

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Emily Peters :
d/b/a Newport Inn : 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 Periods 9/73-11/73, 3/74-5/77. :

State of New York
County of Albany

Jean Schultz, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of February, 1980, she served the within notice of Determination by mail upon Emily Peters, d/b/a Newport Inn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Emily Peters
d/b/a Newport Inn
129-18 Newport Ave.
Belle Harbor, NY 11694

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
29th day of February, 1980.

Joanne Krapp

Jean Schultz

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Emily Peters :
d/b/a Newport Inn : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Periods 9/73-11/73, 3/74-5/77. :

State of New York
County of Albany

Jean Schultz, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of February, 1980, she served the within notice of Determination by mail upon Joseph A. Gallo 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. Gallo
and Murray Appleman
1332 Forest Ave.
Staten Island, NY 10302

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
29th day of February, 1980.

Joanne Krapp

Jean Schultz

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

February 29, 1980

Emily Peters
d/b/a Newport Inn
129-18 Newport Ave.
Belle Harbor, NY 11694

Dear Ms. Peters:

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
Joseph A. Gallo
and Murray Appleman
1332 Forest Ave.
Staten Island, NY 10302
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
EMILY PETERS	:	DETERMINATION
d/b/a NEWPORT INN	:	
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 September 1, 1973 through	:	
November 30, 1973 and March 1, 1974	:	
through May 31, 1977.	:	

Applicant, Emily Peters d/b/a Newport Inn, 129-18 Newport Avenue, Belle Harbor, New York 11694, 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 periods September 1, 1973 through November 30, 1973 and March 1, 1974 through May 31, 1977 (File No. 20500).

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 March 22, 1979 at 2:45 P.M. and was continued on May 22, 1979 at 2:45 P.M. and September 18, 1979 at 1:15 P.M. Applicant appeared by Murray Appleman, Esq. and Joseph Gallo, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the Audit Division is precluded from performing a markup audit when it appears that applicant has maintained adequate books and records.

II. Whether the audit procedures employed by the Audit Division in an examination of applicant's books and records were proper and the resultant findings of additional taxable sales were correct.

FINDINGS OF FACT

1. During the period at issue, applicant, Emily Peters d/b/a Newport Inn, operated a neighborhood restaurant and bar located at 129th Street and Newport Avenue in Rockaway Park, New York. The business was sold on June 7, 1977.

2. On August 30, 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 applicant for the periods September 1, 1973 through November 30, 1973 and March 1, 1974 through May 31, 1977 for taxes due of \$28,276.51, plus penalty and interest of \$13,777.79, for a total of \$42,054.30.

3. Applicant executed a consent extending the time within which to issue an assessment of sales and use taxes for the periods in issue, to December 20, 1977.

4. Applicant timely filed an application for revision of the aforementioned determination.

5. On audit, the sales tax auditor totaled bank deposits recorded in the cash receipts journal and determined that such deposits exceeded sales reported on sales tax returns filed for the period under audit by \$111,943.00. A markup test was then performed for liquor, wine and beer using purchases for the months of November, 1976 and December, 1976, which revealed a combined liquor-wine markup of 327 percent and a beer markup of 268 percent. The auditor estimated the food markup at 125 percent because current food purchases were not available to perform a test. The markups were applied to applicable purchases for the audit period which resulted in additional taxable sales of \$355,943.00. The markup computations for liquor, wine and beer considered the following:

a) quantity, cost and selling prices of individual brands,

- b) 1-ounce serving of liquor (1½ ounces and 2½ ounces for certain brands),
- c) wine sold by the bottle,
- d) 15 percent allowance for liquor spillage and buy backs.

The Audit Division also asserted additional sales tax of \$57.04 on furniture and fixtures sold with the business; however, this is not at issue. The total tax deficiency determined of \$28,276.51 includes \$632.80 in unpaid sales taxes reported on applicant's return filed for the period March 1, 1977 through May 31, 1977 and is not at issue in this hearing.

6. The discrepancy found by the Audit Division between applicant's bank deposits and sales was erroneous in that the discrepancy included deposits of \$35,742.00 for periods not under audit. In addition, applicant substantiated that bank deposits included loans of \$26,413.00; therefore, the difference between bank deposits attributable to sales and reported sales is \$49,788.00.

7. Applicant argued that the books and records were substantially correct and accurately reflect the business activity and, as such, precluded the Audit Division from using the audit procedures described in Finding of Fact "5" to determine sales. Applicant went on to argue that the Audit Division must demonstrate the total inadequacy of the books and records to establish a basis for using such indirect audit procedures.

8. The books and records maintained by applicant were insufficient for the Audit Division to determine the exact amount of applicant's sales tax liability. The cash receipts journal did not record actual sales of food, beer and liquor, but rather recorded bank deposits on an inconsistent basis.

9. Applicant submitted her own markup test using the same purchases as the Audit Division which indicated a liquor markup of 143 percent and a beer markup of 155 percent.

10. During the period at issue, applicant's liquor drinks contained $1\frac{1}{2}$ ounces to 3 ounces of liquor and when combined with wine sold by the bottle results in an overall liquor and wine markup of 191 percent.

11. Applicant's personal consumption of food from the business amounted to \$2,600.00 a year.

12. Applicant contended that the amount of food purchases marked up by the Audit Division should be reduced to reflect the following factors:

- a) payments of approximately \$19,000 during the audit period for food purchased prior to 1973,
- b) allowance for waste of 25 percent,
- c) expense purchases erroneously recorded in the cash disbursements journal as food purchases.

The above contentions were not supported by any substantial evidence.

CONCLUSIONS OF LAW

A. That the Audit Division was not required to accept applicant's books and records as presented. The audit procedures described in Finding of Fact "5" are generally accepted procedures established by the Audit Division and are used to determine the accuracy of books and records. That in the instant case, such procedures showed that applicant's books and records were incorrect and formed the basis of a proper determination in accordance with the provisions of section 1138(a) of the Tax Law.

B. That the Audit Division, in using proper audit procedures and tests, overstated applicant's markup on liquor and wine in that the Division did not give full consideration to the amount of liquor served in drinks as indicated in Finding of Fact "9". Accordingly, the combined liquor and wine markup is reduced to 191 percent. Additionally, the Audit Division did not give consideration to personal consumption of food referred to in Finding of Fact "10"; therefore, food sales are adjusted to \$227,923.00.

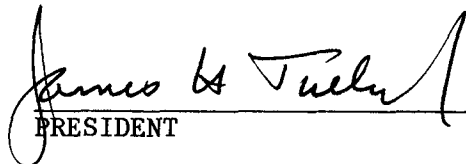
C. That in all other respects, the audit findings were supported by substantial evidence.

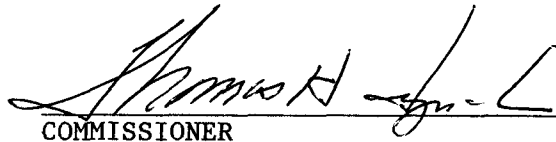
D. That the application of Emily Peters d/b/a Newport Inn is granted to the extent of reducing the additional sales and use taxes due for the periods September 1, 1973 through November 30, 1973 and March 1, 1974 through May 31, 1977 to \$20,985.58 to conform with Conclusion of Law "B". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 30, 1977; and that, except as so granted, the application is in all other respects denied.

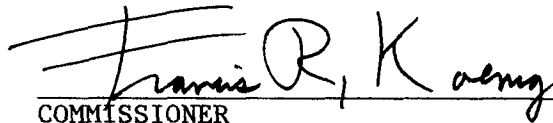
DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1980


PRESIDENT


COMMISSIONER


COMMISSIONER