

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Good Times Lakeview Inn, Inc.  
and Donald Fabini, as Officer

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  
12/1/74-11/30/77.

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 18th day of June, 1982, he served the within notice of Decision by certified mail upon Good Times Lakeview Inn, Inc., and Donald Fabini, as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Good Times Lakeview Inn, Inc.  
and Donald Fabini, as Officer  
RD #2 Lake Rd.  
Ballston Lake, NY 12019

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  
18th day of June, 1982.

*James R. Haglund*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Good Times Lakeview Inn, Inc. :  
and Donald Fabini, as Officer : AFFIDAVIT OF MAILING  
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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. :

\_\_\_\_\_  
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 18th day of June, 1982, he served the within notice of Decision by certified mail upon Timothy Kove the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Timothy Kove  
112 State St.  
Albany, NY 12207

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  
18th day of June, 1982.

*Donnie A. Haglund*

*J. Vredenburg*

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

June 18, 1982

Good Times Lakeview Inn, Inc.  
and Donald Fabini, as Officer  
RD #2 Lake Rd.  
Ballston Lake, NY 12019

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 & 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  
Timothy Kove  
112 State St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
GOOD TIMES LAKEVIEW INN, INC.	:	DECISION
and DONALD FABINI, AS OFFICER	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 & 29	:	
of the Tax Law for the period December 1, 1974	:	
through November 30, 1977.	:	

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Petitioners, Good Times Lakeview Inn, Inc. and Donald Fabini, as officer, Lake Road, Ballston Lake, New York 12019, filed petitions 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. 22734).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on October 7, 1980 at 1:15 P.M. Petitioners appeared by Timothy Kove, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly and accurately determined the purchases subject to use tax and the resultant use tax liability of petitioner Good Times Lakeview Inn, Inc.

II. Whether the result of a field audit performed by the Audit Division using a markup of purchases method of audit properly reflected the additional sales tax liability of petitioner Good Times Lakeview Inn, Inc.

FINDINGS OF FACT

1. On April 24, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Good Times Lakeview Inn, Inc. (Good Times) and a second Notice against Donald Fabini as officer for the period December 1, 1974 through November 30, 1977. The Notices were issued as a result of a field audit asserting additional tax due of \$3,091.35 plus penalties and interest.

2. Petitioner Donald Fabini, as president, executed a consent to extend the period of limitation for the issuance of an assessment to June 20, 1978.

3. On audit, the Audit Division examined Good Times' purchases and sales records for the audit period and found that Good Times was reporting the following markups on its sales and use tax returns:

Beer	194%
Liquor & Wine	261%
Food	79%

In order to verify the accuracy of Good Times' records, the Audit Division proceeded to perform a markup test based on Good Times' costs and selling prices in effect during November, 1977. Good Times' selling prices were higher during those hours in which entertainment was provided. Therefore, the Audit Division analyzed sales for the months of March, 1975, December, 1976 and June, 1977 and determined that 50.18 percent of Good Times' sales were made during the periods of entertainment. It determined the following markups using the above sales ratio:

Beer	226%
Liquor & Wine	445%
Food	100%

The Audit Division applied the above markups to purchases for the entire audit period and determined additional taxable sales of \$71,867.23 and tax due thereon of \$2,874.70.

The recurring expense purchases were reviewed for the month of October, 1977, and it was found that tax was not paid on \$125.76 or 21.52 percent of the purchases examined. The Audit Division therefore determined that 21.52 percent of recurring expense purchases for the entire audit period were subject to use tax. This resulted in recurring expense purchases subject to use tax of \$4,454.39. Purchases of a non-recurring nature were reviewed for the entire audit period, and purchases of \$963.19 were found on which no tax was paid. The Audit Division thereby determined a total use tax deficiency of \$216.65.

4. Good Times submitted additional information at a conference which reduced the ratio of sales made during periods of entertainment to 22.5 percent. The Audit Division accepted the food sales as reported and reduced the markup on beer to 203 percent and the markup on liquor and wine to 343 percent. The Audit Division conceded that the additional sales tax due be reduced to \$1,146.33.

5. Petitioners argued that a higher percentage of six-pack sales was made than the 10 percent allowed on audit. They further argued that more draught beer was sold by the pitcher than the one half of draught beer purchases allowed by the Audit Division. Petitioners contended that more "on the rocks" drinks (drinks which required greater amounts of liquor) were sold than the 10 percent allowed on audit. No evidence was submitted

to support these contentions or to show how they would effect the revised audit results.

6. The Audit Division failed to establish that the petitioners' records were inadequate to determine an exact amount of purchases subject to use tax.

7. Petitioners did not argue the application of penalties.

#### CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.

That the Audit Division failed to establish that records were unavailable from which to determine the exact amount of use tax due. Therefore, the use tax determined due is reduced to the actual tax found due for the month of October, 1977 plus the amount of tax found due on non-recurring purchases.

B. That the markup test performed by the Audit Division disclosed the insufficiency of records for the verification of Good Times' taxable sales; therefore, the taxable sales as adjusted by the Audit Division in Finding of Fact "4" was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

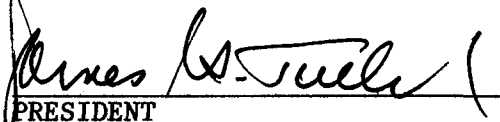
C. That the petitions of Good Times Lakeview Inn, Inc. and Donald Fabini, as officer, are granted to the extent indicated in Conclusions "A" and "B" above; that the Audit Division is hereby directed to modify the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued April

24, 1978 with penalties and interest thereon; and that, except as so granted, the petitions are in all other respects denied.

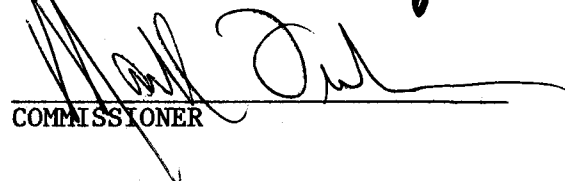
DATED: Albany, New York

JUN 18 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER