

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Ritter Wines & Liquor, Inc.  
and Alfred & Fred Ritter

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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 9/1/72 - 8/31/76.

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 13th day of November, 1981, he served the within notice of Decision by certified mail upon Ritter Wines & Liquor, Inc., and Alfred & Fred Ritter the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

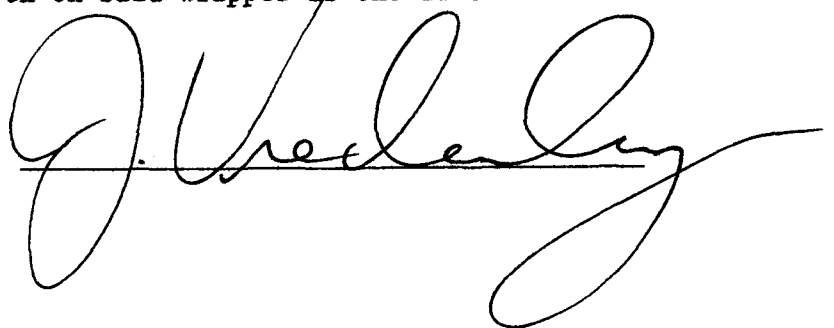
Ritter Wines & Liquor, Inc.  
and Alfred & Fred Ritter  
549 Classon Ave.  
Brooklyn, NY 11238

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  
13th day of November, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
Ritter Wines & Liquor, Inc.  
and Alfred & Fred Ritter

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 9/1/72 - 8/31/76 :

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 13th day of November, 1981, he served the within notice of Decision by certified mail upon Malcolm Cole the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Malcolm Cole  
Walter Cole & Associates  
500 Old Country Rd.  
Garden City, NY 11530

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  
13th day of November, 1981.

*Bernie A. Haglund*

*J. Vredenburg*

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

November 13, 1981

Ritter Wines & Liquor, Inc.  
and Alfred & Fred Ritter  
549 Classon Ave.  
Brooklyn, NY 11238

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  
Malcolm Cole  
Walter Cole & Associates  
500 Old Country Rd.  
Garden City, NY 11530  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
RITTER WINES & LIQUORS, INC.	:	
and	:	DECISION
ALFRED and FRED RITTER	:	
	:	
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, 1972	:	
through August 31, 1976.	:	

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Petitioners, Ritter Wines & Liquors, Inc. and Alfred and Fred Ritter, 549 Classon Avenue, Brooklyn, New York 11238, 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, 1972 through August 31, 1976 (File No. 20377).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 20, 1979 at 10:45 A.M. and was continued to conclusion before Archibald F. Robertson, Jr., Hearing Officer, at the same offices, on January 21, 1980 at 1:15 P.M. Petitioners appeared by Walter Cole and Associates (Malcolm Cole and Walter Cole, Public Accountants). The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether, in assessing petitioners under Articles 28 and 29 of the Tax Law for additional sales taxes for the period herein involved, the use by the

sales tax auditor of external indices in conducting its audit of Ritter Wines & Liquors, Inc., was a necessary and proper use of such indices within the meaning of section 1138(a) of the Tax Law.

II. Whether a deficiency assessment for any period ending on or before May 31, 1974, is barred as a result of the operation of section 1147 of the Tax Law.

#### FINDINGS OF FACT

1. Individual petitioners operate the corporate petitioner's retail liquor store.

2. Petitioners filed all sales tax returns for the audit periods in timely fashion.

3. Petitioners executed consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law, as follows:

<u>Date of Consent</u>	<u>Periods</u>	<u>Last Day to Determine</u>
11/17/75	9/1/72-8/31/75	12/19/76
9/14/76	9/1/72-8/31/75	6/19/77
3/28/77	9/1/72-8/31/76	12/19/77

4. The Audit Division on June 29, 1977 issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due No. 90,151,145, for additional taxes due of \$55,421.97 and penalties and interest of \$28,542.19, for a total of \$83,964.16.

5. The sales tax auditor found that the petitioner maintained a complete set of books on a cash basis, and that the sales tax returns reconciled with the federal tax returns, but the cash register records were not sufficient. Cash register tapes denominated "bulk sale" tapes contained only gross figures, and did not show whether bulk discounts on bulk sales were given nor did they

disclose the item(s) sold. On such bulk sale tapes, sales taxes allegedly collected were not separated from the purchase price listed on those tapes.

6. Petitioner's posted prices did not tie into receipts, hence petitioners' books and records were not only significantly incomplete, but did not permit the exact tax to be determined.

7. As a result of finding incomplete records, the sales tax auditor analyzed the purchase invoices for the month of November 1974. The percentage of purchases found was 9 percent for wine and 91 percent for liquor. These percentages were used in considering wine and liquor purchases for the entire audit period.

8. The sales tax auditor utilized the selling prices posted on the shelves and the November 1974 purchase prices in a markup test to determine the adjusted taxable sales for the audit period. The assessment was based on a 16 percent mark-up on liquor and a 55.79 percent mark-up on wine, which resulted in adjusted taxable sales of \$6,430,864.00. Reported sales were \$5,690,376.00. At the hearing it was conceded that the liquor mark-up should be reduced to 12 percent and that an allowance should be made for an increase in inventory. The adjusted sales were revised to \$6,083,934.00, an increase of \$397,776.00 over the reported sales for the audit period herein involved. The additional taxes based on the revision came to \$29,862.00.

9. Petitioner Alfred Ritter testified that sales tax is rung up with the sale; that the prices included sales tax, and later testified that the cash register receipts showed tax separately. Petitioner Fred Ritter also testified that the cash register receipts showed tax separately.

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

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

12. Petitioners 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 of the amounts for additional sales taxes due for the periods from September 1, 1972 through August 31, 1976.

B. That with the Notice of Determination and Demand for Payment of Sales and Use Taxes Due being duly received in evidence, jurisdiction in this matter was established.

C. That the method used in the sales tax audit of petitioners' business was proper under the circumstances in that a direct check of petitioners' records found them to be insufficient, incomplete and unreliable so that it was not possible to make an accurate computation of the sales taxes due.

D. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued timely for all periods at issue. Each of the consents was executed prior to the last day for determining tax for all the periods under audit.

E. That the use by the sales tax auditor of external indices in the absence of sufficient records during the audit of petitioners' business was necessary and proper within the meaning of section 1138(a) of the Tax Law for the audit period.

F. That the petition of Ritter Wines & Liquors, Inc. and Alfred and Fred Ritter is granted to the extent indicated in Finding of Fact "8"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 29, 1977 is reduced from \$55,421.97 to \$29,862.00; and that, except as so granted; the petition is in all other respects denied.

DATED: Albany, New York

NOV 13 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER