

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Club 17M Restaurant, 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 & 29 of the Tax Law  
for the Period 9/1/73 - 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 3rd day of October, 1980, he served the within notice of Decision by mail upon Club 17M Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Club 17M Restaurant, Inc.  
Route 17M  
Monroe, NY 10950

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  
3rd day of October, 1980.

Guillermo Benitez

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Club 17M Restaurant, Inc. :

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for Redetermination of a Deficiency or a Revision :  
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Sales & Use Tax :  
under Article 28 & 29 of the Tax Law  
for the Period 9/1/73 - 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 3rd day of October, 1980, he served the within notice of Decision by mail upon Thomas A. Condon 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. Thomas A. Condon  
Hirshfeld, Birbrower, Montabano, Condon & Seidenberg  
20 Squadron Blvd.  
New City, NY 10956

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  
3rd day of October, 1980.

Guillermo Bank

J. Vredenburg

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

October 3, 1980

Club 17M Restaurant, Inc.  
Route 17M  
Monroe, NY 10950

Gentlemen:

Please take notice of the Decision 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  
Thomas A. Condon  
Hirshfeld, Birbrower, Montabano, Condon & Seidenberg  
20 Squadron Blvd.  
New City, NY 10956  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
CLUB 17M RESTAURANT, INC. : DECISION  
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, 1973 :  
through August 31, 1976. :  
:

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Petitioner, Club 17M Restaurant, Inc., Route 17M, Monroe, New York 10950, filed a petition 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, 1973 through August 31, 1976 (File No. 19209).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 28, 1979, at 1:15 P.M. Petitioner appeared by Thomas A. Condon, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

- I. Whether petitioner's available books and records were sufficient to determine its tax liability.
- II. Whether the markup computed on audit and applied to purchases properly reflected petitioner's sales.
- III. Whether the purchases on which the markups were applied were correct.

FINDINGS OF FACT

1. On March 30, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Club 17M Restaurant,

Inc. for the period September 1, 1973 through August 31, 1976 in the amount of \$6,952.94 tax plus penalties and interest as a result of a field audit.

2. Petitioner signed a consent extending the period of limitation for assessment to June 20, 1977.

3. On audit, the Audit Division performed a markup test on purchases for the month of September, 1975. The Division determined a combined markup of 341 percent on liquor and beer purchases. In determining the markup, the Audit Division used a 1 ounce serving of liquor for mixed drinks and a 1½ ounce serving for gin and vodka. A 15 percent allowance was made for the spillage of liquor. No spillage allowance was made for beer. Food purchases were marked up 150 percent. The Audit Division also found that purchases on petitioner's Federal tax returns exceeded purchases on its books by \$8,034.51 for the period October 1, 1973 through June 30, 1974 and \$1,098.68 for the period July 1, 1974 through June 30, 1975. Therefore, the Audit Division increased purchases from petitioner's books by 9.4 percent for the audit period and applied the appropriate markups thereon. The remainder of the items in the audit results were not at issue.

4. The Audit Division later adjusted the combined markup on liquor and beer to 301 percent as a result of an allowance of 15 percent spillage for beer. It also reduced the food mark up to 100 percent. These adjustments reduced the tax due to \$3,459.11.

5. Petitioner's records were not sufficient for the Audit Division to determine the exact amount of petitioner's taxable sales or sales tax.

6. Petitioner is engaged in a highly competitive business in a small town and depends on steady customers for its trade. As an incentive, it is normal practice to give a customer a free drink for every 4 or 5 drinks purchased. The 15 percent allowance on audit is not sufficient for this practice.

7. Petitioner free-poured  $1\frac{1}{4}$  ounces of liquor for mixed drinks.

8. Petitioner contended that the difference in purchases between its books and Federal tax returns was due to a non-physical inventory valuation in the first year of operation and the possible inclusion of expense items in Federal tax return purchases. Petitioner failed to introduce any evidence to support these contentions.

9. Petitioner further contended that inventory was donated to various organizations and that all the sales taxes collected were properly reported. No substantiation was submitted in support of these contentions.

10. Petitioner offered no evidence to show that reasonable cause existed for not paying over any of the tax asserted due.

#### CONCLUSIONS OF LAW

A. That the combined markup on liquor and beer purchases is reduced to 259 percent to reflect the  $1\frac{1}{4}$  ounce portions of liquor petitioner served in mixed drinks.

B. That the increased liquor and beer purchases marked up on audit are reduced by 5 percent to fully compensate for the practice of buy-backs in the business operation; that these buy-backs are purchases at retail and, therefore, there is due a use tax of \$166.46 pursuant to section 1110 of the Tax Law. That the purchases marked up on audit are otherwise correct.

C. That the books and records available for audit were not sufficient to verify an exact amount of tax; therefore, except as noted in Conclusions "A" and "B" above the Audit Division properly determined the petitioner's tax liability within the meaning and intent of section 1138(a) of the Tax Law.

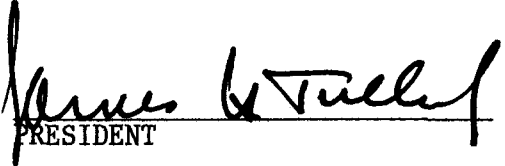
D. That the Audit Division is hereby directed to reduce the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 30,

1977 to reflect total taxes due of \$1,629.71, plus applicable penalties and interest; and that except as so granted, the petition of Club 17M Restaurant, Inc. is in all other respects denied.


DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER