

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
McCluskey's Steak House, 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 of the Tax Law  
for the Years 1971-1974. :

State of New York  
County of Albany

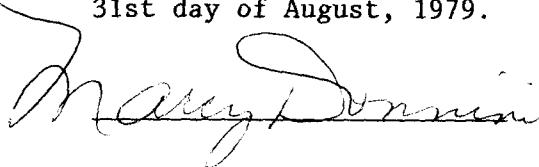
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Determination by mail upon McCluskey's Steak House, Inc., the petitioner in the within proceeding,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

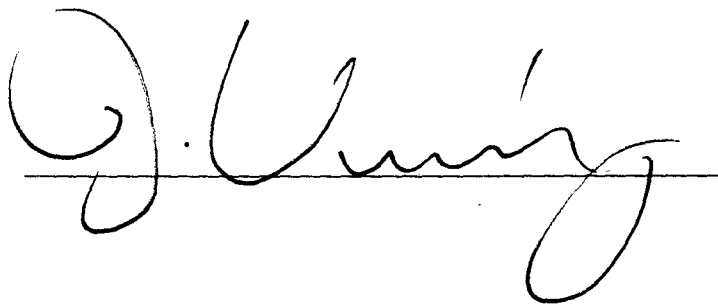
McCluskey's Steak House, Inc.  
157 W. Sunrise Hgy  
Bellmore, NY 11710

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.

  
Mary Dominici

  
J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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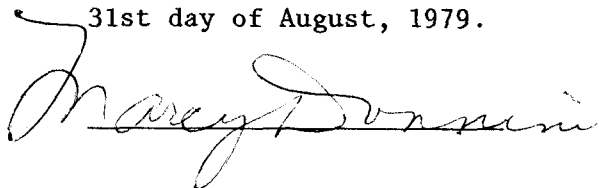
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Determination by mail upon Isidore Alperin the representative of the petitioner in the within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

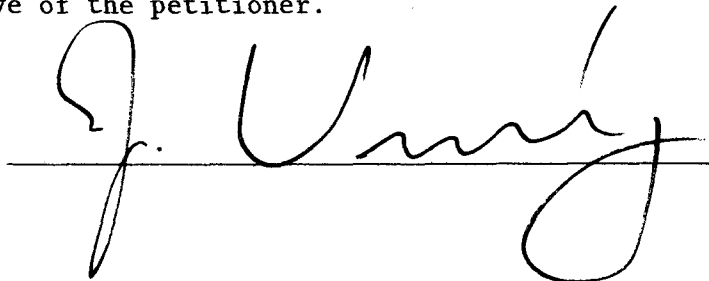
Mr. Isidore Alperin  
Alperin & Kozarsky  
66 North Broadway  
Hicksville, NY 11801

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.







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

McCluskey's Steak House, Inc.  
157 W. Sunrise Hwy  
Bellmore, NY 11710

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 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,

cc: Petitioner's Representative  
Isidore Alperin  
Alperin & Kozarsky  
66 North Broadway  
Hicksville, NY 11801  
Taxing Bureau's Representative

## STATE TAX COMMISSION

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, 1971  
through August 31, 1974.

Applicant, McCluskey's Steak House, Inc., 157 West Sunrise Highway, Bellmore, New York 11710, 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, 1971 through August 31, 1974 (File No. 11593).

A small claims hearing was held before Raymond Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 9, 1978. Applicant appeared by Isidore Alperin, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

## ISSUE

Whether the results of an audit by the Sales Tax Bureau properly reflect applicant's New York state and local sales and use tax liability.

FINDINGS OF FACT

1. Applicant, McCluskey's Steak House, Inc., filed New York state and local sales and use tax returns for the period September 1, 1971 through August 31, 1974.

2. On February 26, 1975 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 \$52,599.14, plus penalty and interest of \$15,513.06, for a total due of \$68,112.20 for the period September 1, 1971 through August 31, 1974.

3. During the period at issue, applicant operated a restaurant at 157 West Sunrise Highway, Bellmore, New York.

4. On audit, the Sales Tax Bureau determined applicant's tax liability on additional sales based on a markup of purchases, over-collection of sales taxes which were not remitted, and use taxes due on the purchases of fixed assets.

5. On January 21, 1976, an informal conference was held at the Mineola District Office between applicant and representatives of the Sales Tax Bureau. A re-audit of applicant's books and records revealed that the additional tax due was actually \$9,028.17. This reduction in the tax due was based on additional testing for the allocation of food purchases and for a weighted markup representing the fluctuations of costs to selling price and also, a reduction of the liquor markup from 281.4% to 186.13%. The amount of the redetermined taxes due is the amount at issue here.

6. Applicant contended that on re-audit, the Sales Tax Bureau had not allowed a sufficient deduction for the cost of meals supplied to employees. The documentary evidence submitted by applicant did not substantiate this contention.

7. Applicant also contended that the beer markup of 165.3% was overstated and submitted its own schedule indicating a lower markup on beer. However, applicant did not substantiate the draft beer prices used in the computation.

8. Applicant substantiated that the liquor markup computed in the re-audit was overstated and that the correct liquor markup was 177.33% instead of 186.13%.

9. Applicant introduced documents substantiating that the use tax due is \$89.93 and not \$170.73, as determined by the original audit.

10. In the course of its audit, the Sales Tax Bureau examined applicant's August 9, 1974 guest checks. This examination revealed that applicant overcollected sales tax and that said overcollections were not remitted to the Bureau. The results of this test were projected over the entire audit period resulting in additional tax due of \$2,536.16. The applicant argued that it paid all the sales tax that it had collected; however, it did not produce evidence to support its contention.

#### CONCLUSIONS OF LAW

A. That the additional sales taxes due of \$9,028.17, as computed by the Sales Tax Bureau in a re-audit of applicant's books and records (Finding of Fact "5"), for the audit period September 1, 1971 through

August 31, 1974, was erroneous, due to the overstated liquor markup of 186.13%; therefore, the additional sales tax due is reduced to \$7,832.80.

B. That the Sales Tax Bureau's computation of the compensating use tax due for the audit period is reduced from \$170.73 to \$89.93, in accordance with Finding of Fact "9".

C. That the application of McCluskey's Steak House, Inc. is granted to the extent of reducing additional sales and use taxes due for the period September 1, 1971 through August 31, 1974 from \$52,599.14 to \$7,922.73; 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 on February 26, 1975; and that, except as so granted, the application is in all other respects denied.


DATED: Albany, New York

AUG 31 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER