

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Shore Manor - JJ Development Corp :

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 - 5/31/77. :

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 17th day of October, 1980, he served the within notice of Decision by mail upon Shore Manor - JJ Development Corp, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Shore Manor - JJ Development Corp
1443 Montauk Hwy.
Mastic, NY 11950

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
17th day of October, 1980.

Eustach A Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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State of New York
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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 17th day of October, 1980, he served the within notice of Decision by mail upon Herbert Grodin & Paul Beeber the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

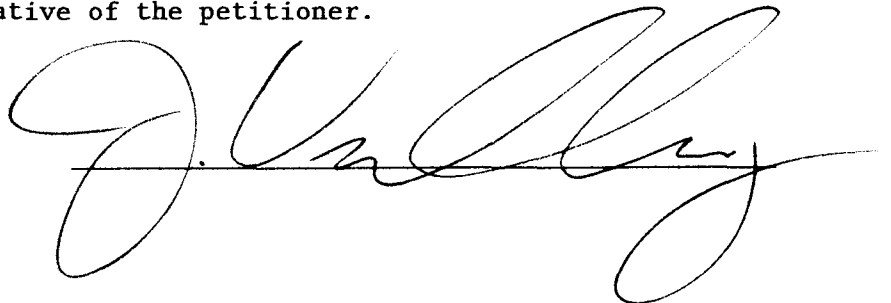
Messr. Herbert Grodin & Paul Beeber
32 Delaware Ave.
Jericho, NY 11753

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
17th day of October, 1980.





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

October 17, 1980

Shore Manor - JJ Development Corp
1443 Montauk Hwy.
Mastic, NY 11950

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
Herbert Grodin & Paul Beeber 32 Delaware Ave.
Jericho, NY 11753
Taxing Bureau's Representative

STATE TAX COMMISSION

DECISION

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 April 25, 1980 at 9:15 A.M. Petitioner appeared by Paul Beeber, Esq. and Herbert Grodin, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

II. Whether the additional taxable sales determined by the Audit Division, based on an examination of petitioner's books and records, were correct.

2. On December 16, 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 petitioner for the period December 1, 1973 through May 31, 1977 for taxes due of \$14,485.28, plus penalty and interest of \$6,524.65, for a total of \$21,009.93.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1973 through August 31, 1976 to March 20, 1978.

4. On audit, the Audit Division performed markup tests for liquor, wine and beer using purchase invoices and selling prices for November, 1976. The test disclosed a combined liquor and wine markup of 214.93 percent and a beer markup of 382.61 percent. Petitioner's accountant prepared a food markup test for November, 1976 which was reviewed by the Audit Division. Petitioner's test revealed a markup of 87 percent; however, the Audit Division adjusted the markup to 140 percent to reflect individual sales of coffee, tea, desserts, soda and salad that were listed on guest checks and not included in petitioner's test. The markup percentages were applied to applicable purchases for the audit period which resulted in additional taxable sales of \$195,518.16. The Audit Division allowed 2 percent of food purchases for spoilage, \$5,100.00 for employee meals and \$2,520.00 for self-consumed liquor. Use taxes of \$182.77 were asserted on the self-consumed liquor purchases. The audit also disclosed that petitioner overcollected sales taxes of \$616.84 for the audit period based on a test of guest checks totaling \$510.40.

5. The petitioner's markup test for food referred to in Finding of Fact "4" was based on food items listed on guest checks, quantities of such items sold, menu selling prices, and purchase invoices. The cost of each item included the entree, salad bar, and where applicable, vegetable, potato, bread and coffee. The Audit Division determined that the markup test was inaccurate because it found separate charges on guest checks for salad, coffee, tea, soda

and dessert and such items were not considered in petitioner's test. Additionally, the Division concluded that salad was not complimentary with all meals and thereby petitioner overstated cost of meals. The markup was adjusted as follows:

sales per markup test	\$4,115.25	cost per markup test	\$2,182.79
additional sales of coffee		reduction for salad cost	
soda, tea, desserts	250.45	on 740 meals @ .50	370.00
adjusted sales per test	<u>\$4,365.60</u>		<u>\$1,812.79</u>
adjusted sales	\$4,365.60	gross profit	<u>\$2,552.81</u>
less: adjusted cost	<u>1,812.79</u>	cost	<u>\$1,812.79</u> = 140%
gross profit	<u>\$2,552.81</u>		

6. Petitioner's selling prices of dinner entrees includes salad bar, bread, potato and coffee. The salad bar is also complimentary with luncheon items; however, there is a charge for salad with luncheon items served after 4:00 P.M.

7. Petitioner properly included a cost for salad and coffee in its markup test for dinner entrees. Petitioner also included a cost for salad on all luncheon items; however, the charges for salad on the guest checks indicate that luncheon items were sold after 4:00 P.M. Therefore, the markup computed by petitioner is understated to the extent of luncheon items sold after 4:00 P.M. where the patron was not entitled to a salad. The Audit Division also erred in the computation of the adjusted markup. The Division determined additional sales of coffee, soda, tea, desserts and salad, but did not consider petitioner's cost of such items. During the test month, petitioner served a total of 491 luncheon items. Accordingly, the Audit Division's disallowance of salad cost on 740 meals was erroneous. Based on the foregoing errors, petitioner's food markup was 108 percent.

8. Petitioner served free hors d'oeuvres such as shrimp, meatballs and sandwiches at the bar on certain days during the week. Cheese and crackers were available daily. The cost of such items for the audit period was \$7,800.00.

9. Petitioner's food purchases recorded in its books and records included purchases of soda and ice totaling \$7,011.00. These items were used in bar drinks and are not applicable to the food markup. Petitioner also argued that purchases of coffee, cream and sugar should be deleted from food purchases; however, since the markup test considered a cost for such items, they are properly includible.

10. Petitioner contended that the Audit Division did not give consideration to its practice of giving a free drink to a customer who purchased three drinks, excessive waste of draft beer due to outdated equipment, and sales of six packs. Petitioner offered no substantial evidence to support these contentions.

11. Petitioner's books and records reflect an overall markup of 92 percent, whereas the markup tests for November, 1976 revealed an overall markup of 175 percent.

12. Petitioner argued that it maintained and provided the auditor with complete and adequate books and records and, therefore, the Audit Division lacked a basis for making a determination using a test period method.

13. Petitioner did not willfully attempt to evade the tax.

CONCLUSIONS OF LAW

A. That the Audit Division was not required to accept petitioner's books and records as presented. The audit procedures described in Finding of Fact "4" are generally accepted procedures established by the Audit Division and are used to verify the accuracy of books and records. Matter of Emily Peters d/b/a Newport Inn, State Tax Commission Decision, February 29, 1980.

That such procedures disclosed a significant discrepancy with petitioner's sales records to substantiate a determination that such records were insufficient or incorrect.

B. That since petitioner's books and records were insufficient, the Audit Division could not determine the exact amount of tax due therefore the use of a test period to determine petitioner's sales was proper in accordance with the provisions of section 1138(a) of the Tax Law. Matter of Chartair Inc. v. State Tax Commission, 65 A.D.2d 44.

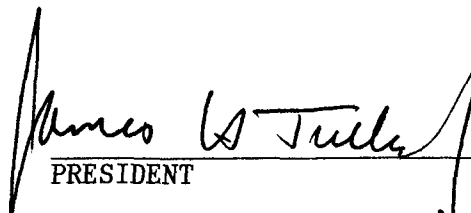
C. That the Audit Division, in using proper audit procedures and tests, did not give consideration to the factors set forth in Findings of Fact "7", "8" and "9"; therefore, the Audit Division's findings of additional taxable sales for the period December 1, 1973 through May 31, 1977 are reduced to \$124,459.00.

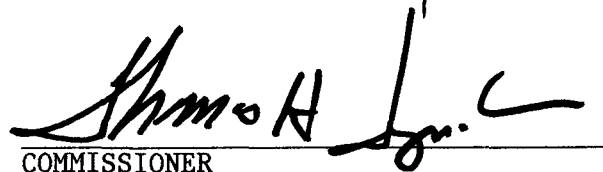
D. That the petition of Shore Manor - J J Development Corp. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 16, 1977, together with interest computed at the minimum statutory rate; and that, except as so granted, the petition is in all other respects denied.

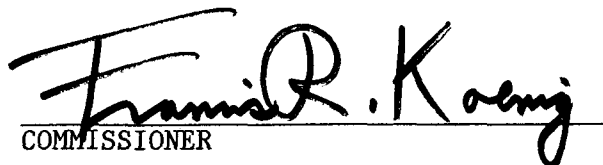
DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER