

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
55 Christopher St. Bar & Grill, Inc. :
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 3/1/74 - 2/28/77. :

AFFIDAVIT OF MAILING

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 6th day of August, 1980, he served the within notice of Decision by mail upon 55 Christopher St. Bar & Grill, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

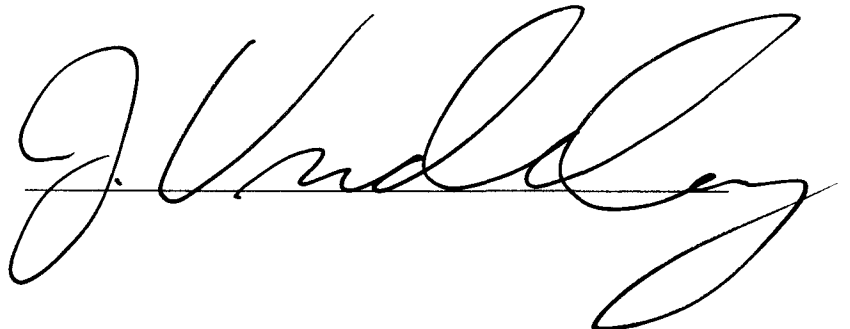
55 Christopher St. Bar & Grill, Inc.
55 Christopher St.
New York, NY 10014

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
6th day of August, 1980.

Deborah A Bank

A large, stylized handwritten signature, likely of Jay Vredenburg, written in black ink over a horizontal line.

STATE OF NEW YORK
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55 Christopher St. Bar & Grill, Inc. :
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AFFIDAVIT OF MAILING

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 6th day of August, 1980, he served the within notice of Decision by mail upon George Ziefert and Samuel Boorstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

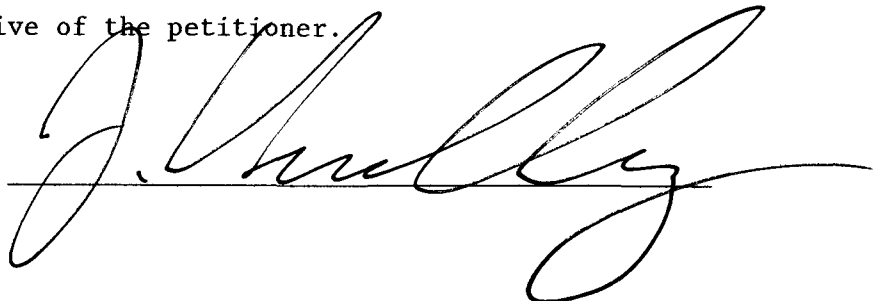
Mr. George Ziefert and Samuel Boorstein
Moskowitz, Ziefert & Co.
1987 Flatbush Ave.
Brooklyn, NY 11234

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
6th day of August, 1980.

Dorothy A. Bank



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

August 6, 1980

55 Christopher St. Bar & Grill, Inc.
55 Christopher St.
New York, NY 10014

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
George Ziefert and Samuel Boorstein
Moskowitz, Ziefert & Co.
1987 Flatbush Ave.
Brooklyn, NY 11234
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition
of
55 CHRISTOPHER ST. BAR AND GRILL, INC.

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, 1974 through February 28,
1977.

Petitioner, 55 Christopher St. Bar and Grill, Inc., 55 Christopher Street, New York, New York 10014, 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 March 1, 1974 through February 28, 1977 (File No. 21223).

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 January 24, 1980 at 9:15 A.M. Petitioner appeared by George Ziefert and Samuel Boorstein, CPA's. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo Scopellito, Esq., of counsel).

Whether the audit procedures employed by the Audit Division in an examination of petitioner's books and records were proper and the resultant findings of additional taxable sales for the period March 1, 1974 through February 28, 1977 were correct.

1. Petitioner, 55 Christopher St. Bar and Grill, Inc., operated a bar located at 55 Christopher St., New York, New York 10014.

2. On September 22, 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 petitioner for the period March 1, 1974 through February 28, 1977 for taxes due of \$12,213.85, plus penalty and interest of \$5,022.62, for a total of \$17,236.47.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes, to June 19, 1978.

4. On audit, the Audit Division performed a markup test for liquor, wine and beer using selected purchases for the months of January and February 1977. The test disclosed a combined liquor and wine markup of 288 percent and a beer markup of 192 percent. The Audit Division accepted petitioner's reported beer sales because the books and records reflected a beer markup of 214 percent. The combined liquor and wine markup was applied to applicable purchases for the audit period, after adjusting for purchases of \$9,719.00 consumed by petitioner and its employees, which resulted in additional liquor and wine sales of \$114,931.00. The Audit Division asserted use taxes of \$766.67 on the self-consumed liquor and wine, however, said amount is not at issue. The audit also included unpaid sales tax of \$2,238.40 reported by petitioner on its sales tax return for the period ending November 30, 1976.

The Audit Division's markup computation for liquor and wine used a 1 1/4 ounce serving of liquor for mixed drinks, a 1 7/8 ounce serving for gin, vodka and rum drinks, and a 6 ounce serving of wine. Additionally, an allowance of 15 percent was given for spillage and buy backs.

5. The applicant's books and records were not adequate for the Audit Division to determine the exact amount of the applicant's taxable sales or sales tax liability. Because of the inadequate records, the Audit Division performed a markup on applicant's purchases.

6. Petitioner's liquor inventory increased \$700.00 during the audit period and was not considered by the Audit Division.

7. The Audit Division conceded that its markup test used incorrect drink sizes for Dubonnet red wine, Ron Rico rum, Korbel brandy and Drambuie. Also, Campari bitters was erroneously considered sold as an individual drink when it was actually used as a mixer.

8. Petitioner's cash register had separate keys for beer and liquor sales. In many instances the petitioner erroneously used the beer sales key when making liquor sales and vice versa. These sales were then recorded in the petitioner's sales records. Consequently (since the erroneous cash register rings for beer and liquor were not equal) the beer sales were overstated and liquor sales understated on the petitioner's books. Thus, the petitioner's markup on beer was 192 percent rather than 214 percent recorded on its books because of the erroneous cash register rings.

9. During the period at issue, petitioner used 1½ ounces of liquor in mixed drinks and 2 ounces in gin, vodka and rum drinks.

10. Petitioner's gross sales recorded in its books and records are \$41,222.00 greater than those reported on sales tax returns filed for the period at issue.

CONCLUSIONS OF LAW

A. That the audit procedures and tests used by the Audit Division were proper in accordance with section 1138(a) of the Tax Law. However, the additional taxable sales determined as a result thereof were erroneous in that the markup test for liquor and wine did not reflect the correct quantities served as set forth in Findings of Fact "6" and "8"; therefore, the liquor and wine markup is adjusted to 233 percent. Moreover, the Audit Division failed to give

consideration to petitioner's inventory increase referred to in Finding of Fact "5". That the petitioner's books and records overstated beer sales pursuant to Finding of Fact "7"; that such overstated sales were in fact liquor sales, therefore the additional taxable sales as computed by the Audit Division must be reduced by an amount equal to the overstated beer sales. Accordingly, the additional taxable sales of \$141,931.00 for the period March 1, 1974 through February 28, 1977 are reduced to \$44,782.00.

B. That petitioner failed to provide proof of payment for unpaid sales taxes of \$2,238.40 for the period ending November 30, 1976 and that such amount shall be in addition to the sales tax due on the redetermination in Conclusion of Law "A".

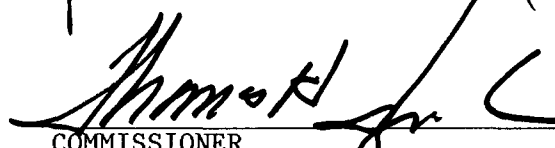
C. That the petition of 55 Christopher St. Bar and Grill, Inc. is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 22, 1977; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 06 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER