

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Carroll's Bar & Grill :  
and Edwin J. Costello & Thomas P. Carroll : 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 6/1/72 - 5/31/75. :

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 14th day of March, 1980, he served the within notice of Determination by mail upon Carroll's Bar & Grill, and Edwin J. Costello & Thomas P. Carroll, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

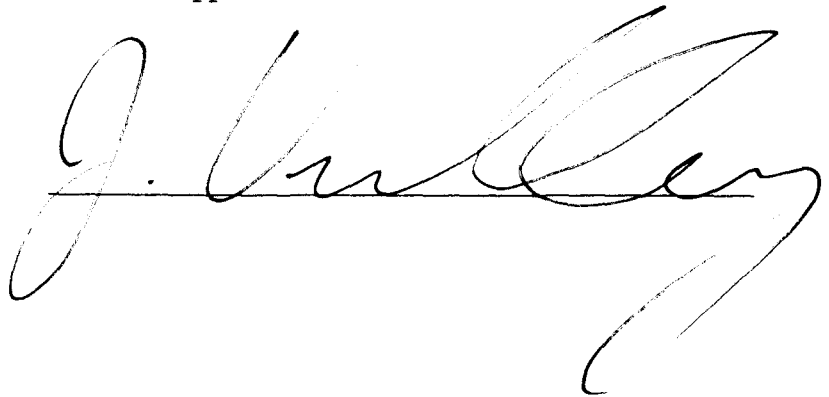
Carroll's Bar & Grill  
and Edwin J. Costello & Thomas P. Carroll  
5105-5 Ave.  
Brooklyn, NY 11220

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  
14th day of March, 1980.

Joanne Knapp



STATE OF NEW YORK  
STATE TAX COMMISSION

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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 14th day of March, 1980, he served the within notice of Determination by mail upon Edwin J. Costello 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. Edwin J. Costello  
5105 Fifth Ave.  
Brooklyn, NY 11220

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 March, 1980.

Joanne Knapp

J. Vredenburg

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

March 14, 1980

Carroll's Bar & Grill  
and Edwin J. Costello & Thomas P. Carroll  
5105-5 Ave.  
Brooklyn, NY 11220

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  
Edwin J. Costello  
5105 Fifth Ave.  
Brooklyn, NY 11220  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|   |   |               |
|---|---|---------------|
| In the Matter of the Application          | : |               |
| of  | : |               |
| CARROLL'S BAR & GRILL                     | : | DETERMINATION |
| and                                       | : |               |
| EDWIN J. COSTELLO and THOMAS P. CARROLL,  | : |               |
| Partners                                  | : |               |
| 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 June 1, 1972 through May 31, 1975. | : |               |

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Applicants, Carroll's Bar & Grill and Edwin J. Costello and Thomas P. Carroll, partners, 5105 Fifth Avenue, Brooklyn, New York 11220, 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 June 1, 1972 through May 31, 1975 (File No. 15859).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 25, 1978 at 10:45 A.M. Applicants appeared by Edwin Costello, partner. The Sales Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the results of the Sales Tax Bureau's audit of applicant Carroll's Bar & Grill's books and records for the period June 1, 1972 through May 31, 1975 properly reflected applicants' additional tax liability.

FINDINGS OF FACT

1. Carroll's Bar & Grill ("Carroll's") operated a bar and grill at 5105 Fifth Avenue, Brooklyn, New York.

2. The Sales Tax Bureau obtained a timely-filed Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law from Carroll's.

3. On April 19, 1976 as the result of a field audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants for \$3,857.08, plus penalty and interest, for the period June 1, 1972 through May 31, 1975.

4. The aforesaid audit results were arrived at as follows:

- (a) An analysis of paid wine and liquor purchases and beer purchases for the test month of May 1975 were compared with corresponding selling prices supplied by the bartender in September of 1975. This revealed markups of 264.31% and 233.43%, respectively. The auditor obtained a shot glass from the bar (in September of 1975) with a capacity of seven eighths of an ounce, and a beer glass with an eight-ounce capacity. The auditor allowed a 15% spillage factor for draught beer and liquor.
- (b) Purchase categories per books for the period June 1, 1972 through May 31, 1975 were marked up to arrive at taxable sales as follows:

| <u>Purchases</u>   | <u>Category</u>                                       | <u>Markup</u> | <u>Taxable Sales</u> |
|--------------------|---|---------------|----------------------|
| \$27,240.00        | Wine & Liquor   | 264.31%       | \$ 99,238.00         |
| 28,261.00          | Beer  | 233.43%       | 94,231.00            |
| 4,496.00           | Food  | 125.00%*      | 10,116.00            |
| 739.00             | Cigarettes  | 25.00%*       | 616.00               |
|                    | (Less 1/3 off sale<br>for cigarette tax<br>exclusion) |               |                      |
| 3,239.00           | Soda (considered sold<br>with liquor)                 |               | ---                  |
| <u>\$63,975.10</u> |   |               |                      |
|                    | Total audited taxable sales . . . .                   |               | \$204,201.00         |
|                    | Less taxable sales reported . . . .                   |               | 154,039.00           |
|                    | Additional taxable sales . . . . .                    |               | <u>\$ 50,162.00</u>  |

\*Estimated Markups

The additional taxable sales resulted in an error rate of 32.56% and additional sales tax of \$3,730.03.

- (c) In addition, \$1,815.00 worth of tangible personal property was found to have been acquired without tax having been paid (tax quarter ended February 28, 1974); therefore, a compensating use tax of \$127.05 was assessed.

5. Applicants contended that (a) a one-ounce shot glass had been used in the bar prior to November of 1973 and that the selling prices of bar drinks quoted as of September 1975 were the highest prices ever charged, which factors would reduce the markups in the test period, and (b) free food was given away on specific nights during "Super Snack Hour", which was not taken into consideration in the estimated food markup used by the Sales Tax Bureau.

6. At all times, applicants acted in good faith and did not intend to evade the tax.

#### CONCLUSIONS OF LAW

A. That applicants failed to support their contentions with documentary evidence; therefore, the additional sales tax due was determined in accordance with section 1138(a) of the Tax Law.

B. That the penalties and interest in excess of the minimum statutory rate are cancelled.

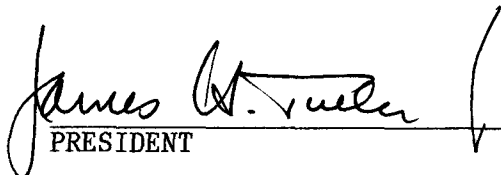
C. That the application of Carroll's Bar & Grill and Edwin J. Costello and Thomas P. Carroll, partners, is granted to the extent indicated in Conclusion of Law "B"; that the Sales Tax Bureau is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on

April 19, 1976; and that, except as so granted, the application is in all other respects denied.

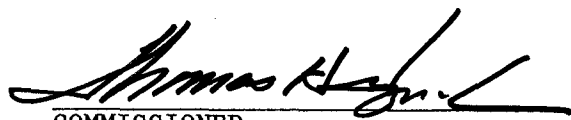
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1980

  
PRESIDENT

\_\_\_\_\_  
COMMISSIONER

  
COMMISSIONER

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 4th day of April, 1980, he served the within notice of Determination by mail upon Carroll's Bar & Grill, and Edwin J. Costello & Thomas P. Carroll, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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Sworn to before me this  
4th day of April, 1980.

Joanne Knapp

J. Vredenburg