

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Schenectady Gourmet Restaurant, 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 3/1/75 - 11/30/77. :

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 19th day of June, 1981, he served the within notice of Decision by mail upon Schenectady Gourmet Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Schenectady Gourmet Restaurant, Inc.
1113 State St.
Schenectady, NY 12304

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
19th day of June, 1981.

Cornelia A. Hagelund

J Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Schenectady Gourmet Restaurant, Inc. :
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under Article 28 & 29 of the Tax Law for the :
Period 3/1/75 - 11/30/77. :

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 19th day of June, 1981, he served the within notice of Decision by mail upon Anthony Pisano the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

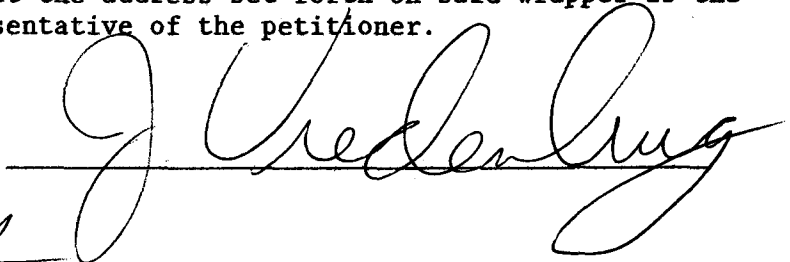
Mr. Anthony Pisano
98 Columbia Tpk.
Rensselaer, NY 12144

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
19th day of June, 1981.


Annie P. Haglund


Jay Vredenburg

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

June 19, 1981

Schenectady Gourmet Restaurant, Inc.
1113 State St.
Schenectady, NY 12304

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) 690 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
Anthony Pisano
98 Columbia Tpk.
Rensselaer, NY 12144
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SCHENECTADY GOURMET RESTAURANT, 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 March 1, 1975 through	:	
November 30, 1977.	:	

Petitioner, Schenectady Gourmet Restaurant, Inc., 1113 State Street, Schenectady, New York 12304, 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, 1975 through November 30, 1977 (File No. 22288).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on January 9, 1981 at 9:15 A.M. Petitioner appeared by Anthony Pisano, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether penalty and interest in excess of the minimum statutory rate imposed pursuant to section 1145(a) of the Tax Law should be cancelled.

II. Whether the Audit Division properly determined petitioner's sales tax liability.

FINDINGS OF FACT

1. Petitioner, Schenectady Gourmet Restaurant, Inc., operated a bar and night club located at 1113 State Street, Schenectady, New York.

2. On April 28, 1978, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against petitioner for the period March 1, 1975 through November 30, 1977 for taxes due of \$11,697.72, plus penalty and interest of \$3,759.67, for a total of \$15,457.39.

3. On audit, the Audit Division performed a markup test for liquor, wine and beer based on purchases for the period July 1, 1977 through September 30, 1977. The resultant markups of 292 percent for liquor and wine and 335 percent for beer were applied to applicable purchases for the audit period to arrive at audited sales of \$341,996.14 and tax due thereon of \$13,679.85. Petitioner paid sales taxes of \$1,982.13 for the same period, leaving additional taxes due of \$11,697.72.

4. Petitioner failed to file sales tax returns and pay over sales tax collected for the periods September 1, 1975 through November 30, 1975 and June 1, 1976 through November 30, 1977. The unpaid sales taxes for the returns not filed are reflected in the taxes due determined on audit.

5. Petitioner contended that \$20,000.00 of liquor purchases were loaned to the Top Hat Club during the period at issue and therefore, the purchases upon which the liquor markup was applied should be reduced accordingly. However, petitioner offered no evidence to show that such a loan took place.

Petitioner did not contest any other aspects of the audit.

6. The books and records maintained by petitioner were insufficient for the Audit Division to determine the exact amount of petitioner's sales tax liability.

7. With respect to the penalty imposed, petitioner argued that the State Tax Commission filed a warrant for sales taxes determined due from an audit of prior years and that because of such warrant, it was unable to borrow money to pay its sales tax liability.

CONCLUSIONS OF LAW

A. That petitioner collected sales tax as trustee for and on account of the State of New York and failed to pay over the same to the State Tax Commission as required by section 1137 of the Tax Law.

B. That section 1145(a) of the Tax Law, as amended by Ch. 714, Laws 1980, provides that the tax commission may remit all the penalty, and that portion of the interest which is in excess of the minimum statutory rate, when it is determined by the commission that the delay or failure to file a return or pay the tax due is for reasonable cause and not willful neglect.

C. That petitioner's inability to borrow money caused by a warrant filed by the State Tax Commission was not reasonable cause for its failure to file returns and pay over the sales taxes due.

D. That the Audit Division properly determined petitioner's sales tax liability for the period March 1, 1975 through November 30, 1977 based on such information as was available, pursuant to section 1138(a) of the Tax Law; that petitioner failed to establish through documentary or other substantial evidence that said determination was incorrect.

E. That the petition of Schenectady Gourmet Restaurant, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 28, 1978 is sustained.

DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION

James G. Tully
PRESIDENT

Thomas H. Hagan
COMMISSIONER

Francis R. Koenig
COMMISSIONER