

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward Carroll :
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 9/1/75-8/31/78. :

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Edward Carroll, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Carroll
6702 5th Ave.
Brooklyn, NY 11220

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
25th day of September, 1981.

Annie G. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward Carroll :
AFFIDAVIT OF MAILING
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under Article 28 & 29 of the Tax Law for the :
Period 9/1/75 - 8/31/78.

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Kevin P. McGovern the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kevin P. McGovern
McGovern & Neglia
7006 Third Ave.
Brooklyn, NY 11209

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
25th day of September, 1981.

Connie A. Haglund

J. Vredenburg

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

September 25, 1981

Edward Carroll
6702 5th Ave.
Brooklyn, NY 11220

Dear Mr. Carroll:

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
Kevin P. McGovern
McGovern & Neglia
7006 Third Ave.
Brooklyn, NY 11209
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDWARD CARROLL	:	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 September 1, 1975	:	
through August 31, 1978.	:	

Petitioner, Edward Carroll, 67-02 5th Avenue, Brooklyn, New York 11220, 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 September 1, 1975 through August 31, 1978 (File No. 25543).

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 28, 1981 at 10:45 A.M. Petitioner appeared by Kevin Patrick McGovern, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period September 1, 1975 through August 31, 1978.

FINDINGS OF FACT

1. Petitioner, Edward Carroll, operated a small neighborhood bar located at 67-02 5th Avenue, Brooklyn, New York.
2. On March 12, 1979, 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 covering the period September 1, 1975 through August 31,

1978 for taxes due of \$8,381.52, plus penalty and interest of \$3,530.93, for a total of \$11,912.45.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period at issue, to March 20, 1979.

4. On audit, the Audit Division performed a markup test for liquor, wine and beer based on purchases for the month of May 1978. The test disclosed a combined liquor and wine markup of 286.94 percent and a beer markup of 119.8 percent. These percentages were applied to applicable purchases for the audit period to arrive at adjusted sales of \$219,271.00. Petitioner reported sales of \$114,502.00, leaving additional taxable sales of \$104,769.00 and tax due thereon of \$8,381.52.

The Audit Division used a 1-ounce serving of liquor in its markup computation for liquor based on the size of the shot glass furnished by petitioner. An allowance of 15 percent was given for spillage and buy backs. Petitioner also provided the following selling prices: rye - .50, scotch - .60, draft beer - .25 per glass and bottle beer - .50. The selling prices for rye and scotch were not used by the Audit Division in computing the liquor markup. Instead, the Audit Division used selling prices of .75 and .85, respectively which were obtained from a visit to petitioner's premises on November 10, 1978.

5. Petitioner increased his selling prices for liquor drinks between May, 1978 and November, 1978. The actual selling prices for purposes of computing a liquor markup were as provided by petitioner at the time the audit was conducted.

6. Petitioner argued that he gave one free drink to regular customers who purchased three drinks and that due to such practice, the 15 percent allowance for spillage and buy backs was not sufficient.

7. The books and records maintained by petitioner were insufficient for the Audit Division to determine the exact amount of petitioner's tax liability or to verify the accuracy of reported taxable sales.

Petitioner estimated the taxable sales reported on sales tax returns filed for the period at issue.

8. Petitioner failed to establish that reasonable cause existed for the abatement of penalty and interest in excess of the statutory rate.

CONCLUSIONS OF LAW

A. That in view of petitioner's insufficient recordkeeping, the Audit Division properly determined additional sales taxes due in accordance with section 1138(a) of the Tax Law. However, the Audit Division overstated the markup on liquor in that it used incorrect selling prices as indicated in Finding of Fact "5". Therefore, the liquor markup shall be adjusted to reflect the correct selling prices set forth in Finding of Fact "4" and the additional taxes due reduced accordingly.

B. That the petition of Edward Carroll is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 12, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 25 1981

STATE TAX COMMISSION

James H. Tuohy
RESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Hall
COMMISSIONER