

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Catherine Chiarella :  
d/b/a Napoli Seven Seas 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 3/1/73-2/29/76. :

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 20th day of June, 1980, he served the within notice of Determination by mail upon Catherine Chiarella, d/b/a Napoli Seven Seas Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Catherine Chiarella  
d/b/a Napoli Seven Seas Restaurant  
7918-12th Avenue  
Brooklyn, NY 11228

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  
20th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Catherine Chiarella :  
d/b/a Napoli Seven Seas Restaurant : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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Sales & Use Tax :  
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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 20th day of June, 1980, he served the within notice of Determination by mail upon Leonard L. Cohen 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. Leonard L. Cohen  
146 E. 46th St.  
New York, NY 10017

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  
20th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 20, 1980

Catherine Chiarella  
d/b/a Napoli Seven Seas Restaurant  
7918-12th Avenue  
Brooklyn, NY 11228

Dear Ms. Chiarella:

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  
Leonard L. Cohen  
146 E. 46th St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
CATHERINE CHIARELLA	:	DETERMINATION
D/B/A NAPOLI SEVEN SEAS RESTAURANT	:	
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 March 1, 1973 through	:	
February 29, 1976.	:	

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Applicant, Catherine Chiarella d/b/a Napoli Seven Seas Restaurant, 7918 12th Avenue, Brooklyn, New York 11128, 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 March 1, 1973 through February 29, 1976 (File No. 21105).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 27, 1979 at 2:45 P.M. Applicant appeared by Leonard L. Cohen, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of additional sales taxes due, based on an audit of applicant's available records, was correct.

FINDINGS OF FACT

1. Applicant, Catherine Chiarella d/b/a Napoli Seven Seas Restaurant, operated a restaurant and bar located at 1601 Surf Avenue, Brooklyn, New York. The business was sold on December 3, 1975.

2. On June 18, 1976, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against applicant for the period March 1, 1973 through February 29, 1976 for taxes due of \$11,407.43, plus penalty and interest of \$3,007.79, for a total of \$14,415.22.

3. The applicant did not have sufficient books and records for the Audit Division to determine the exact amount of tax liability or enough information to perform markup tests. Therefore, it estimated the following markup percentages: liquor - 225 percent, beer - 200 percent and food - 135 percent. The markups were applied to applicable purchases for the audit period, resulting in additional taxable sales of \$104,240.95.

The Audit Division also estimated that the value of personal property sold with the business was \$20,000.00 and asserted additional tax thereon of \$1,600.00.

4. On December 30, 1977, the Audit Division issued a revision to the notice which adjusted the sales taxes due for the period at issue to \$9,275.62. Said revision was based on certain mathematical errors discovered subsequent to the issuance of the notice and a reduction in the bulk sales tax to \$1,520.00 to reflect applicant's payment of \$80.00.

5. The value of the furniture, fixtures and equipment at the time of the bulk sale was \$7,000.00 based on the depreciation schedule filed with applicant's 1975 Federal income tax return.

6. Applicant contended that the markups estimated by the Audit Division were excessive because they were based on an observation of the premises under the new ownership. Applicant argued that her business was a family operation and offered low selling prices for food and drinks. Applicant also argued that free food was provided at holiday parties and on other various occasions and that a free drink is given to customers who purchased three drinks.

7. The foregoing contentions were not supported by any substantial evidence.

8. On February 28, 1979, applicant sold the real property where the restaurant was located. At that time, applicant paid \$16,073.76 to the Tax Commission consisting of \$9,275.62 in tax and \$6,798.14 in penalties and interest accrued thereon in order to satisfy a lien placed on the property resulting from the unpaid taxes at issue.

9. Applicant argued that the penalties and interest in excess of the minimum statutory rate, should be cancelled.

CONCLUSIONS OF LAW

A. That the Audit Division overstated the value of the personal property sold in connection with the bulk sale. Accordingly, the additional tax due is reduced from \$1,520.00 to \$480.00.

B. That in the absence of adequate books and records, the Audit Division properly determined applicant's taxable sales in accordance with the provisions of section 1138(a) of the Tax Law; that applicant failed to show that the Audit Division's determination was incorrect.

C. That the application of Catherine Chiarella d/b/a Napoli Seven Seas Restaurant is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to refund the sum of \$1,040.00 together with such penalty and interest thereon which was paid by applicant, and that except as so granted, the application is in all other respects denied.

DATED: Albany, New York

JUN 20 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER