

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Evelyn D. Dickerson :  
d/b/a Echo Bar & Grill : 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 12/1/73-9/16/76. :

State of New York  
County of Albany

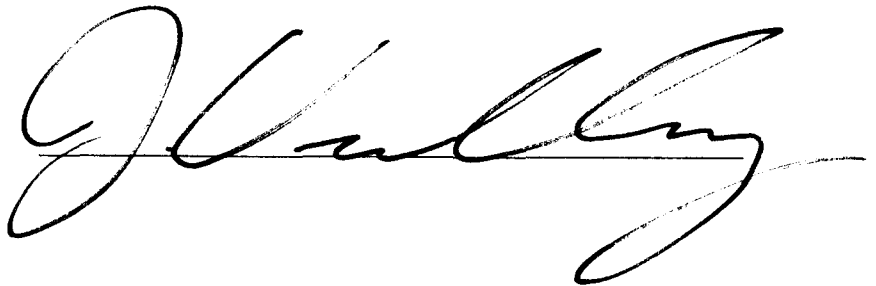
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of May, 1980, he served the within notice of Determination by mail upon Evelyn D. Dickerson, d/b/a Echo Bar & Grill, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Evelyn D. Dickerson  
d/b/a Echo Bar & Grill  
Box 184  
Port Jefferson Station, NY 11776  
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



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Evelyn D. Dickerson :  
d/b/a Echo Bar & Grill : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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Sales & Use Tax :  
under Article 28 & 29 of the Tax Law :  
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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 Matthew M. Leopin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

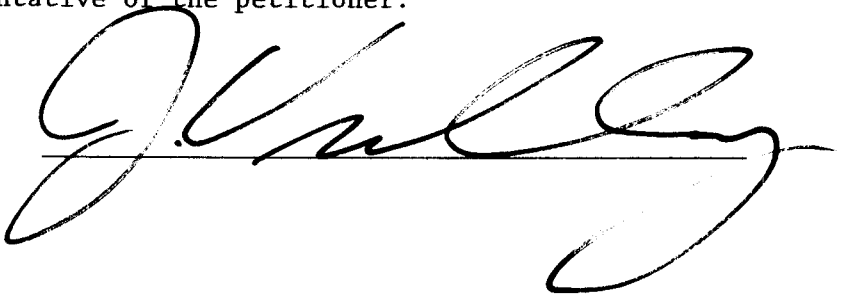
Mr. Matthew M. Leopin  
102 W. Main St.  
Kings Park, NY 11754

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



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

May 16, 1980

Evelyn D. Dickerson  
d/b/a Echo Bar & Grill  
Box 184  
Port Jefferson Station, NY 11776

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  
Matthew M. Leopin  
102 W. Main St.  
Kings Park, NY 11754  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
EVELYN A. DICKERSON	:	DETERMINATION
D/B/A ECHO BAR & GRILL	:	
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 December 1,	:	
1973 through September 16, 1976.	:	

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Applicant, Evelyn A. Dickerson d/b/a Echo Bar & Grill, Box 184, Port Jefferson Station, New York 11776, 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 December 1, 1973 through September 16, 1976 (File No. 20215).

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 April 25, 1979 at 2:45 P.M. Applicant appeared by Matthew M. Leopin, Accountant. The Audit Division appeared by Peter Crotty, Esq. (Samuel J. Freund, Esq., of counsel).

ISSUE

Whether the application of markups to applicant's purchases properly reflected applicant's sales and resultant sales tax liability.

FINDINGS OF FACT

1. On March 4, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Evelyn A. Dickerson d/b/a Echo Bar and Grill for the period December 1, 1973 through September 16, 1976, for \$3,284.87 tax, plus penalties and interest. This Notice was issued as a result of a bulk sale questionnaire completed by applicant.

2. Applicant sold her business to Sylmar Pub, Ltd. on September 16, 1976.

3. Subsequent to the above Notice, the Audit Division conducted a field audit on applicant's books and records. This field audit was initiated by the fact that the purchaser protested the results of the March 4, 1977 assessment.

4. As a result of the field audit, an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against applicant on September 20, 1977 for \$1,040.94 tax, plus penalties and interest.

5. In the performance of the field audit, the Audit Division compared sales and purchases as recorded by applicant and determined that the amount of sales reported were not adequate for the amount of purchases made. It proceeded to markup the purchases of tobacco, beer, liquor and wine from applicant's records and accepted food sales as recorded. To facilitate the markup tests, the Audit Division used applicant's stated selling prices and serving size per drink (a 7/8 ounce serving size was used for liquor sales). A test of liquor and wine purchases for the months of June, July and August, 1976 resulted in a markup of 300.59 percent. A test of beer purchases for the month of June, 1976 resulted in a markup of 121.67 percent. A 15 percent allowance was included in the computations for spillage and free drinks given patrons. Tobacco purchases were marked up an estimated 50 percent. These markups were applied only to the purchases in the audit period. The audit did not provide for any inventory adjustment. This procedure resulted in additional tax due of \$4,325.81 for the audit period.

6. The applicant's records were insufficient for the Audit Division to determine the exact amount of applicant's taxable sales and sales tax.

7. Applicant's average serving size of liquor per drink was 1 ounce during the audit period.

8. Applicant contended that one drink is given away for every 3 or 4 sold, therefore, she reasoned that an additional allowance should be made for these giveaways. Applicant contended that she had an inventory of \$2,000.00 at the time the business was sold and that an adjustment should be made since this inventory was not transferred to the new owner with the other business assets.

Applicant also contended that inventory was withdrawn at other times for personal use. However, applicant offered no evidence to substantiate her contentions.

9. Applicant filed and paid two final returns for the period September 1 through September 16, 1976. On one return she paid sales tax due of \$110.00 and on the other return she paid tax due of \$91.70. Credit was given applicant for only \$110.00.

10. Applicant acted in good faith.

#### CONCLUSIONS OF LAW

A. That the markup applied to applicant's liquor and wine purchases did not properly consider the serving size of liquor; that such drinks averaged 1 ounce, which results in a 253 percent markup for liquor and wine. The balance of the audit was performed in accordance with section 1138(a) of the Tax Law.

B. That the \$91.70 payment of applicant's final sales tax return is to be applied to the additional tax liability determined due.

C. That the penalty and interest in excess of the minimum statutory rate are cancelled.

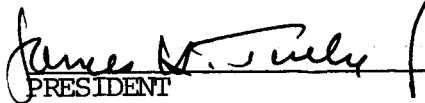
D. That the application of Evelyn A. Dickerson d/b/a Echo Bar & Grill is granted to the extent indicated in Conclusion "A", "B" and "C" above. The Audit Division is hereby directed to cancel the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1977 and to modify accordingly

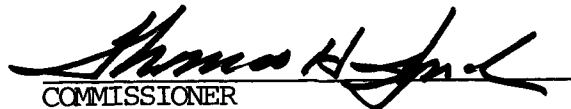
the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 4, 1977 to reflect tax due of \$3,153.51, plus minimum interest; and that, except as so granted, the application is in all other respects denied.

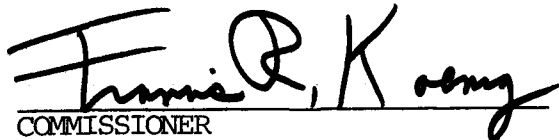
DATED: Albany, New York

STATE TAX COMMISSION

MAY 16 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER