

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

November 26, 1982

Rums-Zorba Endicott Rest. Corp.  
55 Washington Ave.  
P.O. Box 397  
Endicott, NY 13760

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  
Theo J. Totolis  
55 Washington Ave., P.O. 397  
Endicott, NY 13760  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
RUMS-ZORBA ENDICOTT RESTAURANT CORPORATION	:	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 December 1, 1975	:	
through August 31, 1978.	:	

---

Petitioner, Rums-Zorba Endicott Restaurant Corporation, 55 Washington Avenue, Endicott, New York 13760, 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, 1975 through August 31, 1978 (File No. 24508).

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 2, 1981 at 4:00 P.M. Petitioner appeared by Theo J. Totolis, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUES

I. Whether a field audit performed whereby the Audit Division marked up purchases to determine sales properly reflected petitioner's taxable sales and additional tax due thereon.

II. Whether the books and records maintained by petitioner were sufficient for the verification of its taxable sales.

FINDINGS OF FACT

1. On January 29, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against Rums-Zorba Endicott Restaurant Corporation for the period December 1, 1975 through August 31, 1978. The Notice asserted additional tax determined due of \$4,414.87, plus simple interest of \$720.96, for a total of \$5,135.83.

2. On audit, the Audit Division computed the markup for each category of sales reported by petitioner as they were recorded on petitioner's books and records as follows:

Beer	230%
Liquor	191%
Food	58%

The Audit Division performed a markup analysis to verify the above book markups.

The Audit Division examined purchases made by petitioner during the period September through November, 1977. It obtained information regarding selling prices, drink sizes and other information pertinent to the computation of a markup from petitioner's accountant. In the determination of its markup percentage, the Audit Division considered the following factors:

- a) A 1½ oz. serving for liquor drinks was used.
- b) 30 percent of draught beer was considered sold by the pitcher.
- c) 10 percent of drinks were sold during cocktail hours at reduced prices.
- d) 15 percent of liquor and beer purchased was spilled and therefore not sold.
- e) Inventory was on hand and not yet sold.
- f) Liquor purchases included soft drinks subsequent to August, 1976.
- g) Condiments used in food sales constituting 12.7 percent of purchases were excluded from food purchases and therefore not subject to markup.

- h) 5 percent of food purchases were wasted.
- i)  $2\frac{1}{2}$  pizzas per day were given away during cocktail hour(s) and not sold.

The Audit Division determined the following weighted markups:

Beer	280%
Liquor	319%
Food	145%

The Audit Division then applied the above markups to purchases that were sold during the audit period and determined taxable sales of \$340,227.00 and tax due thereon of \$23,815.89. Petitioner reported and paid tax of \$19,401.02 on sales and use tax returns filed. The Audit Division thereby determined additional tax due of \$4,414.87.

3. Petitioner argued that all books and records were available for audit upon request and that such records properly reflected all sales made and should have been relied on during the audit.

4. Petitioner submitted a sampling of records available which consisted of a daily summary sheet for November 29, 1975 with cash pay-out slips attached, a deposit slip dated December 3, 1975, undated guest checks, two pages from a cash disbursements journal covering the period December 2 through 31, 1975, and an undated cash register tape showing sales made during one day. These records were used in accounting for sales on a daily basis. The business was absentee owned, and the manager of the business accounted for all cash taken in. His accounting for a day's sales would consist of the total of the amounts on the cash payment slips attached to a daily summary sheet and the amount recorded on the daily bank deposit slip. Mr. Totolis, secretary-treasurer of the corporation, personally filed the sales and use tax returns from information entered on the daily summary sheets.

5. Petitioner further argued that the audit did not consider such factors as  $\frac{1}{2}$  kegs of beer sold for parties held on the premises and reduced drink prices to clientele from sponsored softball teams or other sports-related functions. Petitioner estimated that 40 to 60 percent of its business was through parties where proceeds from sales were obtained from the sale of  $\frac{1}{2}$  kegs of beer at \$5.00 to \$10.00 over cost. Petitioner contended that its food sales were not made for profit but rather as an incentive for customers to patronize the business.

6. Other than the sampling of records submitted in Finding of Fact "4", petitioner offered no other evidence in support of its arguments and contentions. The records submitted did not indicate any sales of  $\frac{1}{2}$  kegs of beer, nor were the selling prices of items inconsistent with those used by the Audit Division in its determination of the markups applied to petitioner's purchases on audit.

#### CONCLUSIONS OF LAW

A. That the purchase markup audit used by the Audit Division to verify the accuracy of petitioner's sales records disclosed that said records were not sufficient for determining petitioner's tax liability. That the Audit Division was not required to accept petitioner's books and records as presented. Moreover, petitioner's submission of a sampling of guest checks made available after audit did not disprove any findings of the audit.

B. 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 in using purchases to determine sales.

C. That the petition of Rums-Zorba Endicott Restaurant Corporation is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 29, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 26 1982

ACTING

PRESIDENT

*Robert W. Bouchard*

*Francis R. Kasig*

COMMISSIONER

COMMISSIONER

*[Signature]*

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Rums-Zorba Endicott Rest. Corp. :  
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 12/1/75-8/31/78. :  
\_\_\_\_\_ :

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 26th day of November, 1982, he served the within notice of Decision by certified mail upon Rums-Zorba Endicott Rest. Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rums-Zorba Endicott Rest. Corp.  
55 Washington Ave.  
P.O. Box 397  
Endicott, NY 13760

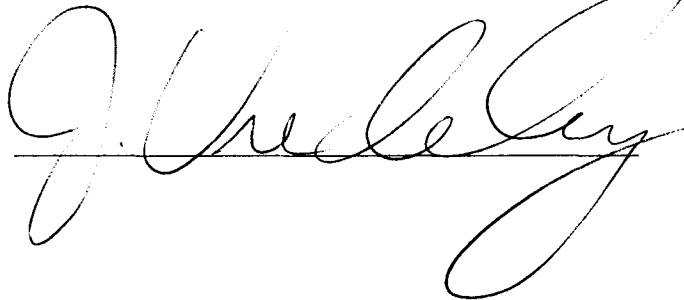
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
26th day of November, 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 :  
Rums-Zorba Endicott Rest. Corp. :

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 12/1/75-8/31/78. :

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 26th day of November, 1982, he served the within notice of Decision by certified mail upon Theo J. Totolis the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theo J. Totolis  
55 Washington Ave., P.O. 397  
Endicott, NY 13760

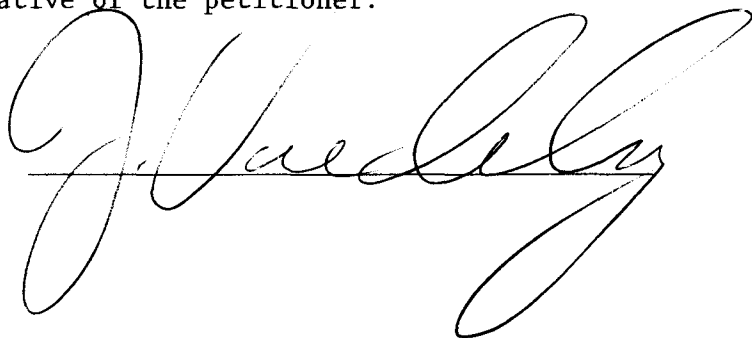
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
26th day of November, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174





**P 230 844 215**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>Theo J. Totalis</i>	
STREET AND NO.		<i>55 Washington Ave</i>	
P.O., STATE AND ZIP CODE		<i>P.O. Box 397 Spokane, WY 83401</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
		SPECIAL DELIVERY	\$
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	\$
		SHOW TO WHOM AND DATE DELIVERED	\$
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	\$
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	\$
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	\$
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

**P 230 844 214**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>Wm Juba, Inc. Indicated Exp</i>	
STREET AND NO.		<i>55 Washington Ave.</i>	
P.O., STATE AND ZIP CODE		<i>P.O. Box 397</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
		SPECIAL DELIVERY	\$
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	\$
		SHOW TO WHOM AND DATE DELIVERED	\$
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	\$
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	\$
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	\$
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			