

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Emanuel Kotsonis & George Kotsonis :  
d/b/a The Liquor Shoppe :  
: 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 - 5/31/77.

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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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Emanuel Kotsonis & George Kotsonis, d/b/a The Liquor Shoppe the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

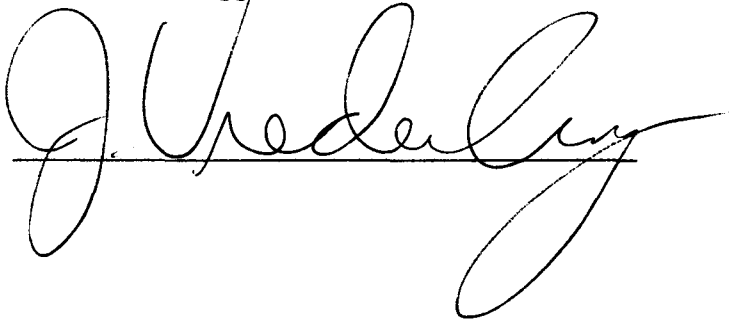
Emanuel Kotsonis & George Kotsonis  
d/b/a The Liquor Shoppe  
108A 7th Avenue  
Brooklyn, NY 11215

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  
27th day of November, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Emanuel Kotsonis & George Kotsonis :  
d/b/a The Liquor Shoppe :  
: 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 - 5/31/77. :

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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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Sophocles A. Kondoleon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

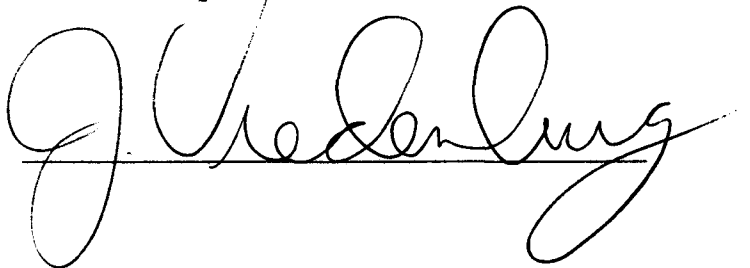
Sophocles A. Kondoleon  
13-27 Parsons Blvd.  
Whitestone, NY 11357

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  
27th day of November, 1981.





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

November 27, 1981

Emanuel Kotsonis & George Kotsonis  
d/b/a The Liquor Shoppe  
108A 7th Avenue  
Brooklyn, NY 11215

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  
Sophocles A. Kondoleon  
13-27 Parsons Blvd.  
Whitestone, NY 11357  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
EMANUEL KOTSONIS AND GEORGE KOTSONIS : DECISION  
d/b/a THE LIQUOR SHOPPE :  
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 May 31, 1977. :  
:

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Petitioners, Emanuel Kotsonis and George Kotsonis d/b/a The Liquor Shoppe, 108A 7th Avenue, Brooklyn, New York 11215, 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 May 31, 1977 (File No. 20960).

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 December 11, 1980, at 10:45 A.M. Petitioners appeared by Sophocles A. Kondoleon, RPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the results of a field audit performed by the Audit Division using a one-month test of purchases to determine a purchase ratio and mark up properly reflected petitioners' sales tax liability.

FINDINGS OF FACT

1. On November 9, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Emanuel Kotsonis and George Kotsonis d/b/a The Liquor Shoppe. The Notice was issued as a result of a field audit covering the period March 1, 1974 through May 31, 1977 and

asserted additional sales tax due of \$8,671.95 plus penalties and interest of \$3,930.60 for a total of \$12,602.55.

2. Petitioners executed a consent to extend the period of limitation for assessment to May 20, 1978.

3. On audit, the Audit Division reviewed petitioners' sales in the general ledger for the audit period and found that the taxable sales reported on petitioners' sales and use tax returns filed were understated by \$18,674.23. The Audit Division then proceeded to examine purchases in the month of May, 1977 and found that 43.99 percent of the purchases made by petitioners were liquor and 56.01 percent were wine. A mark up test was performed for the same month's purchases and the mark ups on liquor and wine were found to be 29.14 percent and 47.90 percent respectively. The Audit Division then applied the mark ups to the appropriate ratio of purchases in the audit period and determined taxable sales of \$808,063.07 and tax due thereon of \$63,725.72. Petitioners reported sales tax of \$55,053.77 on sales and use tax returns filed. The Audit Division thereby held additional tax due of \$8,671.95.

4. Petitioners sold liquor and wine by the case at a 10 percent discount. Petitioners' records disclosed that 6.83 percent of the sales made were cases.

5. Petitioners argued that during the month of May, 1977, wine purchases (which has a higher markup than liquor) exceeded the ratio of wine purchases throughout the audit period due to an increase in wine consumption by their customers in recent years and the building up of wine inventory for the summer months.

6. The Liquor Shoppe was operated as a discount liquor store during some of the periods prior to the audit. Federal tax returns submitted by petitioners disclosed the following over-all mark ups:

1974	30%
1975	23%
1976	15%
1977	25%

7. No allowance was made in the audit for breakage and pilferage. The Audit Division conceded that 1 percent of purchases was a fair adjustment for such losses.

8. The Audit Division failed to establish that the petitioner's records were insufficient for determining the exact amount of their tax liability and to show the necessity for the use of the one-month test period.

9. Petitioners failed to establish that reasonable cause existed for not reporting all of its sales.

#### CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41). That the Audit Division failed to establish that petitioners' records were insufficient for the verification of their taxable sales or their exact sales tax liability.

B. That petitioners' additional taxable sales are reduced to \$18,674.23 as disclosed by the Audit Division's examination of the general ledger pursuant to Finding of Fact "3".

C. That the petition of Emanuel Kotsonis and George Kotsonis d/b/a The Liquor Shoppe is granted to the extent indicated in Conclusion "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 issued November 9, 1977 with applicable penalties and interest thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER