

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

The Estate of Rosaria Barone

:

:

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 - 2/28/76.

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 26th day of March, 1982, he served the within notice of Decision by certified mail upon The Estate of Rosaria Barone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Estate of Rosaria Barone  
c/o Frances Keto, Executrix  
225 W. Main St.  
Wappingers Falls, NY 12590

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 March, 1982.

*Cornelia A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
THE ESTATE OF ROSARIA BARONE	:	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, 1972	:	
through February 29, 1976.	:	

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Petitioner, The Estate of Rosaria Barone, c/o Francis Keto, Executrix, 225 West Main Street, Wappingers Falls, New York 12590, 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 February 29, 1976 (File No. 16766).

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 21, 1980 at 1:15 P.M. and continued on January 23, 1981 at 9:00 A.M. Petitioner appeared by Frances Keto, Executrix. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether the Audit Division, based on an examination of Rosaria Barone's books and records, properly determined additional sales taxes due.

FINDINGS OF FACT

1. During the period at issue, Rosaria Barone, operated a retail liquor store located at 97 Main Street, Poughkeepsie, New York.

2. On July 22, 1976, 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 Rosaria Barone for the period September 1, 1972 through February 29, 1976 for taxes due of \$5,839.56, plus penalty and interest of \$2,297.90, for a total of \$8,137.46.

3. Rosaria Barone executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1972 through August 31, 1975, to December 20, 1976.

4. On audit, the Audit Division performed a markup test for liquor and wine based on purchases for the period March 1, 1975 through May 31, 1975 which revealed a markup of 23 percent for liquor and 45 percent for wine or a combined weighted average markup of 30 percent. The applicable selling prices were provided by Rosaria Barone. The weighted average markup was applied to purchases of \$492,045.00 which reflects an adjustment to total purchases for an inventory increase of \$9,336.00 to determine taxable sales of \$639,659.00 for the audit period. The reported taxable sales of \$542,333.00 were deducted from this amount, leaving additional taxable sales of \$97,326.00 and tax due thereon of \$5,839.56.

5. Federal income tax returns filed by Rosaria Barone for the years 1972, 1973 and 1974 reported markups of 15.87, 14.73 and 12.08, respectively.

6. Petitioner argued that the selling prices given to the auditor were suggested retail selling prices listed in a publication entitled "Beverage Media"; however, the actual selling prices were lower and thus concluded would account for the discrepancy found by the Audit Division.

7. Rosaria Barone acted in good faith at all times.

#### CONCLUSIONS OF LAW

A. That the audit procedures described in Finding of Fact "4" are generally accepted procedures established by the Audit Division and are used to verify

the accuracy of books and records; that such procedures disclosed a significant discrepancy with Rosaria Barone's sales records to establish that such records were insufficient or incorrect.

B. That in view of the insufficiency of the books and records, the Audit Division properly determined Rosaria Barone's taxable sales and sales taxes due in accordance with the provisions of section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44) and that petitioner has failed to sustain the burden of showing error.

C. That the penalty and interest in excess of the minimum statutory rate are cancelled.

D. That the petition of The Estate of Rosaria Barone is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 22, 1976; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAR 26 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER