

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
William Mifsud :
d/b/a Seven Corners Liquor Store : 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 9/1/72-8/31/75. :

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 2nd day of January, 1980, he served the within notice of Determination by mail upon William Mifsud, d/b/a Seven Corners Liquor Store, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Mifsud
d/b/a Seven Corners Liquor Store
55 Sunset Ct.
Haworth, NJ 07641

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
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 2, 1980

William Mifsud
d/b/a Seven Corners Liquor Store
55 Sunset Ct.
Haworth, NJ 07641

Dear Mr. Mifsud:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
WILLIAM MIFSUD d/b/a	:	DETERMINATION
SEVEN CORNERS LIQUOR STORE	:	
	:	
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, 1972 through	:	
August 31, 1975.	:	

Applicant, William Mifsud d/b/a Seven Corners Liquor Store, 55 Sunset Court Haworth, New Jersey 07641, 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 September 1, 1972 through August 31, 1975 (File No. 15014).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 9, 1979 at 9:30 A.M. Applicant appeared pro se. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether applicant's tax liability is limited to the amount stated on the Consent to Fixing of Tax Not Previously Determined and Assessed.

II. Whether applicant collected sales tax on the sales of wine and liquor made for the period September 1, 1972 through August 31, 1975.

FINDINGS OF FACT

1. Applicant operated a retail wine and liquor store at 7 Greene Avenue, Brooklyn, New York, and filed New York State and local sales and use tax returns for the period September 1, 1972 through August 31, 1975.

2. On September 16, 1975, applicant executed a consent extending the period of limitation for assessment of sales and use taxes for the tax period September 1, 1972 through August 31, 1975 to and including December 20, 1976.

3. On March 15, 1976, as a result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant William Mifsud for additional tax due of \$3,776.61, penalty and interest of \$1,375.31, for a total of \$5,151.92. Said notice was reduced by a payment received from applicant in the amount of \$444.21 to an amount due of \$4,707.71.

4. On audit, the Audit Division analyzed the purchases made by applicant during the test month August, 1975 and found that 27.3 percent of the purchases was for wine; the remainder was considered liquor purchases. The auditor then performed a markup test for October, 1975 and found the markup on wine and liquor to be 50.09 percent and 14.68 percent, respectively. The percentages were applied to the purchases made by applicant for the audit period to arrive at adjusted taxable sales. The taxable sales that were reported were deducted to arrive at additional taxable sales of \$5,341.24. The tax rate was then applied and tax due of \$394.27 determined. Applicant agreed to the audit findings, signed a Consent to Fixing of Tax Not Previously Determined and Assessed, and paid the tax due plus simple interest for a total payment of \$444.21.

On the supervisor's review of the auditor's report, it was determined that an error had been made in audit. The auditor in preparing the markup test determined, based on information supplied by applicant, that the sales tax was included in applicant's sales price of wine and liquor. As a result of this error, the audit was not accepted by the supervisor and the auditor was directed to recompute the markup test. As a result, the markup for wines

and liquors was found to be 62.1 percent and 23.85 percent respectively and additional tax of \$3,776.61 found to be due.

5. Applicant contends that when he signed the Consent to Fixing of Tax Not Previously Determined and Assessed at the conclusion of the audit, his tax liability was fixed at \$444.21. He further contends that consideration should be given to the fact that the price tag on each bottle of wine and liquor included the sales tax.

6. The sales tax form, Consent to Fixing of Tax Not Previously Determined and Assessed, states that the form is "subject to the approval of the State Tax Commission".

7. During the period in issue, the applicant affixed a price tag to each bottle of wine and liquor offered for sale. The price tag stated one selling price. There was no indication that the sales tax was included in the stated selling price.

8. Applicant offered no documentary evidence to show that the sales tax was separately stated, that the sales tax was included in the selling price or that sales tax was collected from the customer.

CONCLUSIONS OF LAW

A. That pursuant to section 1138(c) of the Tax Law, a person required to collect the tax is entitled to have a tax finally and irrevocably fixed by filing with the Tax Commission a signed statement in such form as the Tax Commission shall prescribe. The signed Consent to Fixing of Tax Not Previously Determined and Assessed submitted by applicant was rejected by the Audit Division per Finding of Fact "4"; that accordingly, applicant's tax was not fixed at the amount stated on the consent.

B. That pursuant to 20 NYCRR 525.6, entitled Absorption of Tax Prohibited, no person required to collect the sales or use tax shall state, advertise or

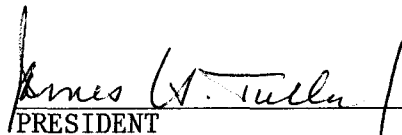
hold out to any purchaser, to any other person or to the public in general, in any manner, directly or indirectly, that he is not charging the customer the tax, that he will pay the tax, that the tax will not be separately charged and stated to the customer or that the tax will be refunded to the customer; and that accordingly, the Audit Division properly and correctly determined that applicant had not collected the tax.

C. That the application of William Mifsud d/b/a Seven Corners Liquor Store, is hereby denied.

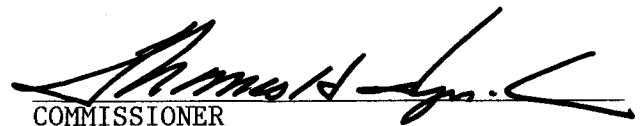
DATED: Albany, New York

STATE TAX COMMISSION

JAN 2 1980


PRESIDENT


COMMISSIONER


COMMISSIONER