

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

ANTHONY DI CARLO

D/B/A DI CARLO'S LOUNGE

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 ~~Year(s)~~ Period ~~(s)~~ :  
March 1, 1971 through February 28,  
1975.

AFFIDAVIT OF MAILING

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 14th day of February , 1979 , ~~she~~ served the within

Notice of Determination by ~~(certified)~~ mail upon Anthony DiCarlo

~~(representative of)~~ the petitioner in the within proceeding,

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

Anthony DiCarlo  
284-290 Route 9W  
Newburgh, New York 12550

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)~~  
~~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

14th day of February , 1979.

Marilyn J. Papineau

John Huhn



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

**February 14, 1979**

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

**Anthony DiCarlo  
284-290 Route 9W  
Newburgh, New York 12550**

**Dear Mr. DiCarlo:**

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 Chyrywat  
Hearing Examiner**

cc: ~~XXXXXXXXXXXXXXXXXXXX~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
ANTHONY DI CARLO	:	
D/B/A DI CARLO'S LOUNGE	:	DETERMINATION
	:	
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, 1975.	:	

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Applicant, Anthony DiCarlo, 284-290 Route 9W, Newburgh, New York 12550, 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, 1975. (File No. 11349)

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 15, 1977. Applicant appeared pro se. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUE

Whether the determination of the Sales Tax Bureau, imposing additional sales tax against applicant, was correct.

FINDINGS OF FACT

1. On August 11, 1975 as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, Anthony DiCarlo d/b/a DiCarlo's Lounge, for taxes due of \$6,864.33, plus penalty and interest of \$2,648.74, for a total due of \$9,513.07 for the period March 1, 1971 through February 28, 1975.

2. During the period at issue, applicant operated a bar and/or lounge. In addition to alcoholic beverages and soda, applicant also sold a limited variety of sandwiches.

3. On audit, the Sales Tax Bureau's auditor found that applicant's records were incomplete and poorly kept. The auditor performed a markup test using sales prices quoted by applicant and cost prices from available beer and liquor purchase invoices dated between January and June of 1973. The auditor determined an average markup on beer and liquor of 595%. Food purchases were marked up an estimated 200%. Applying the above markups to available purchase invoices for 1973 resulted in taxable sales of \$65,338.00, as compared to \$41,647.00 as reported by applicant. This represented a margin of error of 56.9%, which percentage was applied to the entire audit period to determine the additional taxes due.

4. Applicant disputed the results of the examination contending that the markups were too high. Applicant was granted the opportunity to show that the examination was improper or erroneous; however, he failed to submit any evidence to support his contention.

CONCLUSIONS OF LAW

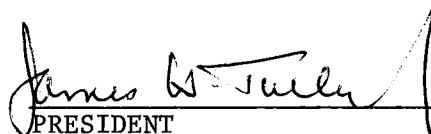
A. That applicant failed to sustain the burden of proof that the Sales Tax Bureau's assessment was not properly determined according to the meaning and intent of section 1138(a) of the Tax Law.


B. That the application of Anthony DiCarlo d/b/a DiCarlo's Lounge is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 11, 1975 is sustained.


DATED: Albany, New York

February 14, 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER