

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Oswego Amusements, Inc.; Harry Caruso, William
Caruso, George Caruso, Jr., Ind. & 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 3/1/71-11/30/73. :

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 7th day of July, 1980, he served the within notice of Determination by mail upon Oswego Amusements, Inc.; Harry Caruso, William, Caruso, George Caruso, Jr., Ind. & Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Oswego Amusements, Inc.; Harry Caruso, William
Caruso, George Caruso, Jr., Ind. & Officers
Hall Road
Oswego, NY 13126

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
7th day of July, 1980.

Eudora A. Bank

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Oswego Amusements, Inc.; Harry Caruso, William
Caruso, George Caruso, Jr., Ind. & 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 3/1/71-11/30/73. :

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 7th day of July, 1980, he served the within notice of Determination by mail upon William P. Christy 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. William P. Christy
One Lincoln Center
Syracuse, NY 13202

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
7th day of July, 1980.

Deborah A. Bank

J. J. Vredenburg

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

July 7, 1980

Oswego Amusements, Inc.; Harry Caruso, William
Caruso, George Caruso, Jr., Ind. & Officers
Hall Road
Oswego, NY 13126

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
William P. Christy
One Lincoln Center
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
OSWEGO AMUSEMENTS, INC.	:	DETERMINATION
HARRY CARUSO, WILLIAM CARUSO	:	
and GEORGE CARUSO, JR.	:	
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 Periods March 1, 1971 :
through November 30, 1973.

Oswego Amusements, Inc., Hall Road, Oswego, New York 13126, Harry Caruso, William Caruso and George Caruso, individually and as officers, filed an application for revision of a determination for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1971 through November 30, 1973 (File No. 11119).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Syracuse, New York on July 22, 1977 and December 7, 1977. Applicant appeared by William P. Christy, Jr., Esq. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss and James J. Morris, Esqs., of counsel).

ISSUE

Whether applicant is liable for additional taxes pursuant to an audit for the periods March 1, 1971 through November 30, 1973.

FINDINGS OF FACT

1. On June 18, 1974, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Oswego Amusements, Inc. ("Oswego")

and Harry Caruso, William Caruso and George Caruso, Jr., individually and as officers, for \$18,599.70, plus penalty and interest of \$4,266.22, for a total of \$22,865.92; this was for the periods March 1, 1971 through November 30, 1973.

2. Applicants filed an Application for Hearing to Review Determination on July 24, 1974, which was received August 1, 1974.

3. Oswego operated an automobile racing track, a concession stand and a restaurant in Oswego, New York. A field audit of Oswego was commenced on February 11, 1974 and completed May 3, 1974 for the periods in issue. Records available of the race track operation were ticket inventory sheets which showed number of tickets sold on a certain date and their respective prices, plus a sales journal. Records pertaining to the restaurant were the sales journal, the purchase journal and the disbursement journal. There were also purchase invoices, some current cash register tapes and guest checks. There were no guest checks or register tapes for the periods in issue. Records available for the concession stands were current purchase invoices, the sales journal and a check disbursement journal.

4. The audit on Oswego found the following errors committed in its tax returns:

- (a) In computing taxable sales, the applicable sales tax rate was subtracted from 100 percent (instead of added) and the result was multiplied (rather than divided) times the total gross sales to arrive at taxable ticket, restaurant and concession sales.
- (b) Audit of worksheets disclosed that taxable ticket sales did not agree with taxable ticket sales reported. Mathematical errors in computing taxable sales were found. Season pass tickets were not reported.
- (c) Service guest checks and cash register tapes for the audit period were not available. Examination of current checks and tapes disclosed that numerous guest checks had not been recorded. Journal entries were made from register tapes. An error of 3.17 percent was determined and applied for the audit period.

- (d) Comparison of sales journal with total purchases for the concession stand revealed a low markup of 4 1/2 percent. A weighted markup established for 1971 was 125 percent. (A simple composite markup later established by applicant was 116.4 percent.) Concession purchases for 1972 were more than reported sales.
- (e) A detailed audit of applicant's assets and supply purchases disclosed that use tax was not paid in all operations during the periods in issue.

5. To secure the weighted markup of 125 percent for applicant, a detailed list of purchases for resale, purchases sold and purchases returned for 1971 was established. Selling prices were multiplied against the applicable net purchases to secure gross sales (\$529.20). The cost of items sold (\$184.76) was subtracted to get a gross profit (\$344.44). Gross profit divided by the cost of the items sold resulted in a markup percentage of 186 percent.

Consideration for breakage, spoilage, food not sold, given away or consumed by employees was given which reduced the percentage to 125 percent. Since there were no records available regarding selling prices, the bookkeeper supplied this information.

6. Applicant offered no substantial evidence that the audit for the periods in issue, on which the additional taxes was computed, was incorrect.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available; if necessary, the tax may be estimated on the basis of external indices such as stock on hand, purchases, comparable charges or other factors. The tax assessed against applicants was properly estimated under this section.

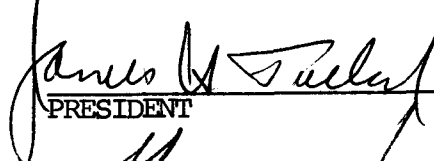
B. That applicant has failed to disprove the findings of the Sales Tax Bureau as determined in compliance with the language and intent of section 1138(a) of the Tax Law.


C. That the application of Oswego Amusement, Inc., Harry Caruso, William Caruso and George Caruso, Jr. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 18, 1974 is sustained.

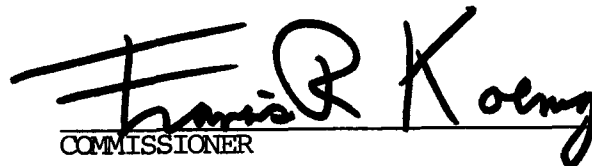
DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER