

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Berta Kusminsky :  
d/b/a Walter's 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 6/1/73-2/12/76. :

State of New York  
County of Albany

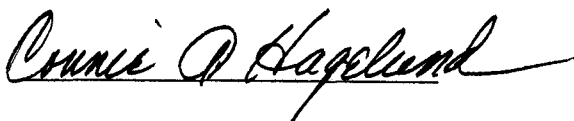
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 30th day of January, 1981, he served the within notice of Decision by mail upon Berta Kusminsky, d/b/a Walter's Tavern, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

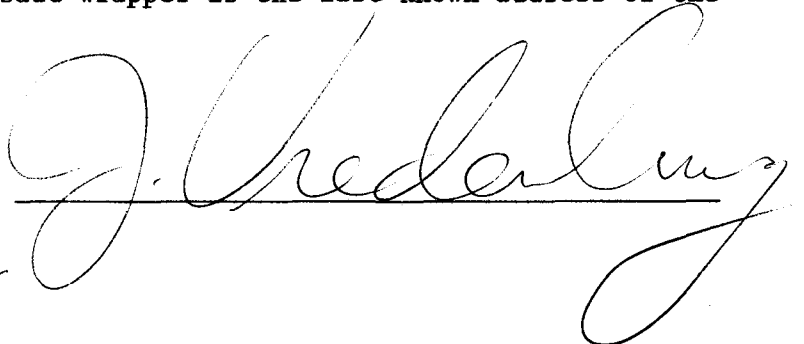
Berta Kusminsky  
d/b/a Walter's Tavern  
c/o Roman Olesnicki  
P.O. Box 127  
Kerhonkson, NY 12446

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  
30th day of January, 1981.

  
Connie D. Hagelund

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Berta Kusminsky :  
d/b/a Walter's Tavern : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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Sales & Use Tax :  
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for the Period 6/1/73-2/12/76. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon Roman Olesnicki 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. Roman Olesnicki  
P.O. Box 127  
Rts. 44 & 55, Minnewaska Trail  
Kerhonkson, NY 12446

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  
30th day of January, 1981.

*Connie P. Haglund*

*Jay Vredenburg*

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

January 30, 1981

Berta Kusminsky  
d/b/a Walter's Tavern  
c/o Roman Olesnicki  
P.O. Box 127  
Kerhonkson, NY 12446

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  
Roman Olesnicki  
P.O. Box 127  
Rts. 44 & 55, Minnewaska Trail  
Kerhonkson, NY 12446  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	DECISION
BERTA KUSMINSKY d/b/a WALTER'S 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 June 1, 1973	:	
through February 12, 1976.	:	

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Petitioner, Berta Kusminsky d/b/a Walter's Tavern, c/o Roman Olesnicki, Esq., P.O. Box 127, Kerhonkson, New York 12446, 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, 1973 through February 12, 1976 (File No. 20592).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 17, 1980 at 1:15 P.M. Petitioner appeared by Roman Olesnicki, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether the result of markups applied to purchases properly reflected petitioner's additional sales tax liability.

FINDINGS OF FACT

1. On August 6, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Berta Kusminsky d/b/a Walter's Tavern for the period June 1, 1973 through February 12, 1976, the date the business was sold. The Notice was issued in an estimated amount

of \$4,907.66 tax, plus penalties and interest, as a result of petitioner's failure to respond to a bulk sale questionnaire.

2. A field audit was subsequently performed by the Audit Division on which markups were applied to purchases. Purchase figures were available only for January 1975 through February 1976. Therefore, the Audit Division multiplied the quarterly average of purchases made in 1975 by eleven quarters in the audit period and determined total beer, liquor and wine purchases of \$19,426.00 and food purchases of \$5,357.00.

No purchase invoices were available for a markup test; therefore, the Audit Division applied a markup of 175 percent to beer, liquor and wine purchases and a markup of 100 percent to food purchases. These percentages were based on past audit experiences of similar business establishments. The application of the markups to the purchases and the comparison to the sales and use tax returns filed by petitioner resulted in additional tax due of \$2,074.21 for the audit period. The Audit Division accordingly revised the tax due plus applicable penalties and interest on April 1, 1977.

3. Petitioner's records were insufficient for the Audit Division to verify the exact amount of petitioner's taxable sales or sales tax.

4. Petitioner contended that sales were recorded daily by the amount of cash taken in, that weekly totals of sales were made, and that all figures were submitted to her attorney for preparation of the quarterly sales and use tax returns. Therefore, petitioner argued that all sales reported on her sales and use tax returns were correct. Petitioner did not maintain register tapes or any supporting documents of her sales.

5. Petitioner's records disclosed purchases of \$9,690.00 for the period January 1975 through February 1976 with corresponding sales of \$12,210.00.

6. Petitioner contended that inventory increased from the time the business was purchased to the time it was sold. Petitioner further contended that buy-backs were made for every three drinks purchased or that liquor was otherwise given away. Petitioner also contended that food was given away and withdrawn for self-consumption. No evidence was submitted to support these contentions or to show that the markup on beer, liquor and wine was lower than that used by the Audit Division.

7. Petitioner made no purchases during the month of January 1976. Purchases recorded during February 1976 amounted to \$531.00 for beer, liquor and wine as opposed to the average used by the Audit Division of \$588.67. Food purchases for February 1976 were \$237.00 as opposed to the average of \$162.33 used by the Audit Division. Further, the Audit Division's use of the quarterly average for food purchases should have been \$462.00 rather than \$487.00.

8. Petitioner's food sales consisted only of sandwiches which were sold at \$.70 and consisted of only 2 or 3 sales a day. Food was kept on hand mainly as a convenience to petitioner and a few customers. No profit was realized from food sales.

9. Petitioner offered no evidence to show that reasonable cause existed for not paying over any additional taxes asserted due.

#### CONCLUSIONS OF LAW

A. That the results of the field audit performed by the Audit Division did not give consideration to the fact that no purchases were made by petitioner during the month of January 1976 and that the amount of actual purchases were available for the month of February 1976. That the purchases of beer, liquor and wine marked up on audit is reduced to \$18,780.67 consistent with Finding of Fact "7".

B. That petitioner's food sales are reduced to the cost of such purchases made inasmuch as petitioner realized no profit from the sale of sandwiches. Petitioner's food purchases for the audit period are reduced to \$5,010.00 to be consistent with Finding of Fact "7".

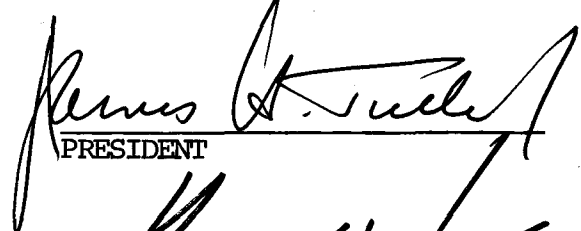
C. That except as noted in Conclusions "A" and "B" above, the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law in the absence of substantiating records.

D. That the petition of Berta Kusminsky d/b/a Walter's Tavern is granted to the extent indicated in Conclusions "A" and "B" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes due revised on April 1, 1977 together with the applicable penalties and interest; and that, except as so granted, the petition is in all other respects denied.

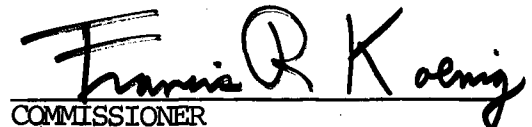
DATED: Albany, New York

JAN 30 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER