

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

November 10, 1983

Capriccio Restaurant, Inc.  
399 Jericho Tpke.  
Jericho, NY 11753

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  
Lionel Lewis  
1075 Central Park Ave.  
Scarsdale, NY 10583  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CAPRICCIO RESTAURANT, 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,	:	
1976 through May 31, 1980.	:	

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Petitioner, Capriccio Restaurant, Inc., 399 Jericho Turnpike, Jericho, New York 11753, 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, 1976 through May 31, 1980 (File No. 33065).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 8, 1983, at 10:45 A.M. with all briefs to be submitted by March 10, 1983. Petitioner appeared by Lionel Lewis, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the markup determined by the Audit Division on petitioner's food purchases and applied to such purchases to determine petitioner's taxable food sales properly reflected such sales made.

FINDINGS OF FACT

1. On December 19, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Capriccio Restaurant, Inc. covering the period December 1, 1976 through May 31, 1980. The Notice was

issued as a result of a field audit and asserted additional tax due of \$13,364.49 plus interest of \$1,695.05 for a total of \$15,059.54.

2. On March 20, 1981, a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued covering the same period for tax due of \$5,228.69 plus interest of \$725.70 for a total of \$5,954.39. This Notice was issued in addition to the first to correct computational errors made in the original audit findings.

3. Petitioner, by signature of Giacomo Trevisan, vice-president, executed a consent to extend the period of limitation for the issuance of an assessment for the period December 1, 1976 through November 30, 1979 to March 20, 1981.

4. On audit, in order to verify sales recorded in petitioner's records, the Audit Division reviewed pre-numbered guest checks utilized by petitioner for the period September 17, 1979 to September 22, 1979. Petitioner recorded its sales daily on summary sheets from these guest checks because no cash register tape was maintained. Upon its review, the Audit Division found that some guest checks were not recorded, and other sales were recorded but unsupported by guest checks.

The Audit Division then calculated petitioner's markup as recorded on its books and found the following:

<u>MARKUP PER BOOKS</u>	
Liquor, Wine & Beer	166.2% (Average)
Food: 12/1/76 - 5/31/78	141.8%
6/1/78 - 5/31/79	123.1%
6/1/79 - 5/31/80	102.6%
	122.5% (Average)

These recorded markups were considered to be low for this type of business serving a la carte dinners with above-average selling prices; therefore, a markup analysis was conducted.

With the aid of Mr. Trevisan, the auditor selected an entree from each category of food sold since all items sold equally well; i.e. 1 veal entree, 1 chicken, 1 steak, 1 shrimp and 1 fish. Also considered, based on the review of guest checks provided for the six days previously noted, were items such as specialty salads, appetizers, soup and dessert.

In the markup analysis such factors as waste were heavily considered. A side of beef was weighed before and after processing to determine the cost of a serving to account for the waste due to fat and bone. A 2/3 waste factor was determined on meat and 1/3 on fish. The serving portions as noted by Mr. Trevisan were used and the selling prices were obtained from the current menu available. Food costs were taken from current purchase invoices. Other factors such as food spoilage, officers' and employees' meals and an additional waste allowance of \$25.00 per day were taken into account. Based on the above, the Audit Division determined petitioner's combined food markup on lunches and dinners served to be 140.85 percent in its original audit findings. The Audit Division therefore considered the food sales as recorded by petitioner for the period June 1, 1978 through May 31, 1980 to be insufficient as reported on sales and use tax returns filed. The Audit Division accepted food sales as recorded for the period December 1, 1976 through May 31, 1978. Additional taxable food sales were determined to be \$150,091.00.

A markup analysis on petitioner's liquor, wine and beer purchases was also made considering a 15 percent allowance for spillage and consumption by officers and employees. The Audit Division determined additional taxable liquor, wine and beer sales to be \$21,748.35 for the audit period. Total additional taxable sales of food and beverages were determined of \$171,839.35 and tax due thereon

of \$12,069.71. In addition, the beverage purchases used by officers and employees were held subject to tax of \$449.59 based on their cost.

The Audit Division also noted that petitioner rounded its sales tax collections to the nearest nickel. Petitioner reported tax collected or the statutory rate of its sales recorded, whichever was higher, on its sales and use tax returns filed. Based on the review of guest checks aforementioned, the Audit Division determined sales tax over and under-collected and applied the rates determined to the additional taxable sales. Additional sales tax due was determined to be \$845.19 for the audit period. The Audit Division thereby determined the total sales and use tax deficiency of \$13,364.49 assessed on the first Notice issued.

5. Based on a review of the audit findings, it was found that some computation errors were made in the markup analysis. Revisions were made and the additional sales tax due was revised as follows:

<u>BASIS</u>	<u>ADDITIONAL TAX DUE</u>
Additional Taxable Sales <sup>1</sup>	\$17,280.18
Over and Under-Collections	863.41
Use Tax - Liquor, Wine & Beer	449.59
TOTAL	<u>\$18,593.18</u>
Previously Determined & Assessed	13,364.49
Additionally Assessed	<u>\$ 5,228.69</u>

6. The sole area of dispute is in the food markup determined. Petitioner contended that more waste was sustained than that which was allowed by the Audit Division in its markup computations of 2/3 on meat including veal and 1/3 on fish. Petitioner submitted no evidence of any additional waste over and

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<sup>1</sup> Although the Audit Division increased petitioner's food markup from a combined 140.85 percent to 125.3 percent for lunches served and 194.4 percent for dinners served, it did not assert any additional taxable food sales for the period December 1, 1976 through May 31, 1978.

above what was allowed by the Audit Division, nor did it submit any markup analysis of its own to disprove the audit findings.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of purchases to determine sales when returns filed are incorrect or insufficient. That the Audit Division found on examination of guest checks and daily records kept that petitioner's sales records could not be used to determine its exact tax liability. The audit procedure using purchases to determine sales was therefore proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S. 2d 41).

B. That once it is established that the auditor's independent determination of sales was permissible, the burden is upon petitioner to show that this determination should be overturned by showing error. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.)

That petitioner failed to establish that the procedures used in determining its food markup or the results therefrom were unreasonable. The Audit Division considered all factors in reducing sales which were brought to the attention of the auditor inasmuch as petitioner was involved in the markup analysis by selecting food items to be marked up and denoting serving portions and waste allowances.

C. That the petition of Capriccio Restaurant, Inc. is denied and the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 19, 1980 and March 20, 1981 are sustained.

DATED: Albany, New York

NOV 10 1983

STATE TAX COMMISSION

Bonnie A. Allen  
PRESIDENT

Francis R. Koehn  
COMMISSIONER

[Signature]  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Capriccio Restaurant, Inc. :  
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 12/1/76 - 5/31/80. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Capriccio Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Capriccio Restaurant, Inc.  
399 Jericho Tpke.  
Jericho, NY 11753

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  
10th day of November, 1983.

Martha L. Brunelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Capriccio Restaurant, 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 12/1/76 - 5/31/80. :  
\_\_\_\_\_

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Lionel Lewis the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lionel Lewis  
1075 Central Park Ave.  
Scarsdale, NY 10583

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  
10th day of November, 1983.

Martha L. Sennelle

Connie A. Hagelund



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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Capriccio Rest. Inc</i>	
Street and No. <i>399 Genesee Tpke</i>	
P.O., State and ZIP Code <i>Geneva NY 11753</i>	
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 470 316 232

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Leonel Lewis</i>	
Street and No. <i>1075 Central Pk Ave</i>	
P.O., State and ZIP Code <i>Schenectady NY 12303</i>	
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