

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Pellegrini's Cafe, 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 6/1/71-11/30/74. :

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 3rd day of October, 1980, he served the within notice of Decision by mail upon Pellegrini's Cafe, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Pellegrini's Cafe, Inc.
66-86 Fresh Pond Rd.
Brooklyn, NY 11227

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
3rd day of October, 1980.

Debbie Bank

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

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of
Pellegrini's Cafe, Inc. :
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AFFIDAVIT OF MAILING

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 3rd day of October, 1980, he served the within notice of Decision by mail upon Joseph A. Vanacore the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

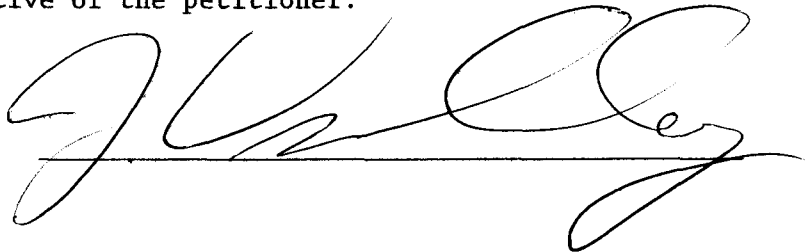
Mr. Joseph A. Vanacore
Sperduto, Priskie, Spector & Vanacore
10 Columbus Circle
New York, NY 10019

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
3rd day of October, 1980.

Robert Bank



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

October 3, 1980

Pellegrini's Cafe, Inc.
66-86 Fresh Pond Rd.
Brooklyn, NY 11227

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) 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
Joseph A. Vanacore
Sperduto, Priskie, Spector & Vanacore
10 Columbus Circle
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PELLEGRINI'S CAFE, 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 June 1, 1971
through November 30, 1974. :

Petitioner, Pellegrini's Cafe, Inc., 66-86 Fresh Pond Road, Brooklyn, New York, 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 June 1, 1971 through November 30, 1974 (File No. 11161).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 17, 1978 and continued on May 17, 1978 before Harvey Baum, Hearing Officer, and on December 18, 1978 and March 22, 1979 before Herbert Carr, Hearing Officer. Petitioner appeared by Hall, Dickler, Lawler, Kent & Howley, Esqs. (Richard Rodman, Esq., of counsel) and Sperduto, Priskie, Spector & Vanacore (Joseph A. Vanacore, CPA) on February 17, 1978, by Laudis Olesker, Esq. and Joseph A. Vanacore, CPA on May 17, 1978 and by Louis N. De Stefano, Esq. on March 22, 1979. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq. and Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau accurately determined applicant's sales tax liability for the period June 1, 1971 through November 30, 1974.

FINDINGS OF FACT

1. The Sales Tax Bureau ("Bureau") issued to petitioner, Pelligrini's Cafe, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due ("Notice of Determination") dated August 27, 1974, covering the period September 1, 1969 through August 31, 1972 which assessed additional tax of \$32,849.56 plus \$13,626.46 penalty and/or interest totalling \$46,476.02. By a Notice of Assessment Review the foregoing Notice of Determination was revised to reflect (a) cancellation of tax due for the period ending November 30, 1969 to May 31, 1971 based upon invalid consents extending the period of limitation for assessment (ST-578), and (b) adjustment of the tax due for the period ending August 31, 1971 through August 31, 1972 based upon a completed field audit, to require payment of \$13,392.37 additional tax plus \$5,829.41 penalty and/or interest, totalling \$19,221.78.
2. The Bureau issued to petitioner a Notice of Determination dated June 25, 1975 based upon a completed field audit covering the period September 1, 1972 through November 30, 1974 which assessed additional tax of \$25,678.37 plus \$7,788.75 penalty and/or interest, totalling \$33,467.12.
3. Petitioner filed petitions protesting the foregoing Notices of Determination.
4. Petitioner operates a bar/restaurant catering business.
5. The Bureau conducted a field audit of petitioner. In connection therewith, the auditor prepared transcripts of petitioner's sales, book sales and purchases. Taxable sales as reflected in petitioner's records were compared with sales tax returns. No discrepancy was found.
6. The auditor computed average percentage markups on sales of liquor and beer for bar/restaurant operations, and separately for catering operations

based upon cost data furnished by petitioner for the agreed upon test periods of the months of July, 1972 and November, 1974. The auditor observed and measured the amount of liquor and beer contained in typical servings at the bar/restaurant and compared the total purchases and prices charged therefor, determining a markup for liquor of 258.07 percent and beer 167.55 percent for the July, 1972 test period, and 260.20 percent (liquor) and 198.79 percent (beer) for the November, 1974 test period.

7. For petitioner's catering operations the auditor compared dinners sold with and without liquor, finding a \$2.00 average differential. This differential was multiplied by the number of dinners with liquor in the test periods and adjusted for extra bottles of liquor sold, to determine the average sales price per bottle. The auditor thus determined a liquor markup of 286 percent from records made available by petitioner.

8. The markup percentages of food sold at the bar/restaurant and food and beer sold in connection with catering of 150 percent were designated based upon external indices owing to the lack of food cost records for the July, 1972 test period.

9. The Bureau assessed additional tax and penalty and interest as indicated in the Notice of Assessment Review and Notice of Determination issued June 25, 1975 based upon markup percentages derived in the manner described above.

CONCLUSIONS OF LAW

A. That the Bureau's use of test periods to determine sales tax liability arising from sales of liquor and beer in connection with petitioner's bar/restaurant activities was unauthorized, since there was no evidence that petitioner's returns were incorrect or insufficient or that petitioner's records

were unavailable or insufficient to conduct a complete audit. (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023, aff'd. 44 N.Y.2d 684; Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, mot. for lv. to app. den. 44 N.Y.2d 645.)

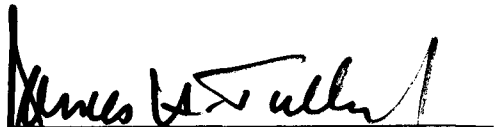
B. With respect to sales of food in connection with petitioner's bar/restaurant activities, the sales of liquor, beer and food in connection with petitioner's catering activities, records supplied by petitioner were inadequate to verify the amount of sales tax due. In the absence of such records, the tax may be estimated on the basis of external indices pursuant to section 1138(a) of the Tax Law. The method of estimating the tax used by the auditor with respect to such sales was reasonably calculated to accurately reflect sales taxes due. The markup percentages found by the auditor with respect to such taxes are sustained.

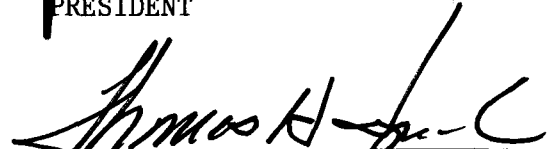
C. The petition is granted to the extent that the Notices of Determination are directed to be modified as indicated in Conclusion of Law "A". Except as so granted, the petition is otherwise denied, and except as so modified, the Notices of Determination are sustained.

DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER