

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Christ Cella, Inc.

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 9/1/76-8/31/79.

AFFIDAVIT OF MAILING

State of New York  
County of Albany

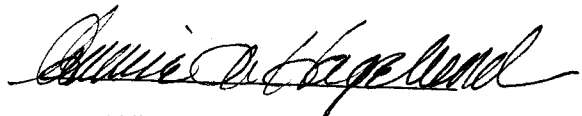
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Christ Cella, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

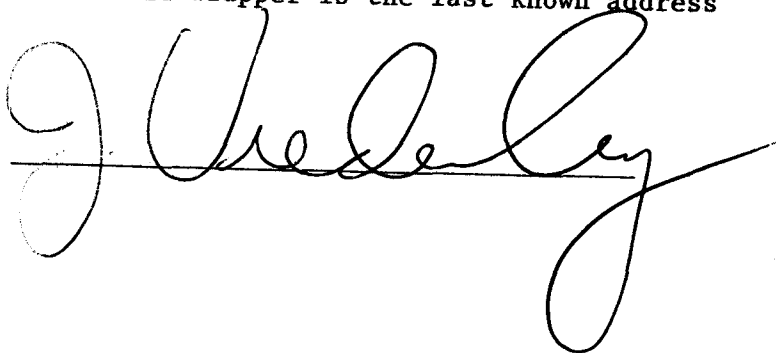
Christ Cella, Inc.  
160 E. 46th St.  
New York, NY 10017

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  
3rd day of December, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Christ Cella, 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 9/1/76-8/31/79. :

State of New York  
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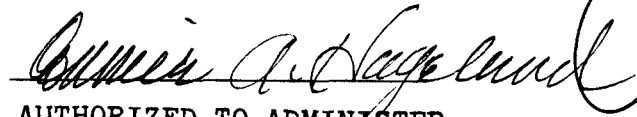
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Paul S. Dobkin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul S. Dobkin  
Herman J. Dobkin & Co.  
200 Madison Ave.  
New York, NY 10016

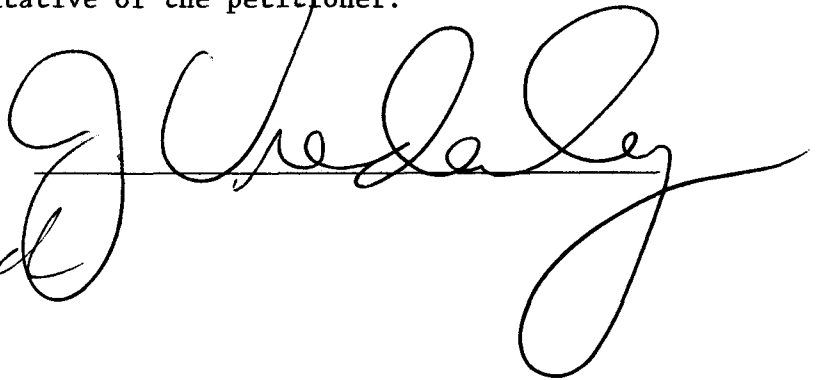
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
3rd day of December, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

December 3, 1982

Christ Cella, Inc.  
160 E. 46th St.  
New York, NY 10017

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 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  
Paul S. Dobkin  
Herman J. Dobkin & Co.  
200 Madison Ave.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
CHRIST CELLA, 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 September 1,	:	
1976 through August 31, 1979.	:	

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Petitioner, Christ Cella, Inc., 160 East 46th Street, New York, New York 10017, 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, 1976 through August 31, 1979 (File No. 31475).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 29, 1982 at 9:30 A.M. Petitioner appeared by Paul S. Dobkin, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq., (Anna Colello, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of petitioner's sales tax liability was proper.

FINDINGS OF FACT

1. On August 4, 1980, pursuant to an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Christ Cella, Inc., in the amount of \$28,641.70 plus \$6,577.87 as penalty due and \$7,467.32 as interest due for the period September 1, 1976 through August 31, 1979.

2. Petitioner operates a restaurant in midtown Manhattan. Its sole stockholder is Richard T. Cella.

3. In an affidavit the petitioner's comptroller asserted:

"2. That the internal control in the restaurant has been designed to insure recording of all cash and credit sales, as follows:

- (a) Each day, the steward gives out pre-numbered guest checks to the bartenders and waiters and accounts for all of them the following day. He gives the office a count of the guest checks and the office compares this with the register tapes.
- (b) The bartender rings up both cash and credit sales -- most times there are two bartenders on duty at the same time.
- (c) The bartender gives cash receipts to the night cashier -- the register tapes are picked up the following morning by the head cashier -- the head cashier reconciles the register tape with the cash receipts.
- (d) The cash register tapes are retained in the office. The controller makes the deposit. The controller does not originally count cash or pick up the register tape.
- (e) As a further check on the bartenders, the individual liquor checks are rung up a second time through the main register and the two tapes (the main register and bar register) are reconciled on a daily basis.
- (f) The liquor inventory is taken daily by the steward. He would know immediately if the bartenders were taking merchandise.
- (g) Mr. Cella, the principal shareholder, does not participate in any of the above procedures.

3. That it is the policy of the restaurant to serve what would be considered extra generous portions of alcoholic beverages and that at no time do the bartenders measure the size of the drinks, but rather pour to fill the glass designed for the drink ordered."

4. The audit herein was commenced on January 11, 1980. At the time of the commencement thereof the auditor requested from the comptroller the receipts and the register tapes; however, he was informed that they were not available at that time. Subsequently, on February 29, 1980 and March 4, 1980, the

auditor was again informed that the receipts and register tapes were not available.

5. A test period audit was required to ascertain petitioner's sales because reliable records regarding the sale of liquor were not made available and the exact amount of sales tax could not have been determined from the records provided.

6. The field audit conducted by the Audit Division followed generally accepted accounting procedures and tests, consistent with the nature of business operation and in accordance with section 1138 of the Tax Law.

7. A mark-up test for liquor was performed for the month of August, 1979 with the consent of the taxpayer and this mark-up was applied to purchases during the audit period resulting in additional tax due of \$24,675.84.

8. The self consumption of alcoholic beverages accounted for additional tax due of \$480.00.

9. An over and under test was performed on August 30, 1979 resulting in an error rate of .2274% which when applied to the audit period results in additional tax due of \$2,087.14.

10. Expense purchases were examined resulting in additional tax due of \$919.12.

11. Capital asset purchases and artwork purchases for the audit period resulted in additional tax due of \$479.00.<sup>1</sup>

12. The petitioner did not offer in evidence its books and/or records, including cash register tapes.

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<sup>1</sup> There is an apparent discrepancy in the records. The actual tax due is \$479.60 for capital asset purchases.

13. The petitioner offered in evidence, over the objection of the Audit Division, affidavits from three of its bartenders stating in part as follows:

"3. At no time are drinks measured from a measuring jigger or "shot glass". Drinks are poured from the bottle to the serving glass. Drink sizes average approximately as follows:

On the rocks	2-1/2 oz.
Martini	3 oz.
Brandy (pony)	1-3/4 oz.
(snifter)	1-3/4 oz.
Wine	6 oz.
Cordials	1-3/4 oz.
Highball	2-1/4 oz."

14. The record is void of any substantial evidence corroborating the size of the drinks indicated in Finding of Fact "13".

#### CONCLUSIONS OF LAW

A. That if the petitioner's records are not reliable, so that it is virtually impossible to verify sales reported by petitioner, then use of external indices may be resorted to in order to determine sales. Section 1138(a) of the Tax Law. Chartair, Inc. v. State Tax Commission, infra; Matter of Meyer v. State Tax Commission, 61 A.D.2d 223 (1978).

B. That an auditor cannot use external indices to ascertain the petitioner's sales if reliable records are available and the exact amount of sales tax could have been determined from those records. Matter of Babylon Milk & Cream Co. v. State Tax Commission, 5 A.D.2d 712 (1957), aff'd., 5 N.Y.2d 736 (1958); Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44 (1978).

C. That the auditor is allowed to resort to external indices to verify the accuracy of petitioner's records. Holland v. United States, 348 U.S. 121 (1954).

D. That the test check used by the auditor was proper as it relied on information gathered from petitioner's records and information supplied to the auditor by petitioner.

E. That the use of a weighted average mark-up as applied to purchases recorded on petitioner's books is a proper method to determine sales where petitioner's records are not reliable or available. Matter of Korba v. State Tax Commission, 84 A.D.2d 655 (1981); Matter of Sakran v. State Tax Commission, 73 A.D.2d 989 (1980).

F. That once it is established that the auditor's independent determination of sales was permissible, the burden is upon petitioner to show that this determination should be overturned. The petitioner has failed to sustain its burden of proof.

G. That the petition of Christ Cella, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, herein, is sustained.

DATED: Albany, New York

DEC 03 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER