

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Gerke, A Rest. & Bar Inc. :

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 3/1/72-2/28/75. :

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 26th day of November, 1979, he served the within notice of Determination by mail upon Gerke, A Rest. & Bar Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerke, A Rest. & Bar Inc.  
750 Manhattan Ave.  
Brooklyn, NY 11222

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  
26th day of November, 1979.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Gerke, A Rest. & Bar Inc. :

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under Article 28 & 29 of the Tax Law :  
for the Period 3/1/72-2/28/75. :

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 26th day of November, 1979, he served the within notice of Determination by mail upon August Gerke 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. August Gerke  
750 Manhattan Ave.  
Brooklyn, NY 11222

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  
26th day of November, 1979.

Joanne Knapp

J. Vredenburg

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

November 26, 1979

Gerke, A Rest. & Bar Inc.  
750 Manhattan Ave.  
Brooklyn, NY 11222

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:

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  
August Gerke  
750 Manhattan Ave.  
Brooklyn, NY 11222  
Taxing Bureau's Representative

## STATE TAX COMMISSION

1. Applicant, A. Gerke Restaurant and Bar, Inc., filed New York State and local sales and use tax returns for the period March 1, 1972 through February 28, 1975.

2. On September 5, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the applicant for additional taxes due of \$10,967.27, plus penalty and interest of \$3,665.52. This determination was issued as the result of a field audit. Applicant filed a letter of protest on December 4, 1975.

3. The Sales Tax Bureau's auditor performed a markup test based on the applicant's available books and records. Due to a fire, the test was limited to the months December, 1974, January, 1975 and February, 1975. The auditor used the applicant's serving size per drink, as well as the costs and selling prices of wine and liquor in effect during the three month period. To determine the markup on beer, the auditor used the cost and selling prices in effect during January, 1975. The auditor determined a 323 percent markup on liquor and wine and a 203 percent markup on beer. An estimated markup of 125 percent was used for food purchases. These markup percentages were applied to the applicant's purchases for the audit period, and resulted in additional taxes due of \$10,846.07. The balance of the assessment consisted of use tax on expense items which is not at issue.

4. The beer markup computed by the Sales Tax Bureau was erroneous, for during the test period applicant returned an extraordinary high number of kegs for which credit was allowed by the supplier. This resulted in a lower cost than was normal for applicant's monthly beer purchases. A more accurate markup is 167 percent.

Food purchases marked up on the audit included fruit juices used in bar sales and food consumed by employees. Based on the review of purchases by the Sales Tax Bureau for February, 1975, 12.5 percent of food purchases recorded by the applicant, for the period March 1, 1972 through June 30, 1974, constituted juice purchases of \$661.00. The estimate of food purchases for the balance of the audit period did not include juices.

Food purchases consumed by employees was \$3,285.00 for the audit period.

5. The applicant contended that the markup test on beer, liquor and wine is not reflective of the entire audit period in that purchases vary due to buying in volume to take advantage of discounts offered, and that all brands sold were not included in the markup test. Applicant also argued that a 15 percent breakage allowance should be given for bottled beer.

6. Applicant further contended that the restaurant operation ceased in the beginning of the audit period. Applicant contended that a loss of inventory was suffered through two fires in February, 1973 and October, 1974. The applicant also claimed that it donated inventory to exempt organizations. The applicant offered no documentary evidence to support these contentions.

CONCLUSIONS OF LAW

A. That the Sales Tax Bureau did not give proper consideration to applicant's business operation in the following areas: employees consumed \$3,285.00 of applicant's food purchases, food purchases totaling \$661.00 were for juices sold through the bar operation as mixers and the beer markup should have been 167 percent.

B. That the application of A. Gerke Restaurant and Bar, Inc. is granted to the extent indicated in Conclusions "A." The Sales Tax Bureau is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 5, 1975. Except as so granted, the application is in all other respects denied.

DATED: Albany, New York

NOV 26 1979

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER