

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
ALBERT J. CONSTANTINO and  
ALIO CONSTANTINO, Co-Partners  
d/b/a TINO'S ITALIAN RESTAURANT  
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 ~~XXXXXX~~ Period ~~(X)~~  
March 1, 1971 through February 28, 1974.

AFFIDAVIT OF MAILING

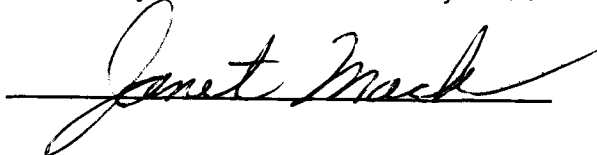
State of New York  
County of Albany


John Huhn, being duly sworn, deposes and says that  
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 13th day of December, 1977, ~~he~~ served the within  
Notice of Determination by ~~(represented)~~ mail upon Albert J. Constantino &  
Alio Constantino ~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows:  
Albert J. Constantino &  
Alio Constantino, Co-Partners  
d/b/a Tino's Italian Restaurant  
6697 Broadway  
Bronx, New York 10471  
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)~~  
~~XXXXXX~~ 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 December, 1977.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
ALBERT J. CONSTANTINO and  
ALIO CONSTANTINO, Co-Partners  
d/b/a TINO'S ITALIAN RESTAURANT  
For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
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Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~XXXXXX~~ Period(~~s~~)  
March 1, 1971 through February 28, 1974.

AFFIDAVIT OF MAILING

State of New York  
County of Albany

John Huhn, being duly sworn, deposes and says that  
he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 13th day of December, 1977, he served the within  
Notice of Determination by ~~(certified)~~ mail upon Leon H. Paisner

(representative of) the petitioner in the within proceeding,

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

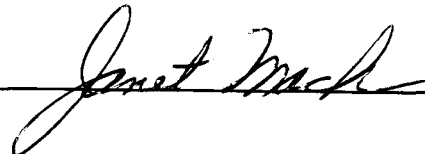
as follows:  
Leon H. Paisner, Accountant  
1577A St. Nicholas Avenue  
New York, New York 10040

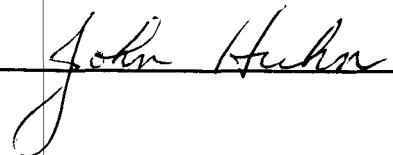
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

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

13th day of December, 1977







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

**December 13, 1977**

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

**Albert J. Constantino &  
Alie Constantino, Co-Partners  
d/b/a Tino's Italian Restaurant  
6697 Broadway  
Bronx, New York 10471**


**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 Chryssanty  
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	:	
ALBERT J. CONSTANTINO and	:	
ALIO CONSTANTINO, Co-Partners	:	DETERMINATION
d/b/a TINO'S ITALIAN RESTAURANT	:	
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, 1971 through February 28,	:	
1974.	:	

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Applicants, Albert J. Constantino and Alio Constantino, co-partners d/b/a Tino's Italian Restaurant, 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 March 1, 1971 through February 28, 1974 (File No. 10,323).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 27, 1977 at 1:15 P.M. Applicants appeared pro se and by their accountant, Leon H. Paisner. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether an audit of the applicants' books and records by the Sales Tax Bureau properly reflected the applicants' additional sales tax liability for the period March 1, 1971 through February 28, 1974.

FINDINGS OF FACT

1. As the result of an audit performed by the Sales Tax Bureau, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against the applicants, Albert J. Constantino and Alio Constantino, co-partners d/b/a Tino's Italian Restaurant. Said Notice was issued on February 24, 1975 for the period March 1, 1971 through February 28, 1974, in the sum of \$28,862.42 including tax, penalty and interest due.

2. During the period in issue, the applicants, Albert J. Constantino and Alio Constantino, were the owners and operators of Tino's Italian Restaurant. The restaurant was primarily a dining establishment, although liquor, wine and beer were served to compliment the meals.

3. On audit, the Sales Tax Bureau computed a markup of 287 percent for liquor purchases and 187 percent for beer purchases. Food purchases were marked up 125 percent. The basis for the markup on food was the Bureau's estimate of what it considered the normal markup for an Italian restaurant. Beer and liquor markups were arrived at by considering the factors prescribed in the Bureau's procedures for restaurant audits. The factors taken into consideration were the following:

- a. Amount of liquor served per drink
- b. Selling price per drink
- c. 15 percent was allowed for buy backs and spillage

4. The combined overall markup of food and liquor sales was computed by the examiners to be 139 percent.

5. Applicants contended that the figures used in the markup were highly inflated and that the examiner's report failed to accurately reflect such factors as plate portions, condiments, employee drinks and meals, competition in the area, actual cocktail mixes, actual size of highballs, and the restaurant's policy of granting free drinks for purposes of maintaining goodwill. Accordingly, the applicants alleged that their overall markup was the 67 percent reported in their sales tax returns.

6. At the hearing, applicants submitted into evidence a cost analysis sheet of five of the meals listed on the menu. The markups from this analysis ranged from 44 percent to 79.25 percent. Applicants also contended that the proportions used by the Bureau in determining the sales of highballs and cocktails were incorrect. Applicants' serving sizes for highballs and cocktails were one ounce and two ounces respectively, resulting in a markup on liquor purchases of 238 percent.

#### CONCLUSIONS OF LAW

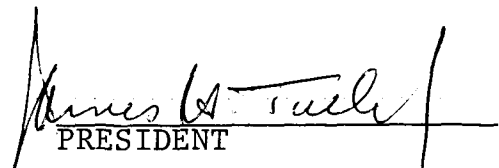
A. That the Sales Tax Bureau, in using established audit procedures and techniques to arrive at markups for purchases of liquor, beer and food, exceeded the actual overall markup employed by the applicants. Therefore, the audit did not accurately reflect the many factors which affected the restaurant's

business and sales. The markups on food and liquor purchases, computed by the Sales Tax Bureau to be 125 percent and 287 percent, respectively, did not accurately reflect certain relevant factors. Accordingly, the markups shall hereby be reduced to a 75 percent markup on food purchases and a 238 percent markup on liquor purchases. The markup on beer shall remain at 187 percent.

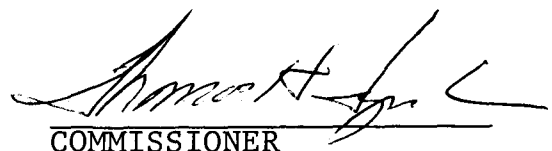
B. That the application of Albert J. Constantino and Alio Constantino, co-partners d/b/a Tino's Italian Restaurant, is granted to the extent of reducing the additional sales tax due for the period March 1, 1971 through February 28, 1974, so as to conform with the conclusions stated herein; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 24, 1975, and that except as so granted, the application is in all other respects denied.

DATED: Albany, New York  
December 13, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER