

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
177-01 Union Turnpike Inc. :

: 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 9/1/74 - 8/31/77.

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 26th day of June, 1981, he served the within notice of by mail upon 177-01 Union Turnpike Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

177-01 Union Turnpike Inc.
177-01 Union Turnpike
Flushing, NY 11366

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
26th day of June, 1981.

Cornie P. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
177-01 Union Turnpike Inc. :

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for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 9/1/74 - 8/31/77.

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 26th day of June, 1981, he served the within notice of by mail upon Bernard J. Klinger 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. Bernard J. Klinger
17 Battery Place
New York, NY 10004

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
26th day of June, 1981.

Cornie A. Haglund

J. Vredenburg

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

June 26, 1981

177-01 Union Turnpike Inc.
177-01 Union Turnpike
Flushing, NY 11366

Gentlemen:

Please take notice of the of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 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 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
Bernard J. Klinger
17 Battery Place
New York, NY 10004
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

177-01 UNION TURNPIKE, INC. : 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, 1974:
through August 31, 1977.

Petitioner, 177-01 Union Turnpike, Inc., 177-01 Union Turnpike, Flushing, New York 11366, 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, 1974 through August 31, 1977 (File No. 22374).

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 October 1, 1980 at 9:15 A.M. Petitioner appeared by Bernard J. Klinger, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel). On February 28, 1981, the petitioner advised the State Tax Commission, in writing, that it desired to waive a continuation of the previously held hearing and submitted the case to the State Tax Commission based upon the hearing record of October 1, 1980 and legal memorandum. After due consideration, the State Tax Commission renders the following decision.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, 177-01 Union Turnpike, Inc., operated a bar known as Gantry's Pub located at 177-01 Union Turnpike, Flushing, New York. The ownership of petitioner corporation changed in the latter part of 1974.

2. On June 12, 1978, 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, 1974 through August 31, 1977 for taxes due of \$16,596.16, plus minimum statutory interest of \$2,834.17, for a total of \$19,430.33. Said Notice was issued as a result of petitioner's failure to submit adequate books and records for audit.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to September 20, 1978.

4. Petitioner produced the following books and records for audit: cash receipts journal (September 1, 1974 to August 31, 1976), cash disbursements journal (October 1, 1975 to March 31, 1977), bank deposits (September 1, 1976 to August 31, 1977), U.S. Corporation Income Tax Return for fiscal year ended September 30, 1975, sales tax returns and incomplete purchase invoices. The Audit Division reconciled sales from the foregoing records which disclosed that bank deposits for the period September 1, 1976 through August 31, 1977 were \$207,930.78 as compared to sales of \$134,002.00 recorded in the cash receipts journal for the previous two years. Petitioner reported sales of \$92,548.00 on sales tax returns filed for the entire period under audit. Because of the inconsistencies and omissions in petitioner's books and records, it was necessary for the Audit Division to perform a markup test to determine petitioner's sales. However, purchase invoices were not available to perform such a test.

Therefore, the Audit Division sent inquiries to thirty beer, liquor and wine suppliers requesting the amount of purchases made by petitioner during the audit period. The names of the suppliers were obtained from workpapers that were part of a prior audit of petitioner's books and records for the period December 1, 1971 through May 31, 1973. The Audit Division received eight responses from which it determined beer and liquor purchases of \$22,765.93 for 1976. Petitioner's cash disbursements journal for the same period showed purchases of \$10,868.41. Petitioner reported purchases of \$33,000.00 on the corporation tax return referred to above. The Audit Division determined that said amount reported on the corporation tax return was the most accurate representation of petitioner's beer and liquor purchases and was used as a basis for computing sales for the audit period. The average markup for beer and liquor of 234 percent determined on the prior audit was applied to purchases of \$99,000.00 ($\$33,000.00 \times 3$ years) to arrive at beer and liquor sales of \$330,660.00. However, this amount was subsequently reduced to \$300,000.00. Petitioner's reported taxable sales of \$92,548.00 was deducted leaving additional taxable sales of \$207,452.00 and tax due thereon of \$16,596.16.

5. Petitioner argued that since there was a change in the corporate ownership, it was not proper to use the markups determined from a prior audit when the business was operated by different principals than those principals during the period at issue herein. Moreover, petitioner contended that the audit conducted was arbitrary, capricious, and erroneous.

6. The books and records maintained by petitioner were inadequate, incomplete and insufficient for the Audit Division to determine petitioner's taxable sales with any exactness.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, inter alia, that if a return, when filed, is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available and, if necessary, the tax may be estimated on the basis of external indices.

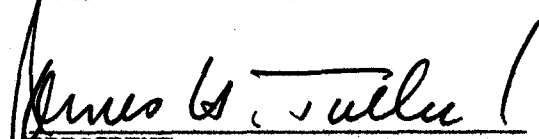
B. That since petitioner's record keeping was insufficient, the audit procedures and tests adopted by the Audit Division to determine petitioner's taxable sales and sales taxes due were proper in accordance with section 1138(a) of the Tax Law Matter of Chartair Inc. v. State Tax Commission, 65 AD2d 44. That it was petitioner's own failure to maintain proper books and records and, as such, exactness in the determination of sales tax liability is not required Matter of Markowitz v. State Tax Commission, 54 AD2d 1023 and that petitioner has failed to sustain the burden of showing error. Matter of Manny Convissar v. State Tax Commission, 69 AD2d 929.

C. That the petition of 177-01 Union Turnpike, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 12, 1978, is sustained.

DATED: Albany, New York

JUN 26 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER