

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Saverio Maiorano :
d/b/a Pinta Di Blu Restaurant : 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 20th day of June, 1980, he served the within notice of Decision by mail upon Saverio Maiorano, d/b/a Pinta Di Blu Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Saverio Maiorano
d/b/a Pinta Di Blu Restaurant
568 Myrtle Ave.
Brooklyn, NY 11205

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
20th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

In the Matter of the Petition
of
Saverio Maiorano
d/b/a Pinta Di Blu Restaurant
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.

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 20th day of June, 1980, he served the within notice of Decision by mail upon Albert Benson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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.

Joanne Knapp

ative of the petitioner.

J. J. Verburg

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

June 20, 1980

Saverio Maiorano
d/b/a Pinta Di Blu Restaurant
568 Myrtle Ave.
Brooklyn, NY 11205

Dear Mr. Maiorano:

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
Albert Benson
183 Broadway
Hicksville, NY 11801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SAVERIO MAIORANO	:	
d/b/a PINTA DI BLU RESTAURANT	:	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.	:	

Petitioner, Saverio Maiorano d/b/a Pinta Di Blu Restaurant, 568 Myrtle Avenue, Brooklyn, New York 11205, 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. 20817).

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 10:45 A.M. Petitioner appeared by Albert Benson, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of additional sales and use taxes due, based on an audit of petitioner's books and records, was correct.

FINDINGS OF FACT

1. Petitioner, Saverio Maiorano d/b/a Pinta Di Blu Restaurant, operated a restaurant and bar located at 568 Myrtle Avenue, Brooklyn, New York 11205.

2. On September 2, 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 September 1, 1973 through August 31, 1976 for taxes due of \$2,434.28, plus penalty and interest of \$1,280.96, for a total of \$3,715.24.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for periods in issue to December 20, 1977.

4. On audit, the Audit Division performed a markup test for liquor, wine and beer using purchases for the month of July, 1976. The test revealed a combined liquor and wine markup of 284 percent and a beer markup of 197 percent. Said markups were applied to applicable purchases for the audit period to determine audited bar sales of \$221,173.42. This amount was combined with food sales of \$212,990.41 as recorded in petitioner's books and records to arrive at total sales of \$434,163.83. Petitioner reported taxable sales of \$411,859.00, leaving additional taxable sales of \$22,304.83. Additionally, an overcollection test resulted in additional taxes due of \$51.44. The audit also disclosed purchases subject to use tax in the following areas and amounts:

a) Liquor, wine and beer for personal use	\$1,295.97
b) Taxable components of employees' meals	1,592.40
c) Expense purchases	2,637.32
d) Fixed assets	1,298.30

The use taxes determined for "a" and "b" above and the overcollections are not at issue.

5. Petitioner's books and records were inadequate to determine the exact amount of beer and liquor sales.

6. In computing the markup percentage, the Audit Division considered that the selling prices of liquor, wine and beer did not include sales tax.

7. Petitioner submitted purchase invoices that showed sales tax was paid to vendors at the time of purchase of fixed assets totaling \$1,011.00. Petitioner contended that sales tax was paid on expense purchases although the tax was not separately stated on invoices.

8. Petitioner displayed a sign stating that the selling price of bar drinks included sales tax.

9. Petitioner separately charges sales tax on the guest checks for food and soda. The sales tax is not charged separately on the guest checks for beer and liquor, as the price of the drink includes the tax.

CONCLUSIONS OF LAW

A. That the petitioner's selling prices of liquor, wine and beer did include sales tax; therefore, the Audit Division overstated petitioner's selling prices of drinks, and thereby overstated the markup percentages. That based on the adjusted markups, petition's taxable sales are in substantial agreement with the books and records. Accordingly, the additional sales tax resulting from increased liquor, wine and beer sales is cancelled.

B. That in accordance with Finding of Fact "7", fixed asset purchases subject to use tax are reduced to \$287.30.

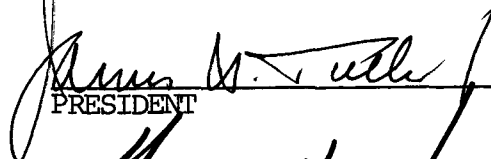
C. That the petition of Saverio Maiorano d/b/a Pinta Di Blu Restaurant is granted to the extent indicated in Conclusion of Law "A" and "B"; that the

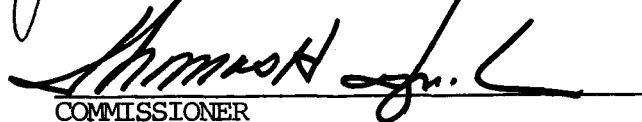
Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 2, 1977; and that, except as so granted, the petition is in all other respects denied.

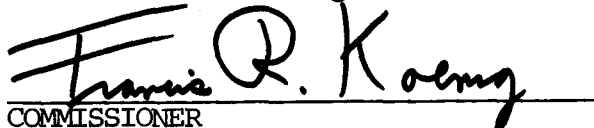
DATED: Albany, New York

JUN 20 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER