

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph Bertolino :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 3/1/72 - 2/28/75. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, 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 28th day of November, 1980, he served the within notice of Decision by mail upon Joseph Bertolino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

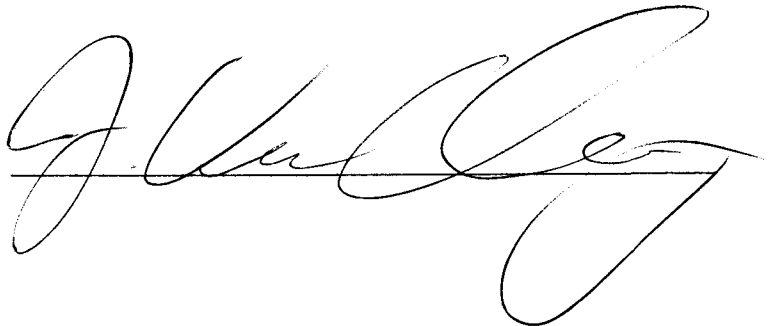
Joseph Bertolino
125-20 Jamaica Ave.
Richmond Hill, NY 11418

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
28th day of November, 1980.

Dorothy A. Bank



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

November 28, 1980

Joseph Bertolino
125-20 Jamaica Ave.
Richmond Hill, NY 11418

Dear Mr. Bertolino:

Please take notice of the Decision 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOSEPH BERTOLINO : DECISION
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, 1972 through February 28, :
1975. :

Petitioner, Joseph Bertolino, 125-20 Jamaica Avenue, Richmond Hill, New York 11418, filed a petition 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, 1972 through February 28, 1975 (File No. 16692).

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 December 19, 1979 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether a field audit performed by the Audit Division properly reflected the petitioner's sales tax liability.

FINDINGS OF FACT

1. Petitioner, Joseph Bertolino, operated a bar and restaurant at 125-20 Jamaica Avenue, Richmond Hill, New York. He filed New York State and local sales and use tax returns for the period March 1, 1972 through February 28, 1975.

2. On October 2, 1975, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for

tax due of \$8,096.72 for the period March 1, 1972 through February 28, 1975. Said Notice was issued pursuant to a field audit of petitioner's records.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the period in issue to May 20, 1976.

4. On audit the Audit Division examined the petitioner's sales tax returns, Federal returns for 1972 and 1974, general ledger and disbursement journal.

The petitioner did not produce purchase invoices to enable the Audit Division to conduct a markup test. In the absence of these invoices, the Division estimated petitioner's markups as follows: wine and liquor, 275 percent; beer, 180 percent; soda (not used as a mixer), 50 percent; and food, 125 percent. The Division applied these markups to the adjusted purchases resulting in audited taxable sales of \$190,237.00 (petitioner reported taxable sales of \$77,341.00) and additional taxable sales of \$112,896.00. The Audit Division also discovered that the petitioner's receipts ledger reflected gross sales of \$143,657.00 which the Division contended were all taxable and, therefore, concluded that the petitioner underreported taxable sales per the books by \$66,316.00. However, since the purchase markup produced a greater deficiency, the underreporting was ignored. The audit resulted in a sales tax deficiency of \$8,096.72.

5. The Audit Division held a post-assessment conference with the petitioner. The petitioner produced wine, liquor and beer purchase invoices for September, October and November 1974. The Division conducted markup tests using serving sizes of 7/8 oz. for liquor and 7 oz. for beer and selling prices of \$.70 for liquor and \$.20 for draught beer. This computation resulted in a wine and liquor markup of 282 percent and a beer markup of 134 percent. No allowance

for spillage of beer was made in determining the beer mark up percentage. The Division applied these markups to the respective purchases and added the food and soda sales resulting in total sales of \$178,316.00. The Division did not revise the Notice of Determination issued on October 2, 1975.

6. The petitioner's records did not reflect the exact amount of his taxable sales or sales tax.

7. Petitioner used a 1 oz. serving for drinks containing liquor.

8. Petitioner did not raise an issue regarding the application of penalty and interest.

CONCLUSIONS OF LAW

A. That the estimated markup and the subsequent markup test conducted by the Audit Division did not reflect the petitioner's correct markup percentages. That the petitioner's serving sizes for alcoholic beverage drinks were 1 ounce for liquor drinks and 7 ounce for draught beer; that the selling prices were \$.70 for liquor drinks and \$.20 for draught beer and that an allowance for spillage of 15 percent is made for both liquor and draught beer. That based on the foregoing, the total taxable sales are reduced from \$190,237.00 to \$165,516.00.

B. That the petition of Joseph Bertolino is granted to the extent of reducing the taxable sales per Conclusion of Law "B", supra; that the revised tax due shall be together with penalty and interest; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER