

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Marano Lounge, 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 12/1/73 - 11/30/76. :

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 14th day of November, 1980, he served the within notice of Decision by mail upon Marano Lounge, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marano Lounge, Inc.
257 W. 116th St.
New York, NY 10026

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
14th day of November, 1980.

Robert A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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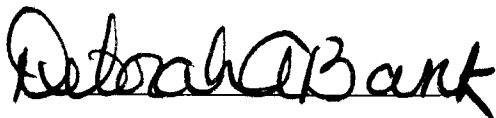
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of November, 1980, he served the within notice of Decision by mail upon Sidney Weiss the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

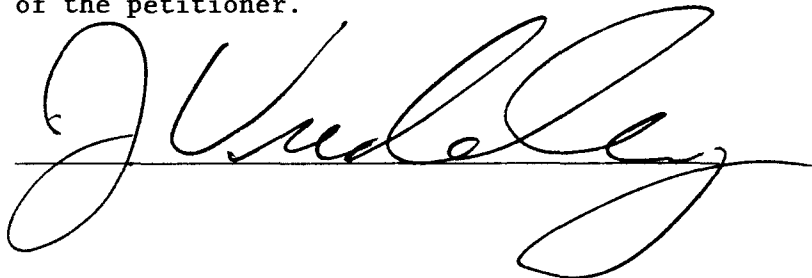
Mr. Sidney Weiss
Rosenstein, Newman & Weiss
61 Broadway
New York, NY 10006

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
14th day of November, 1980.





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

November 14, 1980

Marano Lounge, Inc.
257 W. 116th St.
New York, NY 10026

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) 722 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
Sidney Weiss
Rosenshein, Newman & Weiss
61 Broadway
New York, NY 10006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MARANO LOUNGE, 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 December 1, 1973	:	
through November 30, 1976.	:	

Petitioner, Marano Lounge, Inc., 257 West 116th Street, New York, New York 10026, 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 December 1, 1973 through November 30, 1976 (File No. 20445).

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 30, 1979, at 9:15 A.M. Petitioner appeared by Sidney Weiss, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel J. Freund, Esq., of counsel).

ISSUE

Whether the results of a field audit performed by the Audit Division using a markup of purchases method of audit properly reflected petitioner's additional sales and use tax liability.

FINDINGS OF FACT

1. On July 15, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Marano Lounge, Inc. for the period December 1, 1973 through November 30, 1976 in the amount of \$7,422.44 tax plus penalties and interest. The Notice was issued as a result of a field audit.

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

3. In the performance of the audit, the Audit Division examined current purchase invoices in the month of November, 1976 and marked up the purchases to their current selling prices. An additional charge of 10¢ per drink was added to selling prices for vodka and gin to compensate for juices used in such drinks. The Audit Division determined a 239 percent markup on liquor purchases based on a 7/8 ounce serving per drink and a 15 percent allowance for spillage. A markup of 213 percent was determined on bottled beer purchases using the same month and current selling prices. No spillage allowance was made on the beer markup. A markup of 34 percent was determined on cigarette purchases for the month of October, 1976. The Audit Division applied these markups to the appropriate purchases for the audit period to determine taxable sales and additional tax due thereon of \$7,401.74.

Use tax of \$20.70 on the purchase of fixed assets is not at issue.

4. The Audit Division was unable to verify the exact amount of petitioner's taxable sales or sales tax because petitioner's cash register tapes were not available for audit.

5. Petitioner contended that because of the necessity of rigid controls in an absentee-owned business, all the sales made were properly reported. Daily summary sheets were prepared by employees showing the amount of cash taken in, register readings and inventory consumed during each shift. Petitioner further contended that upon verification by the manager, the cash register tapes were destroyed and daily sheets retained for monthly summation.

Petitioner also contended that the inventory consumed was compared to the amount of sales that should have been generated with reasonable allowances for self-consumption and drinks given away and that any shortages of projected

sales were accountable by the employee. Petitioner argued that the use of these internal controls was sufficient evidence of the correctness of its taxable sales reported.

6. Management allowed 5 percent of bar inventory for personal consumption and drinks given away.

7. During the period in issue, petitioner served a 1 ounce portion of the better brands of liquor and a $1\frac{1}{4}$ ounce portion of cordials. Petitioner served $\frac{7}{8}$ ounce portions of bar brand liquor and such brands were usually sold at 2 for 1 selling price. Additional charges for orange juice which were included in the audit results for gin and vodka drinks were applicable to vodka drinks only and the additional charge of 10¢ was applicable to the drinks which were sold 2 for the price of 1.

Petitioner submitted a schedule which revealed a liquor markup of 201.5 percent. The markup was computed using the above serving sizes and the selling prices in effect at the time of the audit.

8. Petitioner submitted selling prices applicable prior to a price increase in August, 1976. No evidence was submitted to show that the price increases were not due to rising costs of goods sold or that the gross profit for the prior period was lower.

9. Petitioner contended that specials were offered to induce sales; however, no substantial evidence was submitted to document the occurrence of any specials.

10. Petitioner acted in good faith.

CONCLUSIONS OF LAW

A. That the Audit Division did not give proper consideration to the fact that petitioner served 1 ounce liquor portions of certain brands, that $1\frac{1}{4}$

ounce portions of cordials were served, that orange juice was served only with vodka drinks and that the additional charge per drink was 5¢ as noted in Finding of Fact #7. That based on these findings the markup on liquor purchases is 201.5 percent.

B. That the Audit Division did not give proper consideration to the fact that 5 percent of petitioner's beer inventory is used for personal consumption and buy-backs and therefore not sold; that these purchases are subject to tax of \$91.24 in accordance with section 1110 of the Tax Law.

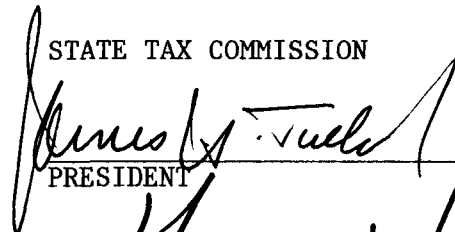
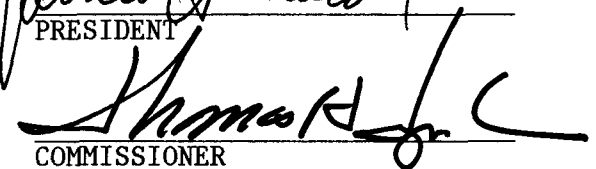
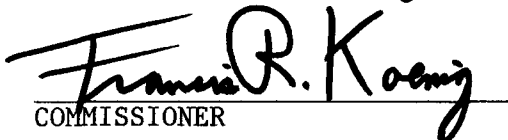
C. That except as noted in Conclusions "A" and "B" above, the audit performed was proper and in accordance with section 1138(a) of the Tax Law in the absence of substantiating records.

D. That petitioner acted in good faith, therefore, the penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the petition of Marano Lounge, Inc. is granted to the extent indicated in the Conclusions above. The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 15, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER