

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

October 12, 1982

Tardi's Bono Catering, Inc.
737 Throggs Neck Expressway
Bronx, NY

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
Mark S. Gross
360 North Street
White Plains, NY 10605
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

TARDI'S BONO CATERING, 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 December 1, 1971
through August 31, 1974.

Petitioner, Tardi's Bono Catering, Inc., 737 Throggs Neck Expressway, Bronx, New York, 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, 1971 through August 31, 1974 (File No. 14745).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 16, 1977 and was continued to conclusion before Herbert Carr, Hearing Officer, at the same location, on November 29, 1978. The petitioner appeared by Mark S. Gross, CPA. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the audit of petitioner's books and records and the resulting determination that additional sales and use taxes were due were proper and correct.

FINDINGS OF FACT

1. On March 19, 1975, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes due of \$61,528.01, plus penalty and interest

of \$17,855.73, for a total of \$79,383.74 for the period December 1, 1971 through August 31, 1974.

2. Petitioner timely 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, 1971 through August 31, 1974.

3. Petitioner operates a "catering-restaurant" establishment consisting of several large catering rooms and a bar.

4. At the time of the audit, the records available to the auditor consisted of the general ledger, the sales book, the purchase book, Federal returns, contracts, invoices and bills.

5. An examination of petitioner's books revealed a markup of 152 percent on food. This was accepted as an accurate markup percentage. However, said books revealed a markup on liquor of 38 percent which percentage was considered inadequate by the auditor. Accordingly, the auditor conducted a markup test on liquor sales.

6. The auditor concluded that petitioner's markup on liquor should be 313 percent. This markup was arrived at by first taking into account the number of drinks in a quart bottle of liquor, the number of drinks the average person has, and the resulting number of people that a quart bottle of liquor serves to determine the bottle selling price. The profit was computed by subtracting the average price per quart from the bottle selling price. Lastly, the markup percentage was derived by dividing the profit by the average cost per bottle.

7. Petitioner's purported sales of food, flowers, favors, miscellaneous items, and labor were accepted.

8. The auditor examined those transactions for the month of June, 1974 which petitioner had claimed were exempt from sales and use tax. The auditor concluded that 40 percent of petitioner's purported exempt sales were nontaxable.

This amount was then applied to the total amount of petitioner's purported exempt sales for the entire audit period.

9. The foregoing computations resulted in adjusted taxable sales for petitioner of \$2,695,247.91 and an additional sales tax due of \$57,770.69.

10. In the course of the audit, the auditor conducted an examination of petitioner's recurring expenses for the month of June, 1974. The auditor concluded that 17 percent of these purchases were subject to use tax. This percentage was then applied to the total recurring expenses for the audit period. This resulted in \$38,925.70 in purchases subject to use tax and additional use tax due of \$2,740.46.

11. Petitioner's purchases of fixtures and equipment during the audit period were \$14,442.67. No bills for these purchases were available at the time of the audit and therefore use tax was assessed on the entire amount generating an additional use tax due of \$1,016.86.

12. On December 16, 1975 petitioner's accountant attended an informal conference at the Bronx District Office of the New York State Department of Taxation and Finance. At that time a tentative reduction, without the aid of additional records, was discussed. However, an agreement on this tentative reduction could not be reached.

13. On March 4, 1976 petitioner's representative delivered furniture, fixtures and expense bills, and the maintenance account from the general ledger, to the Bronx District Office of the New York State Department of Taxation and Finance. These documents reduced the previously computed purchases subject to use tax from \$53,368.37 to \$25,970.35. Accordingly, it was recommended in a field audit report dated April 23, 1976 that the use tax assessment be reduced by \$1,929.03 and that the assessment be adjusted to \$59,598.03.

14. Prior to the formal hearing, petitioner's accountant submitted a letter encaptioned "NOTES ON SALES AND COSTS ANALYSIS", which stated, in part:

"FINALLY, ON LIQUOR SALES, THE AMOUNT SHOWN IS THE RESULTANT FIGURE, AFTER SUBTRACTING ALL OTHER ELEMENTS OF SALES. FOR THE TEN MONTHS ENDED DECEMBER 31, 1975, the total sales of liquor is \$244503 and the cost is \$69974. This represents a markup of 286% on cost, while food shows a markup of 50% on cost.

THE POINT I HAVE TRIED TO STRESS HERE, IS THAT THE METHOD OF CHARGING ON CONTRACTS IS SO FLEXIBLE, THAT, IN ORDER TO REFUTE THE POSITION TAKEN BY THE SALES TAX DEPARTMENT, I HAVE SHOWN THAT WE ARE ACTUALLY MARKING UP LIQUOR AT 286%. I AM AWARE THAT THE TAX DEPARTMENT WILL CONSIDER THIS ARBITRARY, BUT IT IS NO MORE ARBITRARY THAN THEIR OWN METHODS...".

15. Petitioner offered no evidence to show that reasonable cause existed for not paying over any of the tax asserted due.

CONCLUSIONS OF LAW

A. That where a taxpayer maintains records from which the exact amount of sales tax can be determined, it is impermissible to use a "test period" to determine the amount of tax due (Matter of Mohawk Airlines v. Tully, 75 A.D.2d 249, 250-251; Names in the News v. New York State Tax Comm., 75 A.D.2d 145, 147; Matter of Chartair, Inc. v. State Tax Comm., 65 A.D.2d 44, 46).

B. That in view of petitioner's records revealing a 38 percent "markup" on liquor, the letter from petitioner's accountant which stated that liquor is actually being marked up at 286 percent, and the results of the markup test which indicated that the liquor markup was 313 percent, it is clear that petitioner did not maintain adequate sales records upon which the exact amount of sales tax could be determined. Accordingly, the audit procedure utilized to determine liquor sales was reasonable under the circumstances (see Matter of Convissar v. State Tax Comm., 69 A.D.2d 929, 930).

C. That in view of the documents available, it must be concluded that petitioner's records were sufficient to determine the exact amount of use tax due arising from petitioner's recurring expenditures and the exact amount of petitioner's transactions which were exempt from sales and use tax. Accordingly, the use of a one-month test period to determine the amount of tax due arising

from the foregoing transactions for the entire audit period was improper under the circumstances (cf. Matter of Mohawk Airlines v. Tully, 75 A.D.2d 249, 250-251; supra; Names in the News v. New York State Tax Comm., 75 A.D.2d 145, 147, supra; Matter of Chartair, Inc. v. State Tax Comm., 65 A.D.2d 44, 46, supra). Therefore, the amount of use tax due from petitioner's recurring expenditures and the amount of tax due from certain transactions which petitioner had claimed were exempt from taxation is reduced to the amount found due for the month of June, 1974.

D. That since petitioner's accountant produced certain documents regarding the purchase of furniture and fixtures (referred to in Finding of Fact "13"), the use tax found due on said items is to be accordingly reduced.

E. That the petition of Tardi's Bono Catering, Inc. is granted to the extent indicated in Conclusions of Law "C" and "D" and the Audit Division is directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 19, 1975. The petition is in all other respects denied.

DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Tardi's Bono Catering, 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:
12/1/71 - 8/31/74.

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 12th day of October, 1982, he served the within notice of Decision by certified mail upon Tardi's Bono Catering, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

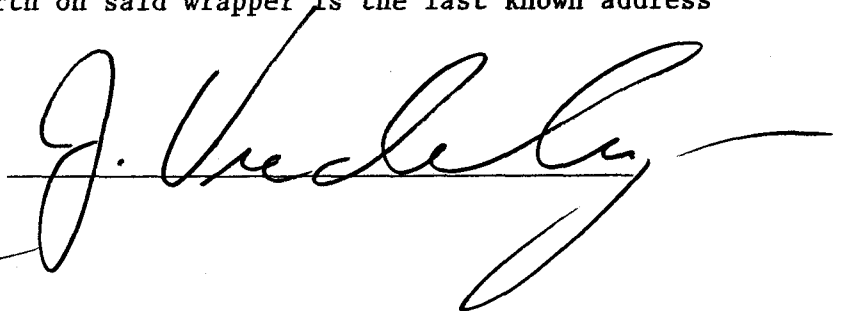
Tardi's Bono Catering, Inc.
737 Throggs Neck Expressway
Bronx, NY

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
12th day of October, 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

Tardi's Bono Catering, 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 12/1/71 - 8/31/74.

State of New York
County of Albany

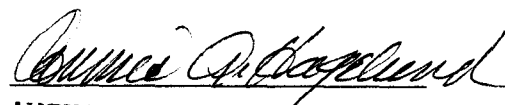
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Mark S. Gross the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mark S. Gross
360 North Street
White Plains, NY 10605

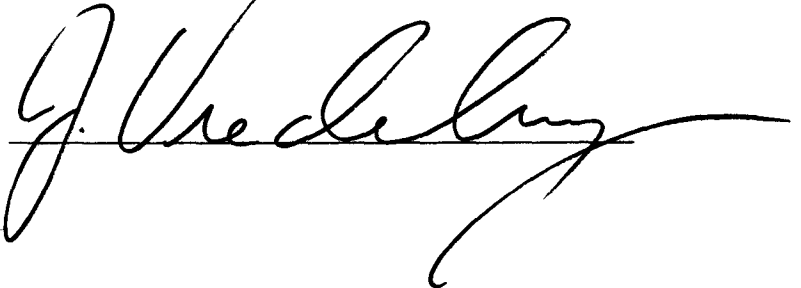
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 844 091
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		MARK S. Gross	
STREET AND NO.		360 North St	
P.O., STATE AND ZIP CODE		White Plains N.Y. 10605	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢	
	SPECIAL DELIVERY	¢	
	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	¢	
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

P 230 844 090
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		TARDI'S BROS Catering Inc	
STREET AND NO.		137 Throggs Neck Expressway	
P.O., STATE AND ZIP CODE		Bronx N.Y.	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢	
	SPECIAL DELIVERY	¢	
	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	¢	
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			