

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

June 11, 1982

Union Rd. Wehrle Dr. Restaurant, Inc.,
d/b/a Lamark Supper Club, Mark Maranto, Ind. & as Officer
33 Woodcrest Blvd.
Kenmore, NY 14217

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
J. Mark Gruber
Harrison & Gruber
1902 Rand Bldg.
Buffalo, NY 14203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
UNION ROAD-WEHRLE DRIVE RESTAURANT, INC. : DECISION
d/b/a LAMARK SUPPER CLUB and :
MARK MARANTO, INDIVIDUALLY AND AS OFFICER :
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 September 1, 1976 :
through August 31, 1978. :

Petitioners, Union Road-Wehrle Drive Restaurant, Inc. d/b/a LaMark Supper Club and Mark Maranto, individually and as officer, 22 Woodcrest Boulevard, Kenmore, New York 14217 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 September 1, 1976 through August 31, 1978 (File No. 28153).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 23, 1981 at 10:45 A.M. Petitioner appeared by J. Mark Grubar, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from Union Road-Wehrle Drive Restaurant, Inc. based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner Union Road-Wehrle Drive Restaurant, Inc. d/b/a LaMark Supper Club (hereinafter "Union") operated a restaurant and bar located at 784

Wehrle Drive, Williamsville, New York. Petitioner Union ceased business operations on or about June 16, 1978.

2. On August 17, 1979, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes due against Union Road-Wehrle Drive Restaurant, Inc. d/b/a LaMark Supper Club and Mark Maranto, individually as President, covering the period September 1, 1976 through August 31, 1978 for taxes due of \$5,726.44, plus minimum statutory interest of \$906.80, for a total of \$6,633.24.

3. On audit, Union provided the Audit Division with cash receipts and cash disbursements journals and purchase invoices. Union did not produce guest checks or cash register tapes to verify the accuracy of the postings to the cash receipts journal. A review of purchase invoices and the cash disbursements journal disclosed that the disbursements journal had entries for which invoices were not available and vice versa. Because of the incomplete purchase records, the Audit Division sent inquiries to Union's suppliers of liquor, beer and food requesting the total purchases made by Union for the period at issue. From the responses received, the Division determined the following purchases: food - \$34,935.24 and liquor and beer - \$35,501.87.

A markup test was performed for liquor and beer using purchases for the months of September, 1977 through December, 1977 (a period for which purchase invoices were substantially complete) and was based on selling prices and drink sizes provided by Union. The test revealed a weighted average markup of 314 percent. The food markup was estimated at 100 percent based on a National Cash Register publication which showed that said markup was the national average for restaurants. The foregoing markups were applied to the above purchases to arrive at taxable sales of \$207,465.11. Union reported taxable sales of

\$125,658.86 for the same period, leaving additional taxable sales of \$81,806.25 and tax due thereon of \$5,726.44.

4. Union did not file a sales tax return for the sales made in June, 1978.

5. Union argued that the sales reported on sales tax returns filed for the audit period reflect the actual sales of the business operation. Union submitted its receipts and disbursements journals for the audit period. The disbursements journal disclosed purchases of food, liquor and beer amounting to \$55,951.76 as compared to \$70,437.11 determined by the Audit Division. The entries in the receipts journal cannot be independently verified without cash register tapes and guest checks.

6. Union also argued that a snow storm in January, 1977, known as the blizzard of 1977, forced the business to close for approximately two weeks. In addition, because of the power failure caused by the storm, the food on hand spoiled.

Union further alleged that stock was stolen which resulted in the firing of three employees. The theft was not reported to the police department or an insurance company. Union offered no evidence to show the extent, if any, of its losses.

CONCLUSIONS OF LAW

A. That petitioner Union Road-Wehrle Drive Restaurant, Inc. d/b/a LaMark Supper Club maintained insufficient books and records for the Audit Division to determine the exact amount of tax liability; and, as such, the audit procedures and tests adopted by the Audit Division to determine taxable sales and taxes due were proper pursuant to section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44); and that petitioner has failed to

sustain the burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

B. That the petition of Union Road-Wehrle Drive Restaurant, Inc. d/b/a LaMark Supper Club and Mark Maranto, individually and as officer, are denied and the notices of determination and demand for payment of sales and use taxes due issued August 17, 1979 are sustained.

DATED: Albany, New York

JUN 11 1982

STATE TAX COMMISSION

James A. Tueller

PRESIDENT

Francis P. Koenig

COMMISSIONER

William J. O'Neil

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Union Rd. Wehrle Dr. Restaurant, Inc., :
d/b/a Lamark Supper Club, Mark Maranto, Ind. :
& 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 9/1/76-8/31/78. :

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Union Rd. Wehrle Dr. Restaurant, Inc., d/b/a Lamark Supper Club, Mark Maranto, Ind. & as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Union Rd. Wehrle Dr. Restaurant, Inc.,
d/b/a Lamark Supper Club, Mark Maranto, Ind. & as Officer
33 Woodcrest Blvd.
Kenmore, NY 14217

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
11th day of June, 1982.

Ann R. Haglund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Union Rd. Wehrle Dr. Restaurant, Inc., :
d/b/a Lamark Supper Club, Mark Maranto, Ind. :
& 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 9/1/76-8/31/78 :
:

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon J. Mark Gruber the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. Mark Gruber
Harrison & Gruber
1902 Rand Bldg.
Buffalo, NY 14203

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
11th day of June, 1982.

Connie A. Hayden

J. Vredenburg

P 230 840 259
RECEIPT FOR CERTIFIED MAIL

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

SENT TO		<i>L. Mark Greber</i>	
STREET AND NO.		<i>Karrison & Greber</i>	
P.O., STATE AND ZIP CODE		<i>1902 Kane Bldg Buffalo N.Y. 14203</i>	
POSTAGE		<i>39</i>	
CERTIFIED FEE		<i>724/14217</i>	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	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			

PS Form 3800, Apr. 1976

P 230 840 258
RECEIPT FOR CERTIFIED MAIL

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

SENT TO		<i>Upstate Medical Center</i>	
STREET AND NO.		<i>Restaurant Inc.</i>	
P.O., STATE AND ZIP CODE		<i>400 Railroad Super Club, Mark Parents Ind. Office</i>	
POSTAGE		<i>39</i>	
CERTIFIED FEE		<i>724/14217</i>	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	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			

PS Form 3800, Apr. 1976