

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Ashburton Red's Bar & Grill, Inc. :  
Frank Demuro, Indiv. & as officer : AFFIDAVIT OF MAILING  
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 3/1/74 - 2/28/77. :

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 17th day of October, 1980, he served the within notice of Decision by mail upon Ashburton Red's Bar & Grill, Inc., Frank Demuro, Indiv. & as officer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

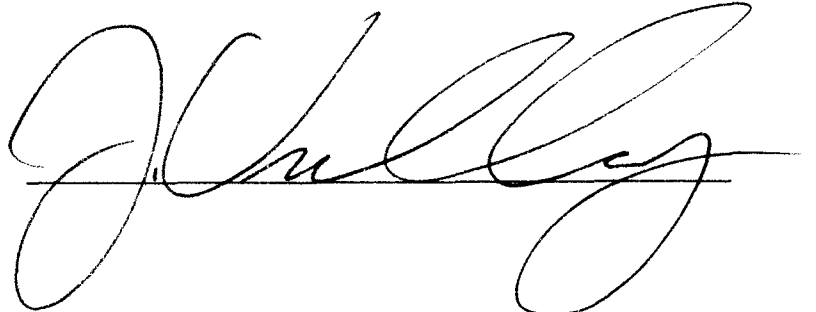
Ashburton Red's Bar & Grill, Inc.  
Frank Demuro, Indiv. & as officer  
47 Grassy Sprain Rd.  
Yonkers, NY 10710

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  
17th day of October, 1980.

Victor A. Bank



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Ashburton Red's Bar & Grill, Inc. :  
Frank Demuro, Indiv. & as officer : AFFIDAVIT OF MAILING  
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 3/1/74 - 2/28/77. :

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 17th day of October, 1980, he served the within notice of Decision by mail upon Louis P. Verzillo the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

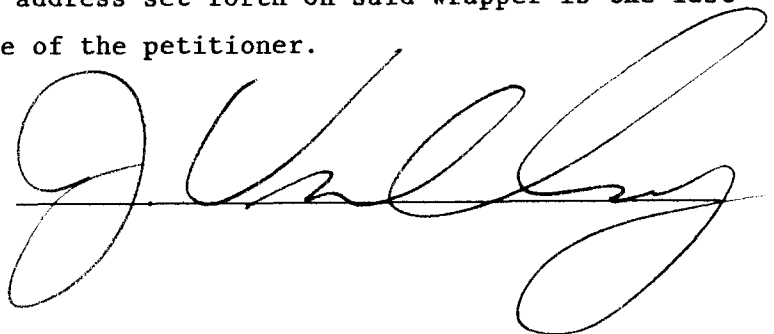
Mr. Louis P. Verzillo  
20 South Broadway  
Yonkers, NY 10701

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  
17th day of October, 1980.

Rebecca A. Bank



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

October 17, 1980

Ashburton Red's Bar & Grill, Inc.  
Frank Demuro, Individ. & as officer  
47 Grassy Sprain Rd.  
Yonkers, NY 10710

Gentlemen:

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  
Louis P. Verzillo  
20 South Broadway  
Yonkers, NY 10701  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
ASHBURTON RED'S BAR & GRILL, INC.	:	
and	:	
FRANK DeMURO, INDIVIDUALLY AND AS OFFICER	:	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, 1974	:	
through February 28, 1977.	:	

---

Petitioners, Ashburton Red's Bar & Grill, Inc. and Frank DeMuro, Individually and as Officer, 47 Grassy Sprain Road, Yonkers, New York 10710, 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, 1974 through February 28, 1977 (File No. 20973).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 26, 1979, at 1:15 P.M. Petitioners appeared by Louis P. Verzillo, PA. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq. of counsel).

ISSUE

Whether the Notice issued by the Audit Division properly reflects petitioners' sales tax liability.

FINDINGS OF FACT

1. On August 9, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Ashburton Red's Bar & Grill, Inc. for the period March 1, 1974 through February 28, 1977 in

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

Page 10 of 10

the amount of \$3,645.77 tax plus penalties and interest. On August 9, 1977, a Notice was also issued against Frank DeMuro, Individually and as Officer.

2. Petitioners filed a timely protest to the notices on September 6, 1977.

3. The Audit Division based its determination of tax due on a questionnaire completed by petitioners after the sale of the business. The Division increased reported taxable sales for the periods in issue by 70 percent.

4. A field audit was later performed by the Audit Division. Petitioners' records were not sufficient to show the exact amount of its tax liability; therefore, petitioners' beer, liquor and wine purchases for the month of September, 1976 were marked up using petitioners' selling prices. The Audit Division used a 3/4 ounce serving portion for liquor in marking up the purchases. It arrived at an overall markup of 213.7 percent on beer, liquor and wine. With the exception of the quarter ended February 28, 1975, the markup percentage was applied to purchases for all other quarters in the audit period. The February, 1975 quarter was estimated due to the unavailability of records which were destroyed by a fire. Adjustments were made to the purchases for loss of inventory by fire and for inventory sold with the business. The field audit resulted in additional tax due of \$3,094.68.

5. During the period in issue, petitioners served one ounce of liquor per drink.

6. Petitioners argued that an adjustment should be made to purchases for losses through burglaries. No evidence was submitted in substantiation of such losses.

7. Petitioners did not raise an issue regarding the application of penalties and interest.

CONCLUSIONS OF LAW

A. That the field audit performed by the Audit Division in Finding of Fact "4" did not give proper consideration for the amount of liquor served in the business operation; that the overall markup of petitioners' purchases is adjusted to reflect the one ounce serving of liquor as noted in Finding of Fact "5".

B. That except as noted in Conclusion "A" above, the field audit performed by the Audit Division in Finding of Fact "4" was proper and in accordance with section 1138(a) of the Tax Law.

C. That the petition of Ashburton Red's Bar & Grill, Inc. and Frank DeMuro, Individually and as Officer, is granted to the extent indicated in Conclusions "A" and "B" above; that the Audit Division is hereby directed to modify accordingly the notices of determination and demand for payment of sales and use taxes due issued August 9, 1977 with applicable penalties and interest thereon; and that, except as so granted, the petition is in all other respects denied..

DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

