	:	
RUSSELL P. CESTARE, SR., Individually	:	
and as an Officer	:	DETERMINATION
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 June 1, 1971 through August 31,	:	
1975.	:	

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Applicants, Flame Lounge, Inc. and Russell P. Cestare, Sr., individually and as an officer, 162 Noell Street, Levittown, New York 11756, filed an application 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 June 1, 1971 through August 31, 1975 (File No. 10131 ).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on March 1, 1977 at 2:00 P.M. Applicants appeared by Russell P. Cestare, Sr., president of applicant, by Russell P. Cestare, Jr. and Monroe Fink, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Alfred Rubinstein, Esq., of counsel).

ISSUE

Whether the margin of error computed by the Sales Tax Bureau and applied to the applicant Flame Lounge, Inc.'s reported taxable sales was correct.

FINDINGS OF FACT

1. On May 2, 1975, and January 16, 1976, the Sales Tax Bureau issued notices of determination and demand for payment of sales and use taxes due against Flame Lounge, Inc. and Russell P. Cestare, Sr., individually and as an officer. These notices were issued for the periods June 1, 1971 through May 31, 1974 and June 1, 1974 through August 31, 1975, respectively, and were issued in accordance with the findings of an audit conducted by the Sales Tax Bureau. Tax in the amount of \$2,450.00 on a bulk sale, which was included in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 16, 1976 has been conceded as being incorrect by the Sales Tax Bureau and is, therefore, no longer at issue.

2. Applicant Flame Lounge, Inc. maintained two business locations. From one location, it operated a bar-lounge facility and from the other, it operated a package liquor and wine store.

3. On audit, the Sales Tax Bureau allocated 61.66% of the liquor purchases of applicant Flame Lounge, Inc. to the package store

and allocated the remaining purchases to its bar-lounge operation. It was necessary to make this allocation because purchases made by applicant Flame Lounge, Inc. for the package store were occasionally transferred to the bar and vice-versa, and no records were maintained to reflect these transfers. The liquor and beer markup percentages for the bar operation were computed by the Sales Tax Bureau with consideration given to the following variables:

- a. The amount of beverage served per drink (1 oz. mixed drinks, 1 1/4 oz. cocktails).
- b. Price per drink (obtained from a price list given the auditor).
- c. Allowance for spillage and waste.
- d. Allocation for highballs and cocktails sold.

The resulting markup percentages were applied to the respective purchases to arrive at audited taxable sales for the bar. The purchases attributable to the liquor store were allocated to liquor and wine using a 2 to 1 ratio. The respective markups were applied to the allocated purchases resulting in audited taxable sales for the liquor store. The audited taxable sales for both operations were compared to reported taxable sales resulting in a margin of error of 54.49%. The additional tax due resulting from the margin of error was \$18,875.60 for the period June 1, 1971 through August 31, 1975.

4. Applicants contended that many of the liquor purchases for the bar were in fact transferred and sold by the liquor store. However, no records were maintained to record these transfers. They also contended that numerous sales were made to exempt organizations; that the selling prices used by the auditor were incorrect; and that no credit was given by the sales tax auditor to applicants for a burglary. However, the applicants did not produce exemption certificates to substantiate sales to exempt organizations; they did not maintain cash register tapes; they offered no evidence to indicate that the prices were different from those prices used by the sales tax auditor; and they did not substantiate the loss of liquor due to a burglary.

5. Applicant Flame Lounge, Inc.'s mixed drinks and cocktails consisted of 1 1/4 ozs. and 2 ozs. respectively of liquor per drink. The resultant markup using these size servings was 301% for mixed drinks and 155.5% for cocktails.

6. Applicant Flame Lounge, Inc.'s overall markup on beer was 199%.

7. Eighty percent of applicant Flame Lounge, Inc.'s package liquor store purchases were liquor purchases, and the remaining 20% were wine purchases.



CONCLUSIONS OF LAW

A. The margin of error percentage computed by the Sales Tax Bureau is reduced from 54.49% to 33.1%, in accordance with the findings. The reduced margin of error is to be applied to applicant Flame Lounge, Inc.'s reported taxable sales for the period June 1, 1971 through August 31, 1975.

B. That the applicants acted in good faith, and, therefore, the penalties and interest imposed in excess of the minimum statutory rate of interest are cancelled.

C. That the application of Flame Lounge, Inc. and Russell P. Cestare, Sr., individually and as an officer, is granted to the extent of reducing the additional sales tax due from \$21,325.60 to \$11,422.80, together with such minimum statutory interest as may be lawfully owing; that the Sales Tax Bureau is hereby directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued May 2, 1975 and January 16, 1976; and that except as so granted, the application is in all other respects denied.

DATED: Albany, New York

October 11, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER