

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

THOMAS GALLAGHER

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 ~~years(s)~~ or Period ~~(s)~~ :  
September 1, 1972 through August 31, 1975.

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 Thomas Gallagher  
~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows:

Thomas Gallagher  
191 Howard Avenue  
Brooklyn, New York 11233

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)~~  
~~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

In the Matter of the Petition

of

THOMAS GALLAGHER

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 ~~Year(s) or~~ Period ~~(s)~~ :  
September 1, 1972 through August 31, 1975.

State of New York  
County of Albany

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 14th day of February, 1979, he served the within  
Notice of Determination by ~~registered~~ mail upon Matthew Rogers, CPA

(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows:

Matthew Rogers, CPA  
P.O. Box 1347  
Jackson, NJ 08527

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

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

Thomas Gallagher  
191 Howard Avenue  
Brooklyn, New York 11233

Dear Mr. Gallagher:

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 OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
THOMAS GALLAGHER : 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 September 1, 1972 through :  
August 31, 1975. :

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Applicant, Thomas Gallagher, 191 Howard Avenue, Brooklyn, New York 11233, 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 September 1, 1972 through August 31, 1975 (File No. 15031).

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 March 8, 1978 at 9:15 A.M. Applicant appeared by Matthew Rogers, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether the determination of additional sales taxes made by the Sales Tax Bureau was proper.

II. Whether the penalty imposed by the Sales Tax Bureau should be cancelled.

FINDINGS OF FACT

1. Applicant, Thomas Gallagher, filed New York state and local sales and use tax returns for the period ending September 1, 1972 through August 31, 1975.

2. On March 22, 1976 as a 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 for taxes due of \$6,820.92, plus penalty and interest, for the period September 1, 1972 through August 31, 1975.

3. During the period at issue, applicant operated a retail liquor store.

4. On audit, the Sales Tax Bureau's auditor tested purchases for the months of February and July of 1975, and determined that approximately 78% of said purchases were liquor purchases and 22% were wine purchases. The auditor determined the markups for wine and liquor to be 58.85% and 21.59%, respectively, using September of 1975 as a test month. The auditor then determined adjusted taxable sales for the audit period of \$519,080.00. Applicant reported taxable sales of \$426,462.00 which, when subtracted from the adjusted taxable sales, resulted in additional taxable sales of \$92,618.00, as well as the aforementioned taxes due.

5. The sales records maintained by applicant were incomplete in that sales and sales tax payable amounts were not available for the period September, 1972 through August, 1973. Therefore, sales could not be reconciled. In determining the markups, the auditor used shelf prices posted in the store and prices quoted by applicant's representative in the store.

6. Applicant asserted the period used for the markup test did not accurately reflect the markup for the entire audit period, due to the pressures of competition. Applicant also claimed that the shelf price used by the auditor included sales tax and that the auditor did not take this into account.

7. Applicant argued that it was unfair to assess interest on the additional sales tax due, when no time was allowed for payment to be made before interest began to accrue.

8. Applicant offered no documentation or any other substantial evidence to support any of his contentions.

9. Applicant acted in good faith at all times.

#### CONCLUSIONS OF LAW

A. That the audit procedures used by the Sales Tax Bureau to compute the taxable sales were proper, as authorized in section 1138(a) of the Tax Law. The resultant findings of additional sales tax due for the period September 1, 1972 through August 31, 1975 were supported by substantial documentary evidence.

B. That applicant acted in good faith; therefore, the penalty and interest in excess of the minimum statutory rate are cancelled.

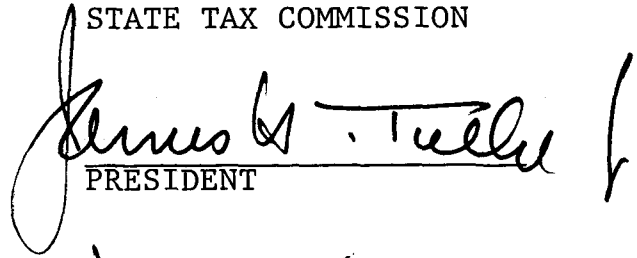
C. That the application of Thomas Gallagher is granted to the extent indicated in Conclusion of Law "B", above; that the Sales Tax Bureau is hereby directed to accordingly modify

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the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 22, 1976 and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York  
February 14, 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER