

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of McCarthy's Tavern	: : : : : :	: : : : : :
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

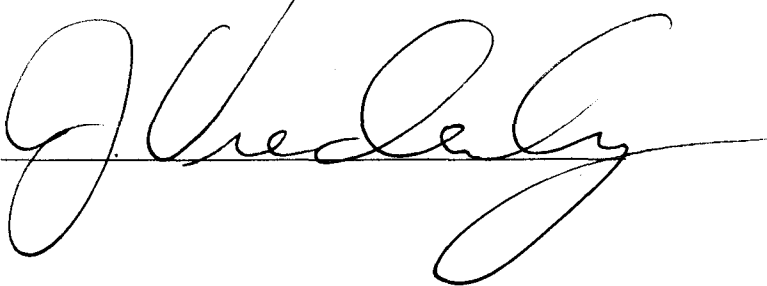
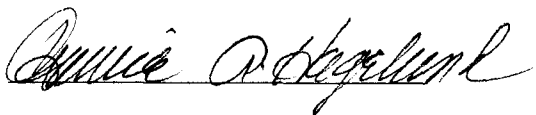
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon McCarthy's Tavern, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

McCarthy's Tavern
c/o Edward J. McCarthy
1010 Eighth Ave.
Watervliet, NY 12189

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
4th day of August, 1982.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
McCarthy's Tavern

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
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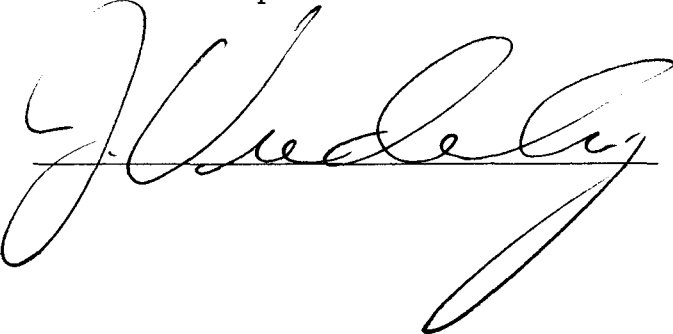

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon David T. Garvey the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David T. Garvey
29 Second St.
Troy, NY 12180

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
4th day of August, 1982.

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

August 4, 1982

McCarthy's Tavern
c/o Edward J. McCarthy
1010 Eighth Ave.
Watervliet, NY 12189

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
David T. Garvey
29 Second St.
Troy, NY 12180
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
MCCARTHY'S TAVERN
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, McCarthy's Tavern, c/o Edward J. McCarthy, 1010 Eight Avenue, Watervliet, New York 12189, 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 Nos. 22444 and 22445).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on October 27, 1981, at 9:15 A.M. Petitioner appeared by Gray & Garvey (David T. Garvey, Esq. of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

Whether mark-ups computed on audit and applied to petitioner's purchases properly reflected petitioner's sales and resultant sales tax liability.

FINDINGS OF FACT

1. Petitioner, McCarthy's Tavern, filed New York State and Local Sales and Use Tax Returns for the period December 1, 1974 through November 30, 1977. Gross sales and taxable sales reported on said returns were identical and totaled \$64,900.00. The sales reported on said returns were in equal one

hundred dollar increments and ranged from a low of \$5,000.00 to a high of \$5,700.00.

2. On March 20, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against McCarthy's Tavern for the period December 1, 1974 through February 28, 1975, assessing \$871.24 in tax, plus penalties and interest. A second Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against McCarthy's Tavern on June 12, 1978, assessing additional tax due of \$11,629.38, plus simple interest. The notice dated June 12, 1978 covered the period March 1, 1975 through November 30, 1977, inclusive.

3. Both of the aforementioned notices were premised on a field audit conducted by the Audit Division. The auditor first compared reported taxable sales to cash receipts per the vendor's journal. The receipts per the journal exceeded reported sales by approximately \$87,447.00. Petitioner does not contest that additional sales tax is due on said \$87,447.00 understatement nor does he contest additional use tax of \$123.20 on the purchase of fixtures and equipment.

4. In order to verify the accuracy of the receipts shown in the journal, the auditor, using the month of December, 1977 as a test period, computed petitioner's mark-ups for liquor and wine (342%), beer (167%) and food (estimated at 50%). The respective mark-ups were applied to purchases to arrive at an audited taxable sales figure of \$241,720.31. The mark-ups determined by the Audit Division for liquor and beer were computed using petitioner's stated selling prices and serving size per drink (a one ounce serving size was used for liquor sales). A 15 percent allowance for spillage was taken into consideration when computing the mark-ups for liquor and wine and draft beer.

5. At the hearing held herein petitioner argued that the mark-ups for liquor and beer, as computed by the Audit Division, were inflated in that the selling prices used by the auditor were too high, and that the serving size of liquor drinks was approximately one and one-half ounces and not one ounce. Petitioner did not have cash register tapes to support the alledged lower selling prices nor was any credible evidence presented to show that a one and one-half serving size was used for liquor drinks.

6. Petitioner also argued that food purchases should be reduced by \$15,600.00 for food withdrawn for personal consumption (\$100.00 per week multiplied by 156 weeks). Petitioner's books and records did not reflect adjustments for food withdrawn for personal use nor did Federal income tax returns show adjustments for personal consumption of food. It was also estimated by petitioner that during the audit period \$8,500.00 of beer, liquor and food purchases were sold at cost to friends and relatives. No credible evidence was produced to support the existence or dollar amount of accommodation sales.

7. Taxable sales reported on the sales tax returns were less than the amounts shown in the cash receipts journal due to petitioner's belief that taxable sales were to be reported on a net basis after subtracting out expenses.

8. The auditor testified that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1978, for the period ending February 28, 1975, was issued because the statute of limitations for assessment was about to expire and a consent extending the statute was not granted by petitioner. For this reason penalty and interest were assessed on said notice. The auditor further testified that in her opinion penalty and interest in excess of the minimum statutory rate should be cancelled.

CONCLUSIONS OF LAW

A. That the audit performed by the Audit Division was proper and in accordance with section 1138(a) of the Tax Law. That petitioner has failed to produce any credible documentary or other evidence to refute or impugn the findings of the Audit Division.


B. That petitioner has acted in good faith, therefore, the penalties and interest in excess of the minimum statutory rate as assessed in the notice dated March 20, 1978 are cancelled.

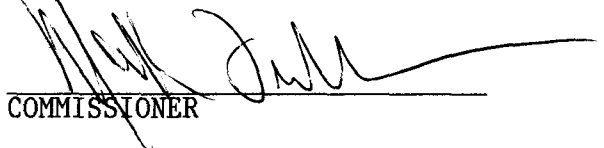
C. That the petition of McCarthy's Tavern is granted to the extent indicated in Conclusion of Law "B", supra, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
AUG 04 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER