

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

May 6, 1983

Barbara's Steak Row, Inc.  
c/o Kraut & Resnick  
450 7th Ave.  
New York, NY 10001

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 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  
Robert W. Resnick  
Kraut & Resnick  
450 7th Ave.  
New York, NY 10001  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
BARBARA'S STEAK ROW, 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 September 1, 1977	:	
through October 5, 1979.	:	

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Petitioner, Barbara's Steak Row, Inc., 141 East 45th Street, New York, New York 10017, 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, 1977 through October 5, 1979 (File No. 31353).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 25, 1982 at 1:30 P.M. Petitioner appeared by Kraut & Resnick, Esqs. (Robert W. Resnick, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales tax due from petitioner, based upon the application of markup percentages of 125 percent for food, 175 percent for beer and 225 percent for whiskey and wine to purchases in each of the respective categories, as reported by petitioner in a Bulk Sale Questionnaire.

FINDINGS OF FACT

1. On or about November 30, 1979, Mr. Henry Kassis, as manager of Barbara's Steak Row, Inc. ("Restaurant"), submitted to the Audit Division, in accordance

with its request, a completed Bulk Sale Questionnaire (Form AU-196.8). Among the information contained therein were petitioner's purchases for the quarters ending November 30, 1978, February 28, 1979, May 31, 1979 and August 31, 1979, shown below.

Quarter Ending	<u>11/30/78</u>	<u>2/28/79</u>	<u>5/31/79</u>	<u>8/31/79</u>
Meat, fish, dairy, bakery, fruit and produce (canned or uncanned); food used in preparation of meals sold by restaurants and delicatessens	\$7,262.89	\$10,782.48	\$14,493.49	\$18,318.87
Beer	1,207.75	1,407.70	886.10	1,323.00
Whiskies and wines	7,402.47	6,453.05	4,011.27	5,348.43

2. A sales tax examiner of the Audit Division performed a desk audit, applying markup percentages of 125 percent for food, 175 percent for beer and 225 percent for whiskey and wine to total purchases in each of the respective categories as reported by petitioner in the questionnaire, to arrive at estimated sales. The examiner next compared the estimated sales with sales as reported by petitioner in its sales tax returns for the same periods (the period ending November 30, 1978 through the period ending August 31, 1979) and determined an error rate of 151 percent. Finally, she multiplied petitioner's reported sales for all quarterly periods at issue, except the period ending October 5, 1979, by 151 percent to compute additional taxable sales. Regarding the last period at issue for which petitioner filed a return reflecting zero gross and zero taxable sales, the examiner estimated sales of \$8,000.00 and applied thereto the 151 percent error rate.

The desk audit thus resulted in the issuance to petitioner of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated December 20, 1979, assessing additional sales tax, plus penalty and interest,

for the period September 1, 1977 through October 5, 1979, scheduled as follows:

<u>PERIOD</u> <u>ENDING</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
11/30/77	\$ 1,830.24	\$ 457.56	\$ 439.25	\$ 2,727.05
2/28/78	1,739.28	434.82	365.24	2,539.34
5/31/78	4,641.68	1,021.16	835.50	6,498.34
8/31/78	2,397.02	455.43	359.55	3,212.00
11/30/78	2,321.04	371.36	278.52	2,970.92
2/28/79	4,045.68	525.93	364.11	4,935.72
5/31/79	2,532.48	253.24	151.94	2,937.66
8/31/79	2,471.36	172.99	74.14	2,718.49
10/05/79	1,606.40	--	--	1,606.40
	<u>\$23,585.18</u>	<u>\$3,692.49</u>	<u>\$2,868.25</u>	<u>\$30,145.92</u>

3. By letter dated January 4, 1980, Mr. Irving Burstein, petitioner's accountant at that time, protested the assessment and requested "a detailed explanation and analysis of how you arrived at the tax which you determined to be due with particular attention paid to the manner in which you calculated the markup percentages which you applied to our client's purchases." On January 17, 1980, the sales tax examiner responded to Mr. Burstein's inquiry and furnished him with the markup percentages which had been used.

4.(a) Subsequent to petitioner's protest of the estimated assessment, the Audit Division assigned a sales tax examiner to conduct a field audit. The examiner contacted Mr. Burstein and requested access to various records including the guest checks, register tapes, menus, federal tax returns, general ledger, cash receipts and disbursements journal, payroll book and union contract. He was provided with the general ledger, purchases book and copies of petitioner's federal income tax returns. Petitioner did not provide invoices or any evidence regarding selling prices; thus, the examiner was unable to compute actual markup percentages.

(b) Petitioner claimed then, and in its petition, that the assessment was erroneous because the markup percentages employed were arbitrary and

unreasonable, and because consideration was not given to: (1) meals and beverages consumed by its employees; (2) tax-exempt sales; (3) food and beverages lost by reason of fire, flood and other casualties; and (4) unsold food and beverages. The examiner asked Mr. Burstein for documentation such as the payroll book or union contract to substantiate meals consumed by employees; documentation such as exempt certificates or diplomatic certificates to substantiate tax-exempt sales; and documentation such as insurance reports to substantiate food lost by casualties. No such documents were shown to the examiner.

(c) Petitioner's gross receipts for the period under review as reported on its federal income tax returns totalled \$320,420.00 (approximately corresponding with the gross sales figures Mr. Kassis supplied in the Bulk Sale Questionnaire); on the other hand, gross sales as reported in its sales tax returns totalled \$164,020.00. The examiner notified Mr. Burstein of the discrepancy. Mr. Burstein stated he would offer an explanation therefor, after he had the opportunity to go over the books and records, but he never did so.

5. Mr. Kassis owns Kassis Associates, Inc., a real estate brokerage and investment corporation, and Kassis Management, Inc., a trading company for the Middle East. He conceived the idea of operating a restaurant where he could entertain clients and potential clients, most of whom were Arabic. Thus he purchased and managed Barbara's Steak Row, Inc. (he owned the building wherein it was located) and named his wife, Barbara Massey Kassis, president of the corporation. Restaurant did serve steak but it also offered a variety of Arabic food.

6. Restaurant had seating capacity for approximately 40 to 50 people and employed one bartender and 3 waiters/waitresses.

7. In accordance with Mr. Kassis' instructions, the waiters turned over the completed guest checks with payment to the bartender. When the patron was a foreign dignitary or United Nations representative, the waiter also gave the bartender the patron's diplomatic card for acknowledgement; in such instances, the bartender struck the taxes from the check and indicated thereon the identification number shown on the diplomatic card. When Mr. Kassis entertained his clients at Restaurant, no guest check was prepared nor were charges made to them.

Mr. Kassis recalled that his accountant noted in the books and records which sales had been made to diplomats and had therefore been treated as tax-exempt; and also that no notation was made in the records of the occasions when he entertained clients.

8. Mr. Kassis estimated that during the course of a week, approximately 50 percent of Restaurant's sales were made to foreign dignitaries and United Nations personnel, although the percentage of tax-exempt sales for a particular week might have reached as high as 70 percent.

9. The business was sold on October 5, 1979. Before closing, Mr. Kassis did not retrieve the guest checks and other source documents from the basement storage area. The new restaurateur shortly thereafter discarded many of the records.

10. No source documents in the form of diplomatic exemption certificates or otherwise have been exhibited to the Audit Division or to this Commission to substantiate petitioner's claims. Nor did petitioner produce journals (except the purchase journal), ledgers, summaries or recapitulations prepared by its accountant from the source documents. Finally, petitioner did not offer the testimony of its accountant that he properly prepared such journals and ledgers and properly filed sales tax returns for the period under consideration.

CONCLUSIONS OF LAW

A. That paragraph (1) of subdivision (a) of section 1138 of the Tax Law empowers the Tax Commission, in the event a return when filed is incorrect or insufficient, to determine the proper amount of sales tax from such information as may be available. If necessary, the tax may be estimated, based upon external indices such as purchases, comparable charges, number of employees and other factors, but the methodology employed must be reasonably calculated to reflect the taxes due. Matter of Grant Co. v. Joseph, 2 N.Y.2d 196.

B. That the Audit Division's estimation of petitioner's taxable sales and of petitioner's sales tax liability is sustained. Petitioner furnished to the Audit Division, in the Bulk Sale Questionnaire, figures for its purchases of food, beer and whiskies and wines in the periods ending November 30, 1978, February 28, 1979, May 31, 1979 and August 31, 1979. The sales tax examiner then applied to such figures reasonable and acceptable markup percentages. See generally Matter of A. T. Korba's Restaurant, State Tax Comm., June 6, 1980, determination confirmed, Matter of Korba v. N.Y. State Tax Comm., 84 A.D.2d 655 (3d Dept.); Matter of Good Times Lakeview Inn, Inc., State Tax Comm., June 18, 1982; Matter of Shore Manor - J J Development Corp., State Tax Comm., October 17, 1980; Matter of 1975 Hylan Blvd. Corp., State Tax Comm., June 18, 1980.

Moreover, there has been no factual foundation established that petitioner's records when in existence were complete and adequate (in accordance with the requirements of section 1135), or that records were made available to the sales tax examiner from which he could conduct a full, item-by-item audit. Consequently, it cannot be said that the Audit Division's estimate procedures

were unwarranted. Matter of Chartair, Inc. v. State Tax Comm., 65 A.D.2d 44 (3d Dept.).

C. That section 1132(c) of the Tax Law provides, in part, that:

"it shall be presumed that all receipts for property or services... are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless...a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased...for some use by reason of which the sale is exempt from tax..., the sale shall be deemed a taxable sale at retail. Where such a certificate... has been furnished to the vendor, the burden of proving that the receipt...is not taxable shall be solely upon the customer."

D. That petitioner failed to sustain the burden of proof imposed by section 1132(c) and is therefore liable for tax on sales which it contended were made to foreign dignitaries and United Nations' representatives.

E. That there has been no gross negligence or willful intent to disobey the tax law on petitioner's part; therefore, all penalties in excess of that amount of interest prescribed by statute are remitted. 20 NYCRR 536.1.

F. That the petition of Barbara's Steak Row, Inc. is granted to the extent indicated in Conclusion of Law "E"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1979 is modified accordingly; and that except as so modified, the determination is in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Barbara's Steak Row, 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 9/1/77-10/5/79.		

State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Barbara's Steak Row, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Barbara's Steak Row, Inc.  
c/o Kraut & Resnick  
450 7th Ave.  
New York, NY 10001

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  
6th day of May, 1983.

David Parchuck

William P. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Barbara's Steak Row, 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 9/1/77-10/5/79. :  
:

State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Robert W. Resnick the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert W. Resnick  
Kraut & Resnick  
450 7th Ave.  
New York, NY 10001

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  
6th day of May, 1983.

David Parchuck

James R. Lippert

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

P 481 207 709

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to Robert W. Resnick Kraut & Resnick	
Street and No. 450 7th Ave.	
P.O., State and ZIP Code New York, NY 10001	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 481 207 708

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to Barbara's Steak Row, Inc. c/o Kraut & Resnick	
Street and No. 450 7th Ave.	
P.O., State and ZIP Code New York, NY 10001	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	