

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

June 24, 1983

Anthony Barnell & Louis Cacciola
d/b/a Taft Grove Partnership
1130 Wolf St.
Syracuse, NY 13208

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard E. Silverman
Gubman, Lowenstein & Silverman
4309 Genesee St.
Dewitt, NY 13214
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ANTHONY BARNELL AND LOUIS CACCIOLA	:	
D/B/A TAFT GROVE PARTNERSHIP	:	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 Periods December 1, 1969	:	
through November 30, 1972, and June 1, 1974	:	
through December 31, 1975.	:	

Petitioners, Anthony Barnell and Louis Cacciola, d/b/a Taft Grove Partnership, 1130 Wolf Street, Syracuse, New York 13208, 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 periods December 1, 1969 through November 30, 1972, and June 1, 1974 through December 31, 1975 (File Nos. 15263, 15264 and 20773).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York, on April 30, 1981 at 1:45 P.M., with all briefs to be submitted by June 2, 1982. Petitioners appeared by Richard E. Silverman, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the amount of petitioners' sales tax liability.

FINDINGS OF FACT

1. On March 19, 1976, as the result of an income tax field audit, the Audit Division issued two notice of determination and demand for payment of

sales and use taxes due against petitioners, Anthony Barnell and Louis Cacciola, d/b/a Taft Grove Partnership. Notice number 90,190,003 covered the Taft Grove and asserted additional tax due in the amount of \$1,776.10, plus penalty and interest of \$1,010.79, for a total of \$2,786.89 for the period December 1, 1969 through November 30, 1972. Notice number 90,190,002 covered the New Wolf Inn and asserted additional tax due in the amount of \$5,138.92, plus penalty and interest of \$2,892.44, for a total of \$8,031.36 for the period December 1, 1969 through December 30, 1972.

2. On July 15, 1977, the Audit Division issued a subsequent Notice of Determination and Demand for Payment of Sales and Use Taxes Due (90,760,577) against Anthony Barnell and Louis Cacciola d/b/a Taft Grove Partnership for the period June 1, 1974 through December 31, 1975. Said notice covered the Taft Grove and asserted additional tax due in the amount of \$4,648.31, plus penalty and interest of \$862.40, for a total of \$5,510.71.

3. On February 26, 1976, petitioners Anthony Barnell and Louis Cacciola each pleaded guilty in the Albany City Police Court to two counts of filing false and fraudulent New York State Combined Income Tax Returns with the intent to evade the payment of tax for the years 1971 and 1972. They admitted to the fraudulent actions in 1971 and 1972 but protested the amounts asserted to be due.

4. The Taft Grove Partnership operated two bar and grills, the Taft Grove on Taft Road, East Syracuse, New York and the New Wolf Inn at 1130 Wolf Street, Syracuse, New York. Petitioners filed two Federal partnership returns for the businesses. Petitioners kept their business books and records in an informal manner. Business transactions were recorded on pieces of tablet paper which were subsequently given to the Partnership's accountant. The accountant did

not have access to petitioners' bank deposit records and there were inconsistencies in sales figures as recorded.

5. The income tax auditor deemed petitioners' records to be inadequate to conduct a proper audit and he performed an income reconstruction audit by the source and application of funds method. The auditor then turned over his findings to the Special Investigations Bureau which reconstructed income by the bank deposit method of audit. The special investigator subpoenaed bank records of petitioners' business and personal accounts for the purpose of determining the amount of income received by petitioners during the period in issue. As a result of the audit, it was found that a difference of approximately \$118,000 existed between actual income and income as reported on the Partnership returns. Petitioners could offer no explanation for this discrepancy. One account, designated the "Sunshine Fund" by petitioners, contained income from the gross receipts of the business which was allegedly to be set aside for petitioners' retirement. The receipts deposited in the aforesaid account were never shown to the Partnership's accountant when he prepared the Partnership's tax returns. Therefore, the income in the "Sunshine Fund" was not reported on the partnership returns.

6. The Audit Division deemed the additional income determined for the years 1970 through 1972 to be omitted sales which comprised the basis of the sales tax assessments issued under notice numbers 90,190,003 and 90,190,002 [Finding of Fact #1]. Petitioners claimed that all of the Partnership's business and personal taxes due had been paid with the exception of the receipts found in the "Sunshine Fund" and that tax was due only on those receipts.

7. Notice number 90,760,577 [Finding of Fact #2] was issued based on a projection of the finding for the years 1970 through 1972.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "(i)f necessary, the tax may be estimated on the basis of external indices." The poor condition of the partnership's records together with unreported receipts and petitioners' admission of fraud clearly indicated the need for using external indices to determine tax due.

B. That "(w)hen records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due. The burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of the tax assessed was erroneous" (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858).

C. That the source and application of funds and bank deposit methods of auditing are generally accepted indirect audit methods and were properly performed according to established accounting principles. The audit findings were uncontroverted by any documentary or other evidence submitted by petitioners.


D. That waiver of penalty and interest is unwarranted in view of petitioners' admissions to filing of false and fraudulent tax returns.

E. That the petition of Anthony Barnell and Louis Cacciola d/b/a Taft Grove Partnership is denied and the notices of determination and demand for payment of sales and use taxes due issued on March 19, 1976 and on July 15, 1977 are sustained.

DATED: Albany, New York

JUN 24 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Anthony Barnell & Louis Cacciola :
d/b/a Taft Grove Partnership : 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 :
Periods 12/1/69 - 11/30/72 & 6/1/74 - 12/31/75.

State of New York
County of Albany

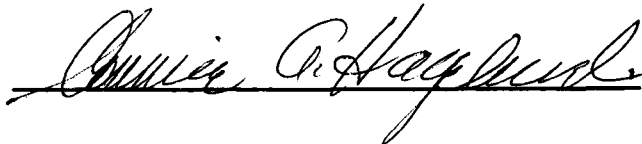
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon Anthony Barnell & Louis Cacciola, d/b/a Taft Grove Partnership the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Anthony Barnell & Louis Cacciola
d/b/a Taft Grove Partnership
1130 Wolf St.
Syracuse, NY 13208

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
24th day of June, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Anthony Barnell & Louis Cacciola :
d/b/a Taft Grove Partnership :

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 :
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State of New York
County of Albany

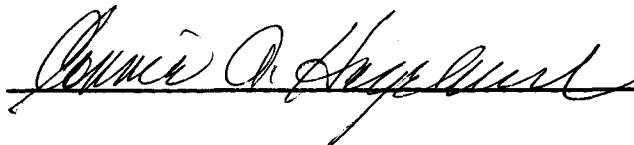
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon Richard E. Silverman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard E. Silverman
Gubman, Lowenstein & Silverman
4309 Genesee St.
Dewitt, NY 13214

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
24th day of June, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 481 207 934

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Anthony Barnell + Louis Cacciola 1612 7th Grove Partnership	
Street and No. 1130 Wolf St.	
P.O., State and ZIP Code Syracuse, NY 13208	
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	

PS Form 3800, Feb. 1982

P 481 207 935

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Richard E. Silverman Gubman, Lowenstein + Silverman	
Street and No. 4309 Genesee St.	
P.O., State and ZIP Code Dewitt, NY 13214	
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	

PS Form 3800, Feb. 1982