

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

James & Robert DePalo  
d/b/a DePalo's Dugout

:

:

: 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:  
6/1/72-5/31/75.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon James & Robert DePalo, d/b/a DePalo's Dugout the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James & Robert DePalo  
d/b/a DePalo's Dugout  
130 West Post Rd.  
White Plains, NY

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  
6th day of November, 1981.

*Annie P. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

James & Robert DePalo :

d/b/a DePalo's Dugout :

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 6/1/72-5/31/75 :

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Richard J. DioGuardi the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

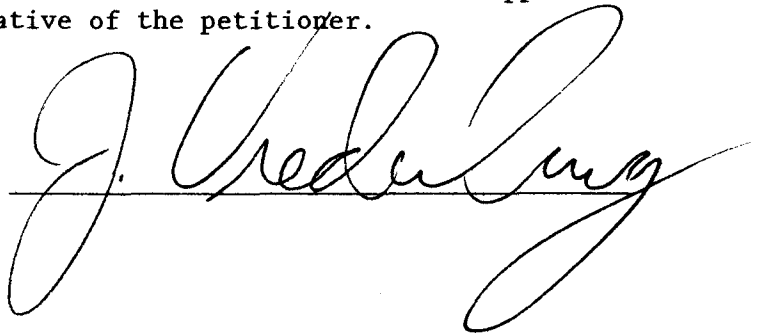
Richard J. DioGuardi  
DioGuardi, Eletto & Co.  
105 Central Park S., Suite 339-341  
New York, NY 10019

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  
6th day of November, 1981.





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

November 6, 1981

James & Robert DePalo  
d/b/a DePalo's Dugout  
130 West Post Rd.  
White Plains, NY

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  
Richard J. DioGuardi  
DioGuardi, Eletto & Co.  
105 Central Park S., Suite 339-341  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JAMES and ROBERT DE PALO	:	DECISION
d/b/a DE PALO'S DUGOUT	:	
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 June 1, 1972	:	
through May 31, 1975.	:	

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Petitioners, James and Robert DePalo d/b/a DePalo's Dugout, 130 West Post Road, White Plains, New York 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 June 1, 1972 through May 31, 1975 (File No. 14363).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 23, 1980 at 9:30 A.M. Petitioners appeared by DioGuardi, Eletto & Co. (Richard J. DioGuardi, CPA. and Ronald V. Eletto, CPA.) The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the use by the sales tax auditor of external indices in conducting its audit of Depalo's Dugout was a necessary and proper use of such indices within the meaning of section 1138(a) of the Tax Law.

FINDINGS OF FACT

1. Petitioners operate a restaurant and bar selling food, beer, liquor and wine. Petitioners' business was audited for the periods from June 1, 1972

through May 31, 1975, as a result of which petitioners were assessed additional sales taxes in the amount of \$43,504.41, plus penalties and interest.

2. On September 3, 1975, petitioners filed a consent extending the period of limitation for assessment of sales and use taxes, for the taxable periods June 1, 1972 through May 31, 1975 until September 20, 1976.

3. The Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, No. 90,758,711, dated January 19, 1976 for the period June 1, 1972 through May 31, 1975 for tax of \$43,504.41, penalties and interest of \$15,643.22, for a total of \$59,147.63 to James DePalo and Robert DePalo, individually and as co-partners doing business as DePalo's Dugout.

4. At the time of the sales tax audit, petitioners did not have any sales records or general ledgers for the period involved herein. No cash receipts books existed and not all purchase invoices were submitted. Petitioners submitted guest checks only for April and May of 1974 and register tapes only for April, 1974. No records were kept of food purchases; although the audit disclosed that food purchases are paid by cash.

5. Petitioners submitted bank statements for the audit period, a cash disbursements book, ST-100's, and federal tax returns to the sales tax auditor.

6. There being incomplete vendor records, the auditor performed markup tests on beer, wine and liquor. The sales tax auditor, in conducting his markup test on liquor, beer and wine, used petitioners' purchase invoices and glass sizes, and the sales prices supplied to the auditor by petitioners' representative, Don J. Guarnieri, for the test months of April and May, 1974. An allowance of 15 percent was made for spillage, waste, theft and gifts. The

auditor determined that a 354 percent markup for wine and liquor and a 266 percent markup for beer were properly reflective of petitioners' actual sales.

7. The sales tax auditor estimated a 150 percent markup for food sold on petitioners' premises during the audit period based on menu prices and comparable businesses.

8. The adjusted taxable sales based on the markups described in Findings of Fact "6" and "7" totalled \$1,375,058.21, less taxable sales reported \$658,905.00, for additional taxable sales of \$716,153.21.

9. Petitioners did not present testimony of anyone employed at the restaurant and bar as to the actual operation of the bar, drink sizes and other relevant matters. Instead, the petitioners relied on generalized testimony of an accountant other than the accountant who kept the books and records of petitioner.

10. Petitioners failed to adduce sufficient evidence to show that the unit sizes of wine, beer and liquor used were incorrect.

11. Petitioners failed to adduce sufficient evidence that the 15 percent allowance for spillage, waste, theft and gifts was incorrect.

12. Petitioners failed to adduce sufficient evidence for the period herein involved that the sales tax auditor's markup and adjusted taxable sales were incorrect.

13. The ST-100 sales tax returns, filed by petitioners for the period herein involved were estimated and indicated no difference between gross sales and taxable sales.

14. Petitioners failed to adduce sufficient evidence that for the period herein involved there existed non-taxable sales.

15. Petitioners' federal tax returns for the period herein involved indicated that inventory did not change from year to year.

16. Petitioners' insufficient record keeping made a rational audit without resort to test periods and markups impossible.

17. Petitioner offered no evidence to show that reasonable cause existed for not paying over any of the tax asserted due.

#### CONCLUSIONS OF LAW

A. That petitioners were duly notified of the determination by the Audit Division that additional sales taxes for the period June 1, 1972 through May 31, 1975 were due.

B. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued within the time period prescribed by the Consent Extending the Period of Limitation for Assessment.

C. That the method used by the sales tax auditor in conducting the audit of petitioners' business was proper under the circumstances since a direct check of petitioners' records found them to be incomplete and unreliable, and the method was reasonably calculated to reflect the taxes due. (Grant v. Joseph, 2 N.Y. 2d 196; Charles R. Wood Enterprises, Inc. v. State Tax Commission, 67 A.D.2d 1042.)

D. That the use of markup percentages by the state auditor in conducting the audit of the petitioners' business was necessary and proper under section 1138(a) of the Tax Law.

E. Although the petitioners attempted to show that the mark-up percentages were inaccurate, they failed to establish that the assessment is erroneous and unreasonable. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of

sales tax liability. (See Convissar v. State Tax Commission, 69 A.D.2d 929 and Markowitz v. State Tax Commission, 54 A.D.2d 1023, aff'd. 44 N.Y. 2d 684.)

Petitioners are, therefore, liable for additional sales tax assessed for the periods June 1, 1972 through May 31, 1975.

F. That the petition of James and Robert DePalo d/b/a DePalo's Dugout is denied; and the assessment is sustained, with penalties and interest to the date of payment.

DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER