

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
1975 Hylan Blvd. Corp. :
Edward Vomero & J. Rhodes, Officers : 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 18th day of June, 1980, he served the within notice of Determination by mail upon 1975 Hylan Blvd. Corp., Edward Vomero & J. Rhodes, Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

1975 Hylan Blvd. Corp.
Edward Vomero & J. Rhodes, Officers
7 Twin Oaks Dr.
Staten Island, NY 10304

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
1975 Hylan Blvd. Corp. :
Edward Vomero & J. Rhodes, Officers : 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 18th day of June, 1980, he served the within notice of Determination by mail upon P. Fusco 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. P. Fusco
37 New Dorp Plz.
Staten Island, NY 10305

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 18, 1980

1975 Hylan Blvd. Corp.
Edward Vomero & J. Rhodes, Officers
7 Twin Oaks Dr.
Staten Island, NY 10304

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
P. Fusco
37 New Dorp Plz.
Staten Island, NY 10305
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
1975 HYLAN BLVD. CORP. and : DETERMINATION
EDWARD VOMERO and J. RHODES, :
Individually and as Officers :
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. :

Applicants, 1975 Hylan Blvd. Corp. and Edward Vomero and J. Rhodes, Individually and as Officers, 7 Twin Oaks Drive, Staten Island, New York 10304, 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 December 1, 1973 through November 30, 1976 (File No. 20446).

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 24, 1979 at 2:45 P.M. Applicants appeared by Patsy Fusco, PA. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the audit procedures employed by the Audit Division in an examination of applicants' books and records were proper and the resultant findings of additional taxable sales for the period December 1, 1973 through November 30, 1976 were correct.

FINDINGS OF FACT

1. On August 8, 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 applicants, 1975 Hylan Blvd Corp. and Edward Vomero and J. Rhodes, individually and as officers, for the period December 1, 1973 through November 30, 1976 for \$14,501.75, plus penalty and interest of \$6,517.91, for a total of \$21,019.66.

2. Applicants executed a consent on December 16, 1976 extending the time within which to issue an assessment of sales and use taxes for the period at issue to March 20, 1978.

3. Applicants operated a bar and restaurant located at 1975 Hylan Blvd. in Staten Island, New York.

4. The auditor for the Audit Division visited applicants' place of business and examined applicants' trial balance, Federal income tax returns, guest checks and purchase invoices. Applicants did not maintain sufficient books and records from which the auditor could determine the exact amount of applicants' tax liability.

5. The auditor performed markup tests for liquor, wine and beer using purchases of such items during the month of January, 1977. The liquor and wine purchases were combined, which resulted in a markup of 326 percent. The beer markup determined was 291 percent. These percentages were applied to respective purchases for the audit period to arrive at liquor and wine sales of \$371,728.00 and beer sales of \$97,101.00. The auditor estimated applicants' food markup to be 100 percent and determined food sales of \$129,912.00. Total audited taxable sales for the audit period amounted to \$598,741.00. Applicants reported taxable sales of \$418,430.00, which resulted in additional taxable sales of \$180,311.00 and tax due thereon of \$14,108.23. The audit also disclosed additional sales taxes of \$393.52 based on an overcollection test; however, said amount is not at issue. The auditor used a 1-ounce serving of liquor in its markup computation for liquor and wine.

6. Applicants contended that an accurate markup cannot be determined based on a one month test of purchases. Applicants argued that for a sample to be statistically correct, it must encompass an entire business cycle of one year. Applicants analyzed liquor purchases for the month of August, 1977 which revealed that gin and vodka purchases represented 43 percent of total purchases for that month. Applicants did not purchase any gin or vodka in the test month used by the Audit Division and therefore concluded that a markup test for one month is only representative of that month.

The Audit Division argued that although the brands of liquor purchased will vary from month to month, there is no substantial effect on the markup since items have similar costs, selling prices and serving sizes.

7. Applicants further contended that the Audit Division's determination did not give consideration to the following factors:

a) Free food and drink for employees at various parties. Applicants estimated the cost at \$150 per year.

b) "Happy hour" prices and promotional drinks. Applicants estimated that 12.68 percent of its daily bar receipts are during happy hour.

c) Liquor consumed by employees. Applicants estimated the cost at \$417.90 per year.

d) Employee meals. Applicants estimated the food cost at \$9,048.00 per year.

e) Free buffets. Applicants estimated the food cost at \$2,190.00 per year.

8. Applicants' books and records relating to food purchases and sales for the period October 1, 1973 through September 30, 1975 reflect a markup of 98 percent which is in substantial agreement with the Audit Division's estimate

of 100 percent. Consequently, applicants' contentions regarding food purchased for its own use and certain menu items which had low markups had no effect on the food sales determined by the Audit Division.

9. The Audit Division found no evidence of happy hour prices and promotional drinks as alleged by applicants. The Division did, however, determine that drink prices increased at night and on Wednesday, Friday and Saturday nights when music was provided.

10. Applicants used 30 percent of their liquor purchases in cocktails and such drinks contained 2 ounces of liquor.

CONCLUSIONS OF LAW

A. That, since sufficient books and records were not available to determine the exact amount of tax due, the audit procedures and tests used by the Audit Division to determine applicants' sales were proper, as authorized in section 1138(a) of the Tax Law. However, the liquor and wine markup did not give consideration to drinks which contained more than 1 ounce of liquor; therefore, the Audit Division's findings of audited liquor and wine sales for the period December 1, 1973 through November 30, 1976 are reduced from \$371,728.00 to \$335,951.00 based on an adjusted liquor and wine markup of 285 percent.

B. That the Audit Division's audit findings, with respect to food and beer sales, were supported by substantial evidence.

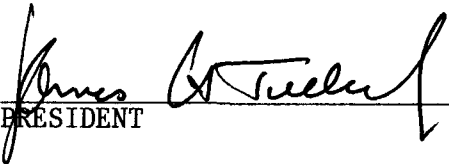
C. That the application of 1975 Hylan Blvd. Corp. and Edward Vomero and J. Rhodes, individually and as officers, is granted to the extent indicated in Conclusion of Law "A". The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due


issued August 8, 1977; and that, except as so granted, the application is in all other respects denied.

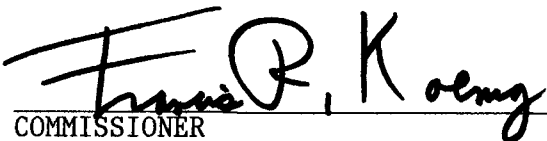
DATED: Albany, New York

JUN 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER