

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

MID ISLAND TAVERN, INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or  
a Revision of a Determination or a Refund  
of Sales and Use  
Taxes under Article(s) 28 and 29 of the  
Tax Law for the ~~XXXXXX~~ Period ~~(X)~~  
September 1, 1971 through August 31, 1974.

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 13th day of December, 1978, ~~she~~ served the within  
Notice of Determination by ~~(certified)~~ mail upon Mid Island Tavern, Inc.

~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mid Island Tavern, Inc.  
2257 Middle Country Road  
Centereach, New York 11720

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)~~ petitioner.

Sworn to before me this

13th day of December, 1978





STATE OF NEW YORK  
STATE TAX COMMISSION

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of

MID ISLAND TAVERN, INC.

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For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
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Taxes under Article(s) 28 and 29 of the :  
Tax Law for the ~~Year(s)~~ Period(x) :  
September 1, 1971 through August 31, 1974.

State of New York  
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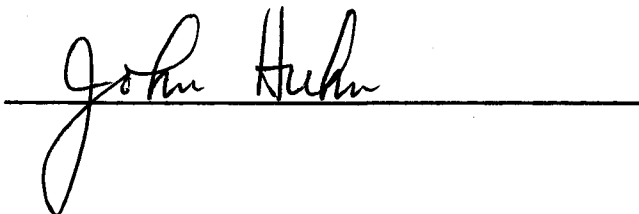
John Huhn , being duly sworn, deposes and says that  
he is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 13th day of December , 1978, he served the within  
Notice of Determination by ~~(certified)~~ mail upon Emanuel Kuflik  
(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Emanuel Kuflik, CPA  
75 Maiden Lane  
New York, New York 10038  
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 , 1978.







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

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

**December 13, 1978**

**Mid Island Tavern, Inc.  
2257 Middle Country Road  
Centereach, New York 11720**

**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 TAX COMMISSION

A small claims hearing was held before Raymond Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 13, 1977. Applicant appeared by Emanuel Kuflik, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

Whether the results of the examination of applicant's books and records for the period September 1, 1971 through August 31, 1974 properly reflect its sales and use tax liability.

FINDINGS OF FACT

1. Applicant, Mid Island Tavern, Inc., filed New York State sales and use tax returns for the period September 1, 1971 through August 31, 1974.

2. On October 8, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Mid Island Tavern, Inc., and Francis J. Boyle and Phillip Boyle, individually and as officers. Said Notice was issued as the result of a field audit which disclosed additional sales and use taxes due of \$23,477.13, plus penalty and interest of \$9,098.62, for a total due of \$32,575.75 for the period September 1, 1971 through August 31, 1974.

3. The aforesaid field audit of the books and records of Mid Island Tavern, Inc. (a bar and grill with limited food sales) revealed the following:

a) the food sales per records of \$15,296.84 for the entire audit period were less than the food purchases per records of \$31,260.76. However, in view of the fact that the applicant maintained a free, self-service buffet, the food sales per records were accepted and considered to be fully taxable;

b) an analysis of wine and liquor purchases compared with corresponding selling prices for the test month (April of 1974) indicated a wine and liquor mark-up of 457.3%. The auditor obtained a shot glass from the bar with a capacity of one ounce but with a half-ounce line; the auditor used 7/8 of an ounce in the mark-up test based on repeated, on premises observation. A four-ounce and six-ounce serving was used in the mark-up test for the minimal amount of wine purchases during the test month;

c) an analysis and comparison of beer purchases with corresponding selling prices for the same test month (April of 1974) indicated a beer mark-up of 296.78%. The auditor picked up a six-ounce beer glass from the bar, but he allowed only five ounces as a serving in the mark-up test;

d) the auditor allowed a 15% spillage factor in both mark-up tests; and

e) the above mark-up percentages were applied to the respective purchases for the audit period (September 1, 1971 to August 31, 1974) to arrive at total audited taxable sales of \$679,115.18, which included food sales per records. As the applicant, Mid Island Tavern, Inc., had reported taxable sales of \$353,658.00, the result was additional taxable sales of \$325,457.18, which represented a 92.026% margin of error over taxable sales reported. This resulted in additional sales tax due of \$21,748.45 for the period from September 1, 1971 to August 31, 1974.

4. The auditor found additional compensating use tax due on purchases of \$1,728.70. Applicant did not protest the compensating use tax found due.

5. Applicant protested the use of only a five-ounce beer serving in a six-ounce glass which was used in the beer mark-up test, and the projection of the resultant 296.78% beer mark-up over the entire audit period.

6. Applicant also protested the use of the 7/8 of an ounce serving used in the liquor mark-up test, and the projection of the resultant

457.3% mark-up over the entire audit period. Applicant contended that a larger shot glass had been used during the audit period.

7. Although applicant conducted its own mark-up tests, the size of the glasses used and the number of drinks used in its mark-up tests were not substantiated.

8. Applicant acted in good faith.

CONCLUSIONS OF LAW

A. That the audit mark-up of 296.78% on beer was erroneous in that it did not give full consideration to the size of the beer glass used; therefore, the beer mark-up is to be corrected by allowing for the use of the six-ounce beer glass, which results in a reduced beer mark-up of 237.985%. This adjustment reduces the margin of error on total taxable sales reported to 83.307% and reduces the additional taxable sales from \$325,457.18 to \$294,621.87.

B. That the audit performed by the Sales Tax Bureau, with the exception of the beer mark-up projection, was properly conducted and that applicant, Mid Island Tavern, Inc., has failed to sustain the burden of proof necessary to disprove the findings therefrom.

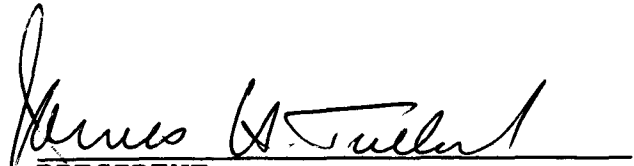
C. That the interest in excess of the minimum statutory rate and the penalty imposed pursuant to section 1145(a) of the Tax Law are hereby cancelled.


D. That the application of Mid Island Tavern, Inc. is granted to the extent indicated in Conclusions of Law "A" and "C", above; 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 issued October 8, 1975 and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

December 13, 1978

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER