

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Clarence R. Oliver Post Memorial 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 12/1/74-11/30/77. :  
\_\_\_\_\_ :

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Clarence R. Oliver Post Memorial Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Clarence R. Oliver Post Memorial Inc.  
236 Scottwood Ave.  
Elmira Heights, NY 14903

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  
29th day of December, 1982.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Clarence R. Oliver Post Memorial 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 12/1/74-11/30/77. :  
\_\_\_\_\_ :

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Frederick J. DeFilippo the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick J. DeFilippo  
DeFilippo Brothers  
408 E. Church St.  
Elmira, NY 14901

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  
29th day of December, 1982.

*Kathy Pfaffenbach*

*J. Vredenburg*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

December 29, 1982

Clarence R. Oliver Post Memorial Inc.  
236 Scottwood Ave.  
Elmira Heights, NY 14903

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  
Frederick J. DeFilippo  
DeFilippo Brothers  
408 E. Church St.  
Elmira, NY 14901  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition  
of  
CLARENCE R. OLIVER POST MEMORIAL, INC.  
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, 1974  
through November 30, 1977. :

---

DECISION

Petitioner, Clarence R. Oliver Post Memorial, Inc., 236 Scottwood Avenue, Elmira Heights, New York 14903, 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, 1974 through November 30, 1977 (File No. 25702).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, State Office Building Annex, 164 Hawley Street, Binghamton, New York, on December 3, 1981 at 10:45 A.M. Petitioner appeared by Frederick J. DeFilippo, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUES

I. Whether that portion of auxiliary sales classified as a "utilities" charge in the books and records of petitioner constituted receipts subject to tax under section 1105(d)(i) of the Tax Law.

II. Whether the results of a field audit performed whereby the Audit Division marked up petitioner's purchases to determine its bar sales properly reflected an additional sales tax liability.

FINDINGS OF FACT

1. On August 28, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Clarence R. Oliver Post Memorial, Inc. for the period December 1, 1974 through November 30, 1977. The Notice asserted tax due of \$7,276.29, plus penalty and interest of \$3,444.91, for a total of \$10,721.20.

2. Petitioner executed consents to extend the period of limitation for assessment to September 20, 1978.

3. Petitioner is an exempt veterans' organization which operates two club bars and services food-catered functions through an auxiliary. Separate books and records are kept for each of three different sources of income as follows: auxiliary sales, bingo night sales, and club (or bar) sales.

4. On audit, the Audit Division found auxiliary sales records were available in their entirety. These were examined in detail. Upon review, the Audit Division determined additional taxes due from auxiliary sales to be \$1,144.68. Of this amount, petitioner agreed that \$168.25 attributable to unsubstantiated exempt sales and \$382.61 attributable to a math error were due. This portion of the audit results is not at issue.

The Audit Division further found that petitioner charged only a single per person amount for catered meals. No individual guest checks were used; however, the bills rendered for the various catered functions showed the number of people served multiplied by the single charge per person to arrive at a total charge. No sales tax was added to this charge. In its books, petitioner broke down the meal receipts as follows: general fund, tip fund, sales tax, and utility. Receipts from auxiliary bar sales were reported as club (or bar) sales. Petitioner based its sales tax collections per books only on the

amount appropriated to the general fund and accordingly reported the tax thereon. It was the Audit Division's position that the receipts designated as "utilities" in the records of petitioner were receipts for meals and therefore subject to tax under section 1105(d)(i) of the Tax Law. It held these receipts, which totalled \$8,483.16, subject to additional tax of \$593.82 and included this tax in the overall audit findings and assessment. The Audit Division did not assert a tax on that portion of the auxiliary's receipts which was designated as "tip fund".

The Audit Division found petitioner's club (or bar) records to be unavailable for December, 1974. The records of sales were incomplete for the period June 1, 1977 through November 30, 1977 and records of purchases were incomplete for the period January 1, 1977 through November 30, 1977. Petitioner's cash register produced two sets of tapes, one showing the individual rings and the other showing only the total receipts. Petitioner destroyed the detailed tapes upon making weekly entries in the cash receipts book. Petitioner's records of club (or bar) sales were insufficient for the verification of the exact amount of its taxable sales; therefore, the Audit Division performed a markup of purchases audit using average purchase months, as available, of July, 1975 for beer and September, 1975 for liquor and wine. The Audit Division used current selling prices available to determine weighted markups including cost of 239.34 percent for beer and 307.61 percent for liquor and wine purchases. In its markup computation, the Audit Division used a 1 1/8 oz. serving portion for liquor drinks. A 15 percent spillage allowance was made. The Audit Division applied the above markups to the purchases available for the period January 1, 1975 through December 31, 1976 to determine club (or bar) sales. The Audit Division further made an allowance for internal consumption. The Audit Division adjusted

the club (or bar) receipts for the inclusion of tax in the selling prices and determined taxable club (or bar) sales of \$289,717.00. Food sold at the bar in the amount of \$19,197.21 was accepted as recorded and taxable club (or bar) sales were determined of \$308,914.21. Petitioner reported sales of \$248,703.58 through the club bar. The Audit Division determined additional taxable sales for the period January 1, 1975 through December 31, 1976 of \$60,210.63, a margin of error of 24.209 percent. The Audit Division then applied the margin of error to club sales recorded in petitioner's books for the entire audit period and determined taxable sales of \$449,436.00. The Audit Division accepted taxable bingo night sales as recorded of \$14,491.00. Taxable auxiliary sales previously determined of \$67,169.00 were also added for total taxable sales as a result of the audit of \$531,096.00. Petitioner reported taxable sales for the audit period of \$427,149.00. The Audit Division thereby determined additional taxable sales of \$103,947.00 and additional tax due thereon of \$7,276.29.

5. Petitioner contended that the receipts designated as "utilities" in its auxiliary books were actually charges for hall rental, and as such, not subject to tax. In determining its selling price of meals served, petitioner added 50¢ per person to help defray the cost of utilities and janitorial services.

6. Petitioner contended that the drink size used in the markup computation made by the Audit Division for liquor was in error in that at least 1½ ozs. of liquor per drink was served. Further, petitioner argued that its selling prices were 10¢ less than those used by the Audit Division during 1975. Petitioner offered no documentary evidence to show that the selling prices were less than those used by the Audit Division or that the drink sizes were other than those stated at the time of the audit.

7. Petitioner did not raise the issue of penalty or interest.

CONCLUSIONS OF LAW

A. That section 1105(d)(i) imposes a tax upon the receipts from every sale of food or drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers. That 20 NYCRR 527.8(1) states, in part, in reference to gratuities and service charges that "(a)ny charge, made to a customer, is taxable as a receipt from the sale of food or drink unless: (i) the charge is separately stated on the bill or invoice given to the customer..."

B. That section 1132(a) of the Tax Law states that every person required to collect the tax shall collect the tax from the customer when collecting the price to which it applies. If the customer is given any sales slip, invoice, receipt or other memorandum of the price paid or payable, the tax shall be stated separately on the first of such documents given to him.

C. That petitioner billed its customers one stated charge per person for meals served through its catering operation. Consequently, the total charge is taxable under the provision of section 1105(d)(i) of the Tax Law. The fact that the charge was broken down internally to the various categories of the receipt is immaterial. The customer was not made aware of any charges other than that designated for the meal. The amount of the additional tax due is limited, however, to that amount determined by the Audit Division.

D. That there is statutory authority under the provisions of section 1138(a) of the Tax Law for the use of external indices such as purchases in determining the amount of tax due when records are insufficient for the determination of an exact amount of tax (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).




E. That petitioner's club (or bar) records were insufficient for an exact determination of its taxable sales or tax due; that petitioner failed to show by any documentary evidence that the method, selling prices or drink sizes used in determining its sales were in error. That the field audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law. Moreover, exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023, 44 N.Y.2d 684).

F. That the petition of Clarence R. Oliver Post Memorial, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 28, 1978 is sustained with applicable penalties and interest thereon.

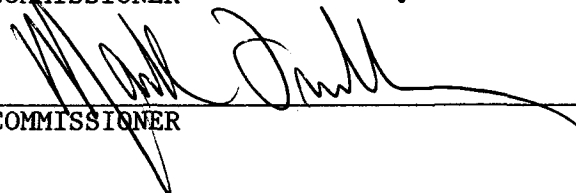
DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER