

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Jack Berger  
d/b/a Seven Pines Restaurant

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  
3/1/72-8/31/75.

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of April, 1982, she served the within notice of Decision by certified mail upon Jack Berger, d/b/a Seven Pines Restaurant the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Berger  
d/b/a Seven Pines Restaurant  
1009 Shore Acres Dr.  
Mamaroneck, NY 10543

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  
2nd day of April, 1982.

Connie A. Hagelund

Kathy Pfaffenbach

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Jack Berger	:	
d/b/a Seven Pines Restaurant	:	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 3/1/72-8/31/75	:	

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of April, 1982, she served the within notice of Decision by certified mail upon William B. Sherman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William B. Sherman  
118-18 Union Tpke.  
Kew Gardens, NY 11415

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  
2nd day of April, 1982.

Connie A. Hagelund

Kathy Pfaffenbach

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

April 2, 1982

Jack Berger  
d/b/a Seven Pines Restaurant  
1009 Shore Acres Dr.  
Mamaroneck, NY 10543

Dear Mr. Berger:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
William B. Sherman  
118-18 Union Tpke.  
Kew Gardens, NY 11415  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
JACK BERGER : DECISION  
D/B/A SEVEN PINES RESTAURANT :  
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, 1972 :  
through August 4, 1975. :  

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Petitioner, Jack Berger d/b/a Seven Pines Restaurant, 1258 Boston Road, Mamaroneck, New York 10543, 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, 1972 through August 4, 1975 (File No. 15035).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1980 at 2:45 P.M. and continued at 99 Church Street, White Plains, New York, on July 2, 1980 at 10:30 A.M. Petitioner appeared by William B. Sherman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq, of counsel).

ISSUE

Whether the audit procedure employed by the Audit Division in an examination of petitioner's books and records was proper and the resultant findings of additional taxable sales were correct.

FINDINGS OF FACT

1. On April 14, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Jack Berger d/b/a Seven Pines Restaurant for the period March 1, 1972 through August 4, 1975.

The Notice was issued as a result of a field audit and asserted tax due of \$20,340.23 plus penalties and interest.

2. Petitioner executed a consent extending the period of limitation for assessment to June 20, 1976.

3. Petitioner operated a bar and restaurant which specialized in catered functions and served smorgasbords two days a week. Sales were generated through the restaurant, separate catered functions and the bar.

4. Petitioner did not file sales and use tax returns for the period September 1, 1973 through August 4, 1975. For the period September 1, 1973 through February 28, 1975, in lieu of filing returns, petitioner paid the estimated notices of determination and demand for payment of sales and use taxes due issued by the Audit Division for non-filing of his sales and use tax returns. No sales tax payments were made for the period March 1, 1975 through August 4, 1975.

5. On audit, the Audit Division examined the following records: sales tax returns filed (March 1, 1972 through August 31, 1973), federal tax returns, daily records, bar tapes, restaurant checks, purchase bills, bank deposits, sales journal, purchase journal and general ledgers.

Upon review of the federal tax returns filed by petitioner, the Audit Division determined that the average markup of 86 percent reported was too low for the type of operation and proceeded to perform a markup test. The Audit Division examined purchases of beer, liquor and wine and computed markups based on petitioner's selling prices. The review resulted in the following allocation and markups:

a. Based on petitioner's sales records for May 1974, 47 percent of liquor and wine sales were derived from catered functions. The Audit Division

examined liquor and wine purchases for May 1974 and using selling prices in effect during said period determined markups of 172 percent and 444 percent for liquor and wine sold at catered functions and through the bar respectively. The Audit Division applied a markup of 172 percent to 47 percent of liquor and wine purchases to arrive at sales for catered functions. The balance of the liquor and wine purchases (53 percent) were deemed to be sold through petitioner's bar and restaurant operation and the audited markup of 444 percent was applied. Total liquor and wine sales were thereby determined to be \$281,452.00 for the audit period.

b. The Audit Division examined beer purchases for June 1974 and determined a markup of 441 percent based on selling prices through catered functions, restaurant and bar sales. It applied the markup to beer purchases for the entire audit period and thereby determined beer sales of \$21,094.00.

c. Food purchases of \$296,379.00 for the audit period were marked up 100 percent after a deduction of \$20,000.00 was made for employee meals. Food sales were determined to be \$592,758.00 for the audit period.

Based on the application of the above markups to petitioner's purchases in the audit period, the Audit Division determined total sales of \$895,304.00 on which \$43,337.73 tax was determined to be due. Petitioner's records indicated sales of \$665,047.00. On that basis, the records were insufficient to determine the exact amount of petitioner's sales tax liability.

The Audit Division further examined guest checks for May 12, 1974 and determined an error rate of .0124 for overcollections of tax. It applied the rate to restaurant sales for the audit period and determined total overcollections of tax not reported of \$140.20.

From the total sales tax determined due of \$43,477.93, the Audit Division deducted sales tax paid of \$22,917.70 (including the amounts paid on the estimated notices) and thereby determined additional tax due of \$20,560.23. Petitioner was further credited for \$220.00 which constituted a refund due him by the Tax Compliance Bureau.

6. Petitioner objected to the use of a one-month test period to determine sales for the entire audit period. He contended that since all records were made available on audit, they should have been used to determine any additional tax liability found due. He further contended that all sales were accurately reflected in his records.

7. In support of his petition, petitioner maintained that liquor and wine was served from any of the following three sources during catered functions:

- a) Rolling bar
- b) Table service (set-ups)
- c) Cocktail hour(s)

In addition to the above, patrons at catered functions were also served from the restaurant bar at no additional charge and petitioner contended that the quantities consumed were unlimited. Petitioner's records did not indicate the amount of liquor and wine consumed by its patrons from the restaurant bar at no additional charge. The only record of liquor and wine consumed during catered functions were those billed to its customers.

8. Petitioner has not shown reasonable cause for his failure to file sales and use tax returns for the period September 1, 1973 through August 4, 1975.

CONCLUSIONS OF LAW

A. That the Audit Division's use of a markup test to determine the accuracy of petitioner's records disclosed that the records were not sufficient to determine petitioner's exact sales tax liability. That the Audit Division was not required to accept petitioner's books and records as presented. In the alternative, the method employed using petitioner's uncontested selling prices in the determination of markups and the application of the markups on petitioner's purchase records was proper and in accordance with the provisions of section 1138(a) of the Tax Law. Matter of Emily Peters d/b/a Newport Inn, State Tax Commission Decision, February 29, 1980.

B. That based on the ratio of petitioner's liquor and wine sales and the markups determined by the Audit Division, in Finding #5, it took more than 47 percent of liquor and wine purchases to generate a 47 percent sales ratio for such sales during catered functions. The effective rate of purchases needed to produce a ratio of 47 percent of sales is 64 percent based on the markups determined by the Audit Division. Therefore, the Audit Division did not properly apply the sales ratio of liquor and wine at catered functions to the purchases sold. That the ratio of liquor and wine purchases sold through catered functions is increased to 64 percent.

C. That the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 14, 1976 in accordance with Conclusion "B" above with full penalties and interest thereon;

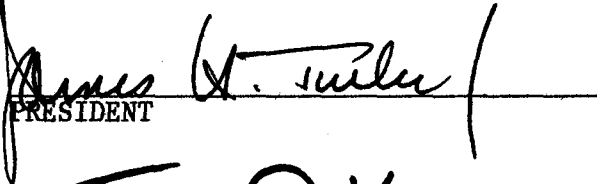


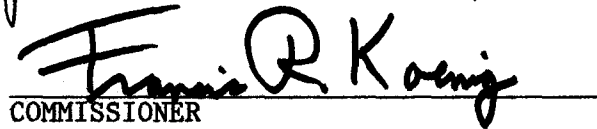
and that, except as so granted, the petition of Jack Berger d/b/a Seven Pines Restaurant is in all other respects denied.

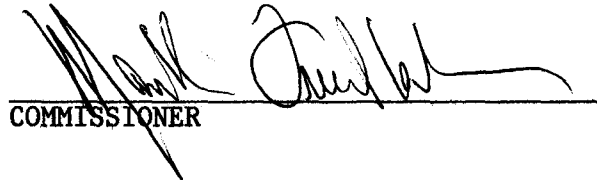
DATED: Albany, New York

APR 02 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER