

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Olivers Lou-Char Corp. :  
& Louis Franceschini, Indiv. & as Officer : 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 3/1/73-2/29/76. :

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 11th day of January, 1980, he served the within notice of Determination by mail upon Olivers Lou-Char Corp., & Louis Franceschini, Indiv. & as Officer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Olivers Lou-Char Corp.  
& Louis Franceschini, Indiv. & as Officer  
2095 Delaware Ave.  
Buffalo, NY 14216

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 January, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Olivers Lou-Char Corp. :  
& Louis Franceschini, Indiv. & as Officer : 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 3/1/73-2/29/76. :

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 11th day of January, 1980, he served the within notice of Determination by mail upon Martin E. Trossman 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. Martin E. Trossman  
Trossman & Trossman  
627 Brisbane Bldg.  
Buffalo, NY 14203

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 January, 1980.

Joanne Knapp

Jay Vredenburg

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

January 11, 1980

Olivers Lou-Char Corp.  
& Louis Franceschini, Indiv. & as Officer  
2095 Delaware Ave.  
Buffalo, NY 14216

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  
Martin E. Trossman  
Trossman & Trossman  
627 Brisbane Bldg.  
Buffalo, NY 14203  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
OLIVER'S LOU CHAR CORPORATION : DETERMINATION  
and :  
LOUIS FRANCESCHINI, :  
Individually and as an Officer :  
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, 1973 through February 29, :  
1976.

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Applicants, Oliver's Lou Char Corporation and Louis Franceschini, individually and as an officer, 2095 Delaware Avenue, Buffalo, New York 14216, 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, 1973 through February 29, 1976 (File No. 17147).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, One West Genesee Street, Buffalo, New York, on April 25, 1979 and was continued on April 26, 1979. Applicants appeared by Martin E. Trossman, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division accurately determined Oliver's Lou Char Corporation's markup percentage on liquor, wine and beer purchases based on a one month test of purchases.

FINDINGS OF FACT

1. On October 22, 1976, as the result of an audit, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants, Oliver's Lou Char Corporation ("Oliver's") and Louis Franceschini, individually and as an

officer, was issued for the period March 1, 1973 through February 29, 1976. The notice was issued for \$6,325.74, plus penalty and interest of \$2,590.19, for a total of \$8,915.93.

2. On June 18, 1976, Oliver's executed a Consent Extending Period of Limitation to issue an assessment of sales and use taxes, for the periods in issue, to December 20, 1976.

3. Oliver's operated a restaurant and bar located at 2095 Delaware Avenue in Buffalo, New York.

4. On audit, the Audit Division verified that Oliver's accurately posted daily receipts to the sales journal and that the sales journal totals agreed with both the general ledger and the sales tax returns.

The Audit Division accepted the accuracy of Oliver's food sales based on a reported markup of 93 percent; however, a markup test was performed to determine the accuracy of beverage sales. The markup test, using purchases of liquor, beer and wine for the month of June 1975, disclosed an overall markup of 209.5 percent. This percentage was applied to total beverage purchases of \$137,681.90 to arrive at audited beverage sales of \$426,125.48. Oliver's reported beverage sales of \$334,695.77, leaving additional sales in the amount of \$91,429.71 and tax due thereon of \$6,325.74.

The Audit Division's markup computation considered the following factors:

- A. Quantity, cost and selling prices of individual brands
- B. Percentage of drinks sold at the bar as compared to those sold in the restaurant operation
- C. "Free pour" method of mixing drinks (2 oz. of liquor per drink)
- D. 15 percent spillage.

5. Applicant Oliver's made extraordinary purchases of "Bellows Reserve" and "Seagram's Extra Dry Gin" during the test month of June 1975. In the test month applicant purchased 10 cases of "Bellows Reserve" and 5 cases of "Seagram's Extra Dry Gin"; during the period January 1, 1976 through June 30, 1976, purchases of said items averaged 4.7 and 3 cases per month, respectively. The markups on "Bellows Reserve" and "Seagram's Extra Dry Gin" were 240 percent and 228 percent, respectively; thus, the markup computation gave excessive weight to brands that have a markup higher than the average.

6. Oliver's contended, based on an analysis of purchases for the period January 1, 1976 through June 30, 1976, that purchases were of approximately 130 different types of liquor and wine. Since the markup percentage computed by the Audit Division was based on a sample of less than one-half that amount, Oliver's concluded that the test month did not encompass a sufficient variety of liquor and wine purchases; and therefore, was not representative of the business activity.

7. Liquor and wine purchases for the period January 1, 1976 through June 30, 1976 averaged \$2,968.08 per month, which is comparable to purchases made in the test month.

8. Applicant Oliver's purchased soda that is resold as such and also used as a mixer for liquor drinks. The total beverage purchases of \$137,681.90 that the Audit Division marked-up to determine audited bar sales included all soda purchases. Soda purchases for the month of June 1975 represented 5 percent of total beverage purchases for the month. Oliver's used 58 percent of soda purchases in liquor drinks. Oliver's markup on soda is 300 percent.

9. Oliver's selling price of Russian vodka was \$1.00 rather than \$1.35 and \$1.50 which was used by the Audit Division in computing the markup percentage.

10. Applicants maintained that their internal cash controls were such that it is inconceivable that there were unrecorded receipts in the amount of \$91,429.71.

11. During the period at issue, Applicant Louis Franceschini was the president of Oliver's.

12. Applicants acted in good faith at all times.

CONCLUSIONS OF LAW

A. That the Audit Division incorrectly determined Oliver's markup on liquor, wine and beer to the extent indicated in Findings of Fact "5" and "9"; accordingly, the markup percentage of 209.5 percent is reduced to 194 percent.

B. That the Audit Division erroneously applied its audited markup percentage on liquor, wine and beer to soda purchases.

C. That in accordance with Conclusions of Law "A" and "B", Oliver's beverage sales are recomputed as follows:

Total beverage purchases	\$137,681.90
Less: Soda purchases (5%)	6,884.09
Liquor, wine and beer purchases	<u>\$130,797.81</u>
Adjusted markup 194%	253,747.75
Liquor, wine and beer sales	<u>\$384,545.56</u>
Soda sales	<u>11,565.74</u>
(\$6,884.09 x 42% non-mixer x 300% markup)	
Total beverage sales	\$396,111.30
Less: Reported beverage sales	334,695.75
Additional sales	<u>\$ 61,437.37</u>
Tax due	\$ 4,300.61

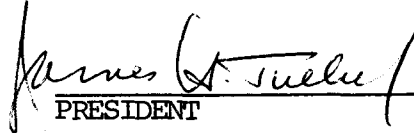
D. That the Audit Division followed generally accepted audit procedure and tests consistent with the nature of the business operation; that the test month of June 1975 included a sufficient variety of beverage purchases and that the liquor and wine purchases in Oliver's six-month analysis have similar costs and selling prices to those purchases within the test period.

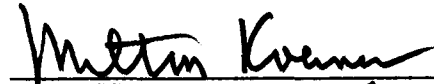
E. That the application of Oliver's Lou Char Corporation and Louis Franceschini, individually and as an officer, is granted to the extent indicated in Conclusion of Law "C", and that the Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 22, 1976, together with interest computed at the minimum statutory rate; and that, except as so granted, the application is in all other respects denied.

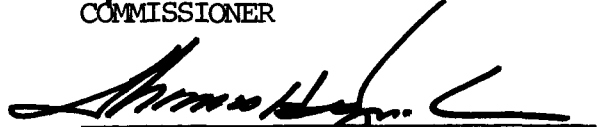
DATED: Albany, New York

JAN 11 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER