

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Victor & Jacqueline Castine
d/b/a Lakeview Snack

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:

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 3/1/74 - 2/28/77.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Victor & Jacqueline Castine, d/b/a Lakeview Snack, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor & Jacqueline Castine
d/b/a Lakeview Snack
R.F.D. Box 242
Champlain, NY 12919

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
5th day of June, 1981.

Cornie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Victor & Jacqueline Castine :
d/b/a Lakeview Snack :
: AFFIDAVIT OF MAILING

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under Article 28 & 29 of the Tax Law for the :
Period 3/1/74 - 2/28/77.

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 5th day of June, 1981, he served the within notice of Decision 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
Steiner & 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
5th day of June, 1981.

Connie A. Hagelund

J. Vredenburg

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

June 5, 1981

Victor & Jacqueline Castine
d/b/a Lakeview Snack
R.F.D. Box 242
Champlain, NY 12919

Dear Mr. & Mrs. Castine:

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

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| of | : | |
| VICTOR CASTINE and JACQUELINE CASTINE | : | DECISION |
| d/b/a LAKEVIEW SNACK | : | |
| 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, 1974 | : | |
| through February 28, 1977. | : | |

Petitioners, Victor Castine and Jacqueline Castine d/b/a Lakeview Snack, R.F.D. Box 242, Champlain, New York 12919, 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 March 1, 1974 through February 28, 1977 (File No. 20342).

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 January 6, 1981 at 1:15 P.M. Petitioners appeared by Eugene Steiner, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division to determine additional taxable sales and taxes due were proper.

FINDINGS OF FACT

1. Petitioners, Victor Castine and Jacqueline Castine d/b/a Lakeview Snack operated a bar located in Champlain, New York.
2. On June 15, 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 petitioners covering the period March 1, 1974 through February 28, 1977 for taxes due of \$9,881.53, plus penalty and interest of \$3,682.86, for a total of \$13,564.39.

3. On audit, the Audit Division found that petitioners' purchases of liquor, beer and wine for 1975 and 1976 were \$56,217.39 and sales reported on sales tax returns for the same period were \$29,319.25. Consequently, a markup test was performed for liquor, beer and wine using purchases for the months of March 1977 and April 1977, which revealed a weighted average markup of 93.6 percent. The liquor markup was computed using a 2 ounce serving of liquor for all brands and types of drinks. The weighted average markup was applied to applicable purchases for the period September 1, 1974 through August 31, 1976 to arrive at audited liquor, beer and wine sales of \$101,872.32. Petitioners reported sales of \$28,112.00 for the same period or an underreporting factor of 362.4 percent. This percentage was applied to reported sales for the entire audit period to determine total audited liquor, beer and wine sales of \$159,061.54.

The Audit Division also determined that petitioners failed to report sales of soda, potato chips, peanuts, etc., totaling \$15,757.30 for the period under audit. This amount was combined with the audited liquor, beer and wine sales to arrive at total sales of \$174,818.84 and tax due thereon of \$12,237.32. Petitioner paid sales taxes of \$2,355.79 leaving additional taxes due of \$9,881.53. (The audit reflects unpaid sales tax of \$213.71 reported on the return filed for the period ending August 31, 1975 and returns not filed for the periods ending November 30, 1976 and February 28, 1977.)

4. Petitioners contended that liquor drinks were served in an eight ounce glass and contained between three and four ounces of liquor.

5. At the hearing, petitioners introduced cash receipts and disbursement journals for the years 1974, 1975 and 1976 and argued that the sales recorded therein reflect the actual sales of the business and as such, preclude the Audit Division from using the audit procedures described herein above.

Said records indicated that during the period at issue, petitioners deducted from gross receipts certain sales of \$16,605.15, which were considered nontaxable. The records also showed that petitioners sold drinks for less than cost.

6. The books and records maintained by petitioners were insufficient for the Audit Division to determine the exact amount of taxable sales and sales tax liability.

7. Petitioners offered no substantial evidence to show that the Audit Division's determination was incorrect.

8. Petitioners' failed to establish that reasonable cause existed for the cancellation of penalty and interest.

CONCLUSIONS OF LAW

A. That the audit procedures described in Finding of Fact "3" are generally accepted procedures established by the Audit Division and are used to verify the accuracy of books and records. That such procedures disclosed that petitioners' books and records and sales tax returns filed were insufficient.

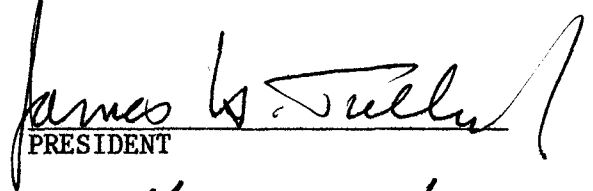
B. That since petitioners' books and records were insufficient, the audit procedures and tests adopted by the Audit Division to determine petitioners taxable sales and taxes due were proper pursuant to section 1138(a) of the Tax Law, Matter of Chartair, Inc. v. State Tax Commission, 65 AD2d 44 and that petitioners have failed to sustain the burden of showing error, Matter of Manny Convissar v. State Tax Commission, 69 AD2d 929.

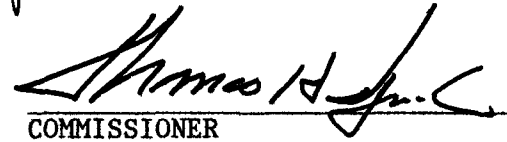
D. That the petition of Victor Castine and Jacqueline Castine d/b/a Lakeview Snack is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 15, 1977 is sustained

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER