

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Samkar Corporation :
d/b/a Schukarts Restaurant & Karl Schukart : 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 12/1/71 - 5/31/74. :

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 Samkar Corporation, d/b/a Schukarts Restaurant & Karl Schukart, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samkar Corporation
d/b/a Schukarts Restaurant & Karl Schukart
118 W. Second St.
Oswego, NY 13120

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 R. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Samkar Corporation :
d/b/a Schukarts Restaurant & Karl Schukart : **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 12/1/71 - 5/31/74. :

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 Carl A. Nanni 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. Carl A. Nanni
273 Lake Ave.
Rochester, NY 14608

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.

Cornie D. Hageland

Jay Vredenburg

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

January 30, 1981

Samkar Corporation
d/b/a Schukarts Restaurant & Karl Schukart
118 W. Second St.
Oswego, NY 13120

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
Carl A. Nanni
273 Lake Ave.
Rochester, NY 14608
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| SAMKAR CORPORATION | : | DECISION |
| D/B/A SCHUKARTS RESTAURANT | : | |
| AND KARL SCHUKART | : | |
| 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 December 1, 1971 through | : | |
| May 31, 1974. | : | |

Petitioners, Samkar Corporation and Karl Schukart, 118 West Second Street, Oswego, 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 December 1, 1971 through May 31, 1974 (File No. 17107).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 23, 1980 at 1:15 P.M. Petitioners appeared by Karl Schukart, President and Carl A. Nanni, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the audit procedures employed by the Sales Tax Bureau were proper and the resultant findings of additional taxable sales for the period December 1, 1971 through May 31, 1974 were correct.

FINDINGS OF FACT

1. On May 13, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Samkar Corporation for the period December 1, 1971 through May 31, 1974. The notice

was issued for \$5,682.19, plus penalty and interest of \$1,926.31, for a total of \$7,608.50.

2. During the period at issue, petitioner operated a bar and restaurant at 630 Ridge Road West, Rochester, New York.

3. During the period August 1974 through May 1975, the Sales Tax Bureau was unable to obtain the books and records of Samkar Corporation from the corporate principal Karl Schukart or from the corporation accountant. As a result, the Sales Tax Bureau contacted the beer and liquor suppliers within the area and requested information on purchases made by Samkar Corporation. This information disclosed that Samkar Corporation made purchases of beer and liquor totaling \$40,971.36 relating to the period at issue. Petitioner reported taxable sales of \$122,402.00 for the same period, of which it was determined by petitioner and Sales Tax Bureau that one-half was for food. The taxable food sales are not at issue. The Sales Tax Bureau estimated the following markup percentages: liquor - 275 percent and beer - 200 percent. The markups were applied to liquor and beer purchases for the audit period, resulting in additional taxable sales of \$81,174.79. The Sales Tax Bureau claimed the markups were based on its prior experience regarding bar and restaurant businesses of similar size and location.

4. Petitioner presented no books and records for the Sales Tax Bureau to determine the exact amount of its taxable sales or sales tax liability. Because of the inadequate records, the Sales Tax Bureau estimated a markup on the petitioners' purchases.

5. Petitioner contended that the audit methods used by the Sales Tax Bureau in determining the sales tax for the period at issue were purely estimates and wholly without foundation and fact; and that the amount of tax due was erroneous because the Sales Tax Bureau did not give consideration to the following:

(a) The amount of liquor in a drink was from one to one and one half ounces, depending on the type of drink.

(b) There was a daily "happy hour" at noon and in the evening where a customer received two drinks for the price of one, with no reduction in the quantity of liquor.

(c) Spillage, broken or damaged bottles.

6. The Sales Tax Bureau contended that the markup percentages used gave consideration to all factors in order to arrive at petitioners' taxable sales.

7. Petitioner failed to present any substantive evidence to show that the basis upon which the additional sales taxes due were determined was improper or unreasonable or that the results were incorrect.

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; that in the absence of petitioners' books and records, the audit procedures used by the Sales Tax Bureau to determine petitioners' taxable sales were proper as authorized in said section of the Tax Law. Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, mot for lv. to app. den. 44 N.Y.2d 645.

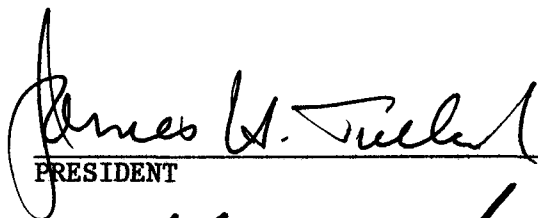
B. That the Sales Tax Bureau's audit findings of additional sales tax due in the amount of \$5,682.19 was supported by substantial evidence; and that petitioners have failed to establish the inaccuracy of said amount and, therefore, the Sales Tax Bureau's determination is correct. Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929; Matter of Goldner v. State Tax Commission, 70 A.D.2d 978.

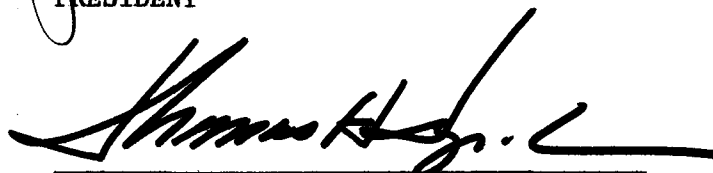
C. That the petition of Samkar Corporation d/b/a Schukarts Restaurant and Karl Schukart is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 13, 1975 is sustained.

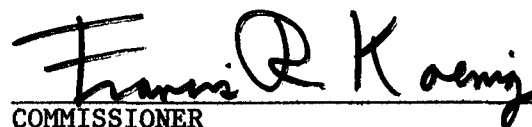
DATED: Albany, New York

JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER