

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Carl Hogel :  
d/b/a Carl's Restaurant : 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 2/1/70 - 11/30/72. :

State of New York  
County of Albany

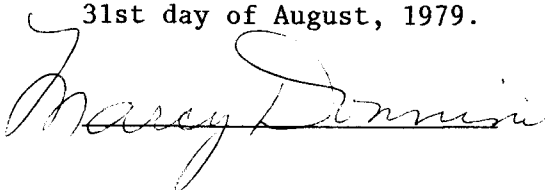
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Determination by mail upon Carl Hogel, d/b/a Carl's Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

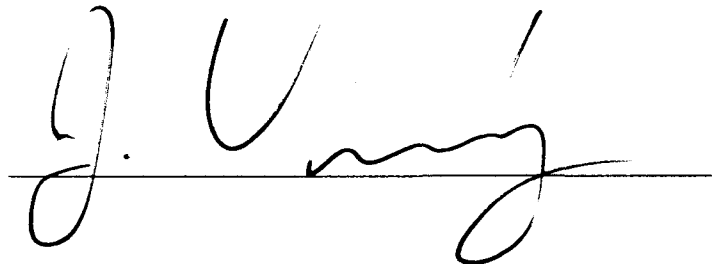
Carl Hogel  
d/b/a Carl's Restaurant  
RD #2  
Bennington, VT

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  
31st day of August, 1979.

  
Nancy Dominici

  
Jay Vredenburg

STATE OF NEW YORK  
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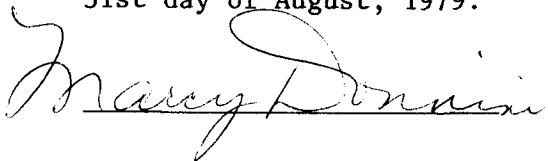
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Determination by mail upon Gerald A. Harley, Esq. the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

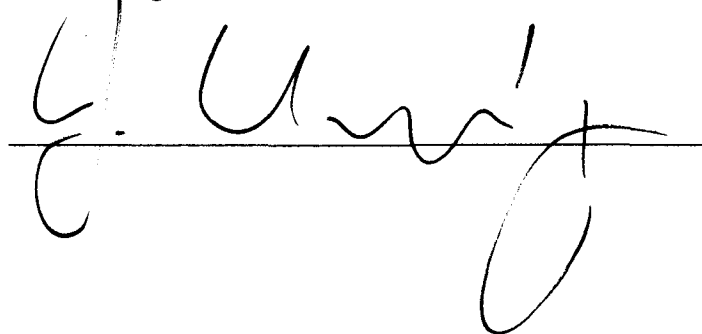
Mr. Gerald A. Harley, Esq.  
24 Church St.  
Hoosick Falls, NY

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  
31st day of August, 1979.

  
Mary Donnan

  
Jay Vredenburg



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

STATE TAX COMMISSION

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

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

August 31, 1979

Carl Hogel  
d/b/a Carl's Restaurant  
RD #2  
Bennington, VT

Dear Mr. Hogel:

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,

A handwritten signature in cursive script, appearing to read "John J. Sollecito".

cc: Petitioner's Representative  
Gerald A. Harley, Esq.  
24 Church St.  
Hoosick Falls, NY  
Taxing Bureau's Representative

## STATE TAX COMMISSION

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on August 18, 1978 at 10:45 A.M. Applicant appeared with Gerald A. Harley, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Barry Bresler, Esq., of counsel).

## ISSUE

Whether the audit procedures employed by the Sales Tax Bureau accurately reflected additional taxable sales for the period December 1, 1969 through November 30, 1972.

1. Applicant, Carl Hogel d/b/a Carl's Restaurant, filed New York state and local sales and use tax returns for the period December 1, 1969 through November 30, 1972.

2. On June 13, 1973 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 in the amount of \$6,566.59, plus penalty and interest of \$1,695.67, for a total of \$8,262.29, for the period December 1, 1969 through November 30, 1972.

3. During the period at issue, applicant operated a restaurant and bar located in Hoosick Falls, New York. The restaurant was open from 11:00 A.M. until approximately 3:00 A.M. the following morning. Menu prices ranged from \$.20 to \$4.25. The business was sold on December 1, 1972.

4. On audit, the Sales Tax Bureau determined that applicant's sales per books agreed with sales as reported on sales tax returns and on Federal and State income tax returns. Prior to July 1, 1971, applicant reported 33% of food sales as taxable. The Sales Tax Bureau analyzed cash register tapes for food sales of \$1.00 or more and determined that such sales represented 76.5% of total food sales. Audited taxable food sales prior to July 1, 1971 were computed by applying 76.5% to reported food sales. Food sales after July 1, 1971 were accepted as reported.

The Sales Tax Bureau also performed individual markup tests for beer and liquor. Three separate markups were computed because of price changes during the audit period. The markups computed were 132%, 137% and 194% for beer and 335%, 357% and 363% for liquor. These markups were

applied to the applicable purchases to arrive at audited beer and liquor sales. Audited taxable food, beer and liquor sales were combined and the tax computed thereon amounted to \$19,891.10. Tax paid in the amount of \$13,324.51 was deducted, leaving additional tax due of \$6,566.59.

5. The liquor markups computed by the Sales Tax Bureau were based on applicant pouring a one-ounce shot and allowing 10% for spillage. Applicant seldom used a shot glass, as it was policy to use the "freepour" method of mixing drinks.

The average drink contained 1 1/4 ounces of liquor.

6. Applicant gave one guest check in the restaurant when serving multiple customers at a table, unless separate checks were requested. The guest check was rung on the cash register in total, although the individual amount to a customer may have been less than \$1.00.

Applicant reviewed the guest checks daily to determine which food sales were \$1.00 or more to an individual. These guest checks were maintained to substantiate the taxable food sales reported.

#### CONCLUSIONS OF LAW

A. That the Sales Tax Bureau's markup computations and application thereof did not accurately reflect liquor sales to the extent indicated in Finding of Fact "5", supra; accordingly, the liquor markup percentages are adjusted to markups of 230%, 247% and 251% for the respective periods; thus, audited beer and liquor sales are reduced from \$271,791.86 to \$247,314.84.

B. That with respect to food sales, the Sales Tax Bureau failed to give consideration to sales of less than \$1.00 to an individual, where the guest check involving more than one customer totaled more than \$1.00; therefore, the additional tax assessed on food sales of \$1.00 or more is cancelled.

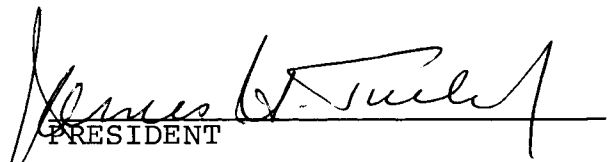
C. That the audit of applicant's books and records by the Sales Tax Bureau in all other respects followed generally accepted audit procedures, consistent with the nature of the business operation.

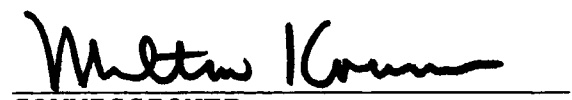
D. That the application of Carl Hogel d/b/a Carl's Restaurant is granted to the extent of reducing the additional sales tax due from \$6,566.59 to \$3,883.42; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 13, 1973; and that, except as so granted, the application is in all other respects denied.

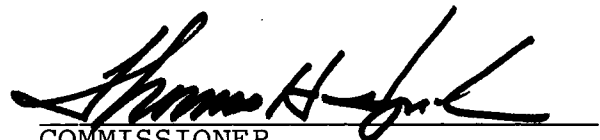
DATED: Albany, New York

STATE TAX COMMISSION

AUG 31 1979

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER