

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

CELINNE KLUGMAN KUSTYK
d/b/a JERRY'S 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 & 29 of the
Tax Law for the ~~Year(s)~~ Period 3/1/71
through 8/31/73

State of New York
County of Albany

Donna Scranton, 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 12th day of May, 1976, she served the within
Notice of ~~Deficiency~~ (or Determination) by (~~certified~~) mail upon Celinne
Klugman Kustyk (~~representative of~~) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Mrs. Celinne Klugman Kustyk
d/b/a Jerry's Restaurant
699 Factory Street
Watertown, 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~~) 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

12th day of May, 1976

Janet Mack

Donna Scranton

STATE OF NEW YORK
STATE TAX COMMISSION

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she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 12th day of May, 1976, she served the within
Notice of ~~Decision~~ (or Determination) by (~~certified~~) mail upon Ronald G.
King, CPA (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Ronald G. King, CPA
King and King
200 Washington Street
Watertown, New York 13601
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) 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

12th day of May, 1976.

Donna Scranton

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

BUILDING 9, ROOM 107
STATE CAMPUS
ALBANY, N.Y. 12227

AREA CODE 518

STATE TAX COMMISSION
HEARING UNIT

PAUL GREENBERG
SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

MR. WRIGHT
MR. COBURN
MR. LEISNER

(518) 457-3850

DATED: Albany, New York
May 12, 1976

Mrs. Celine Klugman Kustyk
d/b/a Jerry's Restaurant
699 Factory Street
Watertown, New York

Dear Mrs. Kustyk:

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

Please take further notice that pursuant to
Section(s) **1138 & 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,


PAUL B. COBURN
SUPERVISING TAX
HEARING OFFICER

Enc.

cc: Petitioner's Representative
Law Bureau

TA-1.12 (12/75)

STATE TAX COMMISSION

1. The taxpayer, Celine Klugman Kustyk, d/b/a Jerry's Restaurant, timely filed New York State sales and use tax returns for the period March 1, 1971 through August 31, 1973.

2. A Notice of Determination of sales and use taxes (and penalties) for the period March 1, 1971 through August 31, 1973, was issued on April 17, 1974, against Celine Klugman Kustyk under Notice No. 90,752,231.

3. The taxpayer applied for a revision of the determination of the deficiencies in sales tax.

4. The sales tax examiner found all of the taxpayer's records adequate and that her books were in complete order. The tax examiner looked at the schedule C of the Federal Tax return and decided that the gross profit percentage was too low. Taking two test periods, March and June, the examiner took all purchases of beer, liquor and food, and after computing a percentage of markup for beer, liquor, and food, he computed gross sales and made a determination that reported sales were underreported by the difference between reported sales and computation of gross sales based on a calculated percent of markup on purchases. He then calculated a percentage of error from the two test periods and applied this to the entire audit period. On this basis he recomputed the sales tax asserting a total deficiency in sales tax of \$1,461.37. The taxpayer and her accountant disagreed with this and asserted that no sales tax was due.

5. The tax examiner had not been inside the taxpayer's establishment for eight or ten years prior to the audit when he was about eighteen years of age, and at the time of the audit he was at the establishment for a matter of minutes. He made his computations from the records and returns, and got the selling price of drinks from an employee of the accountant. He used a 1-ounce drink and calculated 28 drinks to a 32-ounce bottle.

6. The taxpayer did not dispute that the gross profit percentage was low for the test periods in question, but she rejected the assumption that this was due to underreporting of income and sales. The taxpayer's certified public accountant showed that the gross profit percentages were: for 1970, 51.3 percent; for 1971, 51.9 percent; for 1972, 49.0 percent; for 1973, 46.7; for the year 1974, 52.7 percent. The taxpayer submitted evidence that she was not at the tavern, that sometime after a bartender was hired, the gross profit declined and immediately after he was fired, the gross profit went up. In firing the bartender, the taxpayer acted on recommendations of her accountants and after talking to customers who were present at the tavern when she was away.

7. The taxpayer's net worth was as follows: December 31, 1970, \$56,733; December 31, 1971, \$51,773; December 31, 1972, \$51,832.

8. Source and application of funds were also submitted for 1971 and 1972 showing an allowance for personal expenditures of \$7,009.51 and \$6,380.70.

9. Since the taxpayer does not dispute the fact that the markup should have been higher for the test period, the calculation of the sales tax examiner is correct and the sales and sales tax for the test periods should be adjusted accordingly. The sales were made and sales tax was due where the receipts and tax were collected and withheld by the bartender. The taxpayer's assertion that she did not receive either the receipts or sales tax due to the diversion by the bartender does not protect her from liability. Even though the taxpayer did not obtain those receipts or those sales taxes from the bartender, she is liable for those sales taxes.

10. The statements of source and application of funds, of course, show that this situation did not exist in the periods before the bartender was employed or in the beginning of his employment.

11. The percent of gross profit for each year over the periods confirms these facts. After the last year of the bartender's service, profits rose again.

12. Sales were underreported due to an abnormal situation for the quarters ended 11/30/72, 2/28/73, 5/31/73 and 8/31/73. During these periods, the reported margins and markups were too low and this was due to an abnormal situation.

13. As to prior sales tax periods for the taxpayer's business, in 1971 and 1972, her sales and sales tax were correctly reported and this is confirmed by the gross profit percentages, the statements of net worth, the statements of source and application of funds, and by the situation as it existed at the tavern.

14. The taxpayer acted in good faith, she kept good records, and she employed a firm of certified public accountants.

CONCLUSIONS OF LAW

A. The taxpayer having acted in good faith throughout the times in question, all penalties against her are cancelled.

B. The determination of deficiencies in sales tax for the quarters ended 11/30/72, 2/28/73, 5/31/73 and 8/31/73 is sustained without penalties.

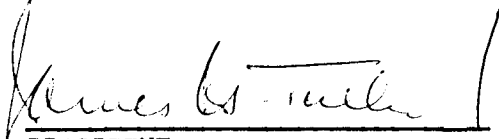
C. It is determined that there are no deficiencies in sales tax for the prior periods in 1972 and 1971.

D. The total deficiency in sales taxes shall be recomputed pursuant to paragraphs A, B, and C above.

E. Pursuant to the Tax Law interest shall be added to the total amount of sales tax due until paid.

DATED: Albany, New York
May 12, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER