

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Jimmy's Backyard 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 3/1/72 - 11/30/76. :

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 11th day of April, 1980, he served the within notice of Determination by mail upon Jimmy's Backyard Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jimmy's Backyard Inc.  
415 Main St.

Port Washington, NY 11050  
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  
11th day of April, 1980.

Joanne Knapp

[Signature]

STATE OF NEW YORK  
STATE TAX COMMISSION

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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 11th day of April, 1980, he served the within notice of Determination by mail upon Nicholas Pallas the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

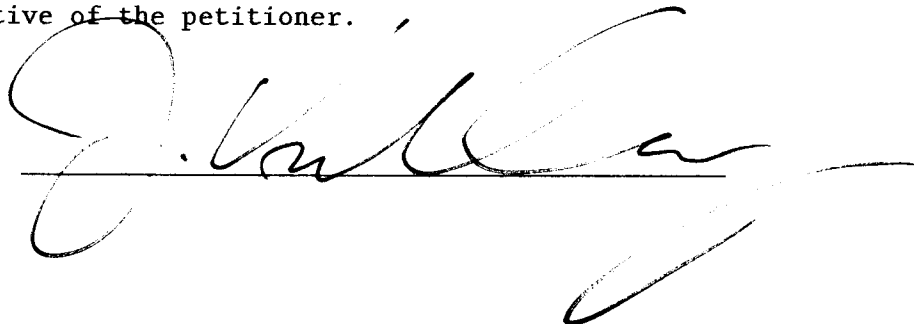
Mr. Nicholas Pallas  
4 Olympia Ln.  
Stony Brook, NY 11790

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  
11th day of April, 1980.

Joanne Knapp



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

April 11, 1980

Jimmy's Backyard Inc.  
415 Main St.  
Port Washington, NY 11050

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  
Nicholas Pallas  
4 Olympia Ln.  
Stony Brook, NY 11790  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
JIMMY'S BACKYARD, INC. : DETERMINATION  
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, 1972 :  
through November 30, 1976. :

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Applicant, Jimmy's Backyard, Inc., 415 Main Street, Port Washington, New York 11050, 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, 1972 through November 30, 1976 (File No. 20783).

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 May 25, 1979 at 9:15 A.M. Applicant appeared by Nicholas Pallas, PA. The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

#### ISSUE

Whether the audit procedures employed by the Audit Division in an examination of applicant's books and records were proper and the resultant findings of additional taxable sales for the period March 1, 1972 through November 30, 1976 were correct.

#### FINDINGS OF FACT

1. On September 20, 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 applicant, Jimmy's Backyard, Inc., for the period March 1, 1972 through November 30, 1976 in the amount of \$31,755.13, plus penalty and interest of \$16,249.15, for a total of \$48,004.28.

2. Applicant executed a consent extending the time within which to issue an assessment of sales and use taxes for the period March 1, 1972 through February 28, 1975, to June 20, 1978.

3. Applicant operated a restaurant and cocktail lounge located at 415 Main Street in Port Washington, New York.

4. On audit, applicant's books and records revealed an overall markup of 84 percent which the Audit Division considered inadequate and therefore performed individual markup tests for liquor, wine, beer and food. The Audit Division computed purchases for each sales category for the entire period. The amount of said purchases were reduced to reflect allowances for liquor and food consumed by employees.

Using liquor purchases for the month of May, 1974, the Audit Division computed separate markups on liquor to reflect each of the following changes in selling prices:

- 1) lower drink prices during the day;
- 2) higher prices for drinks served in the dining room;
- 3) increased prices for drinks on nights when piano music was provided.

An average of 2 ounces of liquor per drink was used as a basis for computing the number of drinks available for sale.

Based on guest checks for the week ending July 25, 1974, the Audit Division determined that 67 percent of applicant's liquor purchases were sold in the dining room and 33 percent at the bar. Liquor purchases were further allocated in proportion to the percentage of sales made during the day, nights

with music and nights without music. The applicable markup percentages were applied to said purchases to arrive at a weighted average markup of 267 percent and audited liquor sales of \$550,124.00.

The beer markup of 228 percent was computed in the same manner as liquor with the exception that it did not distinguish sales made on nights with or without music. Audited beer sales amounted to \$70,013.00.

Applicant sold wine by the bottle only. An analysis of wine purchases for May, 1974 disclosed a markup of 167 percent. This percentage was applied to wine purchases and resulted in audited wine sales of \$103,142.00.

The Audit Division also computed a markup on food using costs and menu prices in effect at the time the audit was conducted. A la carte menu items showed a markup of 121 percent and complete dinners 109 percent. Complete dinners represented 75 percent of total food sales and therefore the weighted average markup was 112 percent which was applied to food purchases and resulted in audited food sales of \$1,885,560.00.

Cigar purchases of \$1,656.00 were marked up 35 percent to arrive at audited cigar sales of \$2,236.00.

Total audited sales from liquor, beer, wine, food and cigars amounted to \$2,611,075.00. Applicant reported sales of \$2,150,371.00 leaving additional taxable sales of \$460,704.00. This amount was adjusted to \$441,984.00 to reflect an allowance for free promotional meals. The tax due on alleged unreported sales amounted to \$31,150.33. Use tax due of \$604.80 was also determined on fixed assets for a total sales tax deficiency of \$31,755.13.

5. Applicant contended that the books and records reflect its actual sales and therefore it was not appropriate for the Audit Division to use markup percentages to determine applicant's sales. In support of this contention,

applicant submitted its sales journal for the month of April, 1975 to demonstrate its procedures for recording sales, applicant also submitted general ledger totals of credit card receipts for the years 1972 through 1976 which substantially agreed with payments made by American Express and Diners Club.

The Audit Division did not contest the accuracy of applicant's books and records with respect to credit card receipts and went on to explain that applicant's internal controls for cash transactions were considered inadequate based on its observations; therefore it was necessary to determine sales by using markup percentages.

6. Applicant also contended that the liquor markup computed by the Audit Division was incorrect in that applicant uses 2 1/2 ounces of liquor in drinks; therefore the Division overstated the number of drinks available for sale. Applicant did not disagree with the markups determined by the Audit Division on beer, wine and food. Although applicant did not take exception to the food markup, it argued the gross profit percentage on food increased after the Audit Division made an additional allowance for personal consumption of food. The additional allowance for personal consumption decreased the food purchases available for sale, thus causing an increase in the gross profit percentage. (However, this had no effect on the food sales determined by the Audit Division.)

7. Applicant testified that it does not increase the price of drinks when piano music is provided.

#### CONCLUSIONS OF LAW

A. That the Audit Division in its audit of applicant's books and records followed generally accepted audit procedures consistent with the nature of the

business operation and the findings derived therefrom were supported by substantial evidence, with the exception that applicant did not increase the price of drinks on nights when piano music was provided; therefore the overall liquor markup of 267 percent is reduced to 254 percent.

B. That the application of Jimmy's Backyard, Inc. is granted to the extent indicated in Conclusion of Law "A". The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1977; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

APR 11 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER