

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leonard Sample & Ernest Sample :
d/b/a Town Tavern : 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 3/1/72-11/13/73. :

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 22nd day of February, 1980, he served the within notice of Determination by mail upon Leonard Sample & Ernest Sample, d/b/a Town Tavern, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Sample & Ernest Sample
d/b/a Town Tavern
P.O. Box 46
Mooers, NY 12958

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
22nd day of February, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Leonard Sample & Ernest Sample :
d/b/a Town Tavern : 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 3/1/72-11/13/73. :

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 22nd day of February, 1980, he served the within notice of Determination by mail upon Eugene J. Steiner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

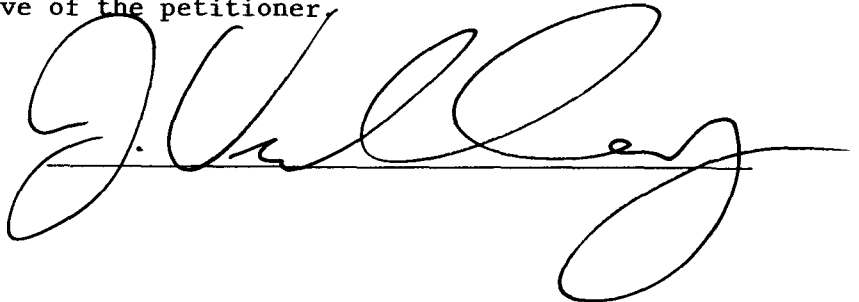
Mr. Eugene J. Steiner
90 State St.
Albany, NY 12207

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
22nd day of February, 1980.

Joanne Knapp



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

February 22, 1980

Leonard Sample & Ernest Sample
d/b/a Town Tavern
P.O. Box 46
Mooers, NY 12958

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
Eugene J. Steiner
90 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
LEONARD SAMPLE and ERNEST SAMPLE,	:	
Individually and as Co-Partners	:	DETERMINATION
d/b/a Town Tavern	:	
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, 1972 through	:	
November 13, 1973.	:	

Applicants, Leonard Sample and Ernest Sample, individually and as co-partners, d/b/a Town Tavern, P.O. Box 46, Mooers, New York 12958, 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, 1972 through November 13, 1973 (File No. 15856).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on February 8, 1979 at 9:15 A.M. and was continued on June 4, 1979 at 9:15 A.M. Applicants appeared by Eugene Steiner, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Kathy Sanderson, Esq., of counsel).

ISSUE

Whether the audit procedures employed by the Sales Tax Bureau were proper and the resultant findings of additional taxable sales for the period March 1, 1972 through November 13, 1973 were correct.

FINDINGS OF FACT

1. Applicants, Leonard and Ernest Sample, were co-partners in the operation of a bar known as the Town Tavern in Mooers, New York. The partnership was dissolved on November 13, 1973 and applicant Leonard Sample continued to operate the Town Tavern as a sole proprietor.

2. On June 6, 1975, as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants, Leonard Sample and Ernest Sample, individually and as co-partners, for the period March 1, 1972 through November 13, 1973. The notice was issued for \$14,176.63, plus penalty and interest of \$4,653.53, for a total of \$18,830.16.

3. Applicants executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes for the period December 1, 1971 through November 30, 1974. The consent extended the period to June 1, 1975.

4. Applicants timely applied for a hearing to review the aforesaid determination.

5. On February 10, 1975, the Sales Tax Bureau was scheduled to conduct an audit of the books and records of the Town Tavern for the period December 1, 1971 through November 30, 1974. At that time, it discovered the change in ownership of the Town Tavern and, therefore, performed two separate audits. Applicants did not provide any books and records pertaining to the business operation, other than some copies of sales tax returns and various monthly statements from beer and liquor suppliers for the years 1973 and 1974. The Sales Tax Bureau totaled statements for three months that corresponded with a sales tax quarter and found that purchases exceeded the sales reported for the same period. Because of this discrepancy, the Sales Tax Bureau contacted, by mail and in person, the beer and liquor suppliers named on the aforementioned statements

and requested information on purchases made by the Town Tavern. This information disclosed that the Town Tavern made purchases of beer and liquor totaling \$113,586.47 for the period December 1, 1971 through November 30, 1974. The purchases were adjusted to \$76,870.79 to reflect only those purchases relating to the period of the partnership. Applicants reported taxable sales of \$20,460.00 for the same period. A markup test for beer and liquor was performed using purchase invoices for the month of July 1974 which were provided by one beer distributor and two liquor wholesalers at the request of the Sales Tax Bureau. The resultant markups determined for beer and liquor were 166 percent and 244 percent, respectively. The markups were computed using a one ounce shot glass and 15 percent spillage for liquor drinks and a twelve ounce glass and 15 percent spillage for draft beer. The selling prices and drink sizes were provided by Eugene Steiner, applicants' representative. The markups were applied to applicable purchases to arrive at audited beer and liquor sales of \$225,933.54.

The Sales Tax Bureau observed cigarettes being sold at the bar and was informed by a bartender that the cigarettes were purchased from a wholesaler in Malone, New York. The wholesaler was able to provide the quantity of cigarettes sold to the Town Tavern for a five week period. Based on this information, cigarette sales were determined to be \$600.00 per sales tax quarter.

The Sales Tax Bureau also observed the sale of sandwiches, snacks, pickled eggs and sausages from the bar. There was a banquet hall on the premises with seating facilities for approximately 200 persons. Based on its observations and past experience with audits of similar businesses, the Sales Tax Bureau estimated food sales at \$2,000.00 per quarter.

Total audited sales of liquor, beer, cigarettes and food were \$245,927.54. Reported taxable sales of \$20,460.00 were deducted from this amount, leaving

additional taxable sales of \$225,467.54 and tax due thereon of \$15,783.03. Due to the statute of limitations, the sales taxes determined to be due for the period ending February 29, 1972 were deleted when the notice was issued.

6. Applicant Ernest Sample contended that the books and records were destroyed in a fire that occurred sometime in 1972. The damage caused by the fire was limited to the bar area where the records were stored. Applicant Ernest Sample could not give a specific date of the fire. Applicant Ernest Sample contended that there was no insurance coverage and that the fire was not reported to a fire department. Applicant Ernest Sample could not explain the whereabouts of records for the period after the alleged fire.

7. Applicants contended that the audit methods used by the Sales Tax Bureau in determining the sales tax for the period at issue were purely estimates and wholly without foundation and fact; and that the amount of tax due was erroneous because the Sales Tax Bureau did not give consideration to the following:

- (a) The amount of liquor in a drink was from two to three ounces, depending on the type of drink.
- (b) There was a daily "happy hour" from 4:00 P.M. to 8:00 P.M. where a customer received two drinks for the price of one, with no reduction in the quantity of liquor.
- (c) The practice of giving a free drink to a customer who purchased four drinks.
- (d) The selling price of bottled beer was \$.35, rather than \$.55.
Draft beer was served in sixteen ounce mugs, in addition to twelve ounce glasses.
- (e) Inventory withdrawn for personal use.

- (f) Broken or damaged bottles.
- (g) There was not a restaurant comparable to the Town Tavern in the Mooers area and to make a comparison to a restaurant in another geographic location would not be accurate.
- (h) The banquet hall was used only for dances on weekends because the kitchen was inoperable.

8. Applicants failed to present any substantive evidence to show that the basis upon which the additional sales taxes due were determined was improper or unreasonable or that the results were incorrect.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, inter alia, that if a return, when filed, is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available and, if necessary, the tax may be estimated on the basis of external indices; that in the absence of applicants' books and records, the audit procedures used by the Sales Tax Bureau to determine applicants' taxable sales were proper as authorized in said section of the Tax Law. Matter of Meyer v. State Tax Commission, 61 AD 2d 223, mot for lv. to app. den. 44 NY2d 645.

B. That the Sales Tax Bureau's audit findings of additional sales taxes due in the amount of \$14,176.63 were supported by substantial evidence; and that applicants have failed to establish the inaccuracy of said amount and, therefore, the Sales Tax Bureau's determination is correct. Matter of Manny Convissar v. State Tax Commission, 69 AD 2d 929; Matter of Goldner v. State Tax Commission, No. 33754, Appellate Division, 3rd Dept., June 14, 1979.

C. That the application of Leonard Sample and Ernest Sample d/b/a Town Tavern is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 6, 1975 is sustained.

DATED: Albany, New York

FEB 22 1980

STATE TAX COMMISSION


RESIDENT


COMMISSIONER

COMMISSIONER