

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chateau Algo Inc. :
and George Goonan, Officer : 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 - 8/31/76. :

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 16th day of May, 1980, he served the within notice of Determination by mail upon Chateau Algo Inc., and George Goonan, Officer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Chateau Algo Inc.
and George Goonan, Officer
Chateau Dr.
Melville, NY 11746
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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chateau Algo Inc. :
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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 16th day of May, 1980, he served the within notice of Determination by mail upon William R. O'Leary 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. William R. O'Leary
548 Roanoke Ave.
Riverhead, NY 11901

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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 16, 1980

Chateau Algo Inc.
and George Goonan, Officer
Chateau Dr.
Melville, NY 11746

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
William R. O'Leary
548 Roanoke Ave.
Riverhead, NY 11901
Taxing Bureau's Representative

STATE TAX COMMISSION

1. On June 10, 1977, 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 applicants, Chateau Algo, Inc. and George Goonan, individually and as officer, for the period March 1, 1973 through August 31, 1976 for tax due of \$23,800.57, plus penalty and interest of \$11,629.14, for a total of \$35,429.71.

2. On March 30, 1976, applicants executed a Consent Extending Period of Limitation For Assessment of Sales and Use Taxes for the period March 1, 1973 through May 31, 1976, to September 20, 1977.

3. Applicants operated a restaurant and bar located at Chateau Drive, Melville, New York.

4. On audit, the Audit Division performed markup tests for liquor, wine and beer using purchase invoices for the months of March and April, 1976. The test disclosed a combined weighted average markup on liquor and wine of 386.77 percent and a beer markup of 371.05 percent. The markup computations considered the following:

- a. quantity, cost and selling prices of individual brands,
- b. different selling prices of drinks sold at the bar and in the dining room,
- c. liquor sold by the bottle at catered affairs,
- d. one ounce serving of liquor in mixed drinks and two ounces in cocktails,
- e. 15 percent allowance for spillage and buy backs.

Applicants' food markup was estimated at 150 percent. The markups were applied to the applicable purchases for the audit period which resulted in additional taxable sales of \$321,154.38. The purchases were adjusted to reflect an increase in inventory and food consumed by employees. The audit also disclosed that applicants overcollected sales taxes of \$1,319.77. This overcollection resulted from applicants' practice of rounding the sales tax collected to the nearest nickel.

5. Applicants' books and records were inadequate for the Audit Division to determine the exact amount of sales taxes due.

6. Applicants allowed each employee to have one drink with their meal. The Audit Division stipulated that the tax liability should be reduced by \$500.00 to reflect this policy.

7. Applicants contended that they "free poured," two ounces of liquor in mixed drinks and $3\frac{1}{2}$ to 4 ounces in cocktails. Applicants further contended that they gave one free drink to each customer who purchased three drinks and that due to such practice, the 15 percent allowance for spillage and buy backs was not sufficient.

8. Applicants argued that the audit procedures used to determine the alleged tax deficiency based on sales reflected any overcollection of sales taxes. Therefore, applicants reasoned that the \$1,319.77 which was assessed for the overcollection of sales tax should be deleted from the assessment. Applicants also maintained that sales tax was included in the selling price of drinks sold at the bar; however, applicants did not display a sign to that effect.

9. During the period at issue, applicants used $1\frac{1}{4}$ ounces of liquor in mixed drinks and $2\frac{1}{2}$ ounces in cocktails.

CONCLUSIONS OF LAW

A. That the Audit Division, in using established audit procedures and techniques, overstated the markup on liquor in that it used incorrect servings of liquor in mixed drinks and cocktails. Accordingly, the liquor markup is hereby reduced based on Finding of Fact "9".

B. That the Audit Division failed to give consideration to drinks consumed by employees as indicated in Finding of Fact "6". After recomputing applicants' sales tax liability based on Conclusion of Law "A", such amount shall be further reduced by \$500.00.

C. That applicants collected sales taxes in excess of the combined New York State and local sales tax rate and therefore is liable for the payment of such overcollections pursuant to section 1137 of the Tax Law.


D. That the application of Chateau Algo, Inc., and George Goonan, individually and as officer, is granted to the extent of reducing the additional sales tax due for the period March 1, 1973 through August 31, 1976, so as to conform with Conclusions of Law "A" and "B". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 10, 1977; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

MAY 16 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER