

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

October 12, 1982

Nicholas P. Vichos & Michael P. Sifnakis
d/b/a Lag's Restaurant
311 W. Water St.
Elmira, NY 14901

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
Donald W. Mustico
200 William St.
Elmira, NY 14901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NICHOLAS P. VICHOS AND MICHAEL P. SIFNAKIS	:	DECISION
d/b/a LAG'S RESTAURANT	:	
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,	:	
1973 through August 31, 1976.	:	

Petitioners Nicholas P. Vichos and Michael P. Sifnakis, d/b/a Lag's Restaurant, 311 West Water Street, Elmira, New York 14901, 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, 1973 through August 31, 1976 (File No. 19736).

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 1, 1981, at 1:15 P.M. Petitioners appeared by Donald W. Mustico, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether the markups as determined on field audit and applied to petitioners' purchases of beer, liquor and wine properly reflected petitioners' taxable sales.

FINDINGS OF FACT

1. On April 21, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Nicholas P. Vichos and Michael P. Sifnakis, d/b/a Lag's Restaurant covering the period September 1, 1973 through August 31, 1976. The Notice asserted additional tax due of \$4,034.59 plus penalties and interest of \$1,865.98 for a total of \$5,900.57.

2. Petitioners had executed consents to extend the period of limitation for assessment to May 20, 1977.

3. On audit, the Audit Division found that petitioners did not retain cash register tapes or guest checks for verification of the amount of sales made or selling prices charged. In order to verify the accuracy of sales reported, the Audit Division performed a markup test selecting average purchase months of October, 1974, April, 1976 and July, 1976 for wine and liquor and average purchase months of April, 1974 and February, 1976 for beer. The Audit Division reviewed purchases made during said months and determined a weighted average cost per unit sold. It then determined a weighted markup for each category of drinks sold based on selling prices and drink sizes obtained from petitioners. In its markup computation, the Audit Division used a 1 ounce serving portion of liquor for mixed drinks and 2 ounces for cocktails. It adjusted the selling prices to exclude the sales tax and considered that beverage sales in the dining room were 10¢ to 15¢ more per drink than beverage sales at the bar. A 15 percent spillage allowance was made for liquor, wine and draught beer. The Audit Division computed petitioners' liquor and wine markup to be 292.94 percent and the beer markup to be 156.68 percent. The Audit Division accepted food sales as reported by petitioners.

The Audit Division applied the purchase to sales conversion factors (cost of 100 percent plus the markup percentages) of 392.94 percent to liquor and wine purchases for the entire audit period and 256.68 percent to beer purchases for the entire audit period and determined taxable sales made in the audit period of \$117,393.00 of liquor and wine and \$66,782.00 of beer. It then added food sales of \$296,882.00 and determined total taxable sales of \$481,057.00 for the entire audit period. Petitioners reported taxable sales

of \$423,420.00 on sales and use tax returns filed for that period . The Audit Division thereby determined additional taxable sales of \$57,637.00 and tax due thereon of \$4,034.59.

4. Petitioners argued that the selling prices stated at the time of the audit were current selling prices and higher than those of prior periods. Petitioners submitted a schedule of increasing price changes contended to have occurred between 1974 and 1976. Petitioners' reported liquor, wine and beer sales, however, decreased from 1974 to 1976 during the average purchase months used by the Audit Division in its test.

5. Petitioners contended that the markups used by the Audit Division in determining sales were in error in that wine was served and included in the prices of meals, selling prices were reduced during happy hours, and lunch-time cocktail specials (reduced prices) were offered. Petitioners further contended that liquor servings were larger than those stated at the time of the audit. Petitioners offered no substantial evidence in support of the above contentions or that any of the above took place during the periods in issue.

6. Petitioners submitted an analysis of guest checks for December 1976 to show the ratio of beverage sales in the dining room to bar sales and also a summary of happy hour sales as compared to total beverage sales. Petitioners failed to submit any source documents used in the analysis or any evidence to show the occurrence in the audit period.

7. Petitioners did not raise the issue of penalty and interest.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return, when filed, is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases.


B. That petitioners' records were insufficient for the verification of the exact amount of taxable sales in that no source documents were available for audit. The audit procedure employed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law (Chartair, Inc. v. State Tax Commission, 65 AD2d 44, 411 N.Y.S.2d 41). That the selling prices and drink sizes used in the determination of the markups were those stated by petitioner and no evidence was produced to show that they were in error.

C. That the petition of Nicholas P. Vichos and Michael P. Sifnakis, d/b/a Lag's Restaurant, is denied; and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 21, 1977 is sustained with penalty and interest thereon.

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
Nicholas P. Vichos & Michael P. Sifnakis :
d/b/a Lag's Restaurant : 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:
9/1/73-8/31/76.

State of New York
County of Albany

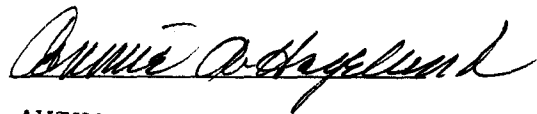
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Nicholas P. Vichos & Michael P. Sifnakis, d/b/a Lag's Restaurant the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicholas P. Vichos & Michael P. Sifnakis
d/b/a Lag's Restaurant
311 W. Water St.
Elmira, NY 14901

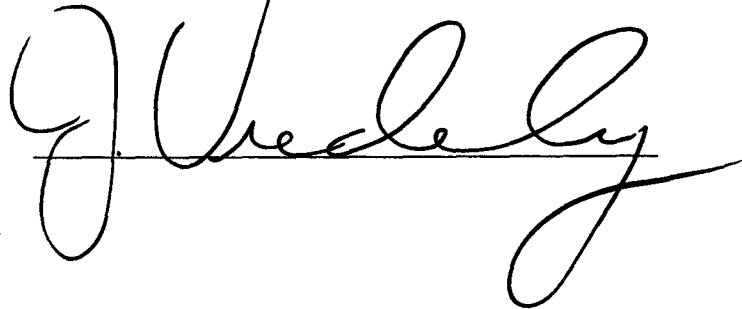
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 :
Nicholas P. Vichos & Michael P. Sifnakis :
d/b/a Lag's Restaurant :
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 9/1/73-8/31/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

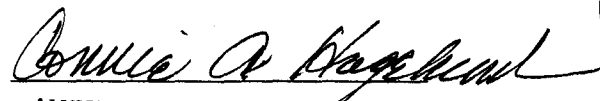
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Donald W. Mustico the representative of the petitioner in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

Donald W. Mustico
200 William St.
Elmira, NY 14901

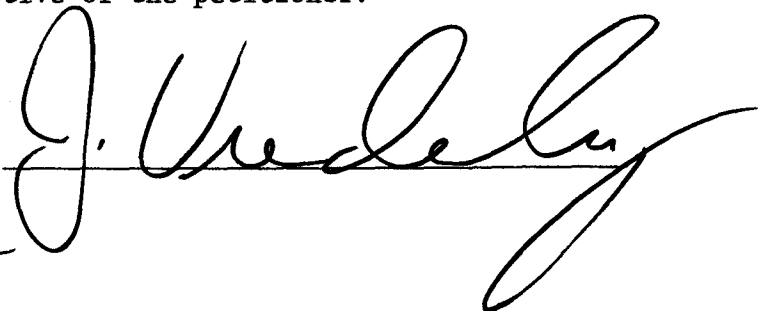
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 230 844 114
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Donald W. Mustico	
STREET AND NO.		200 William St	
P.O. STATE AND ZIP CODE		Elmira N.Y. 14901	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		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			

P 230 844 113
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Nicholas & Nicholas	
STREET AND NO.		d1b19 Los Restaurant	
P.O. STATE AND ZIP CODE		311 W. Water St. Elmira N.Y. 14901	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		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			