

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

May 27, 1983

Cashelard Restaurant, Inc.
c/o Michael Keane, Pres.
944 8th Avenue
New York, NY 10019

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
Saul S. Katz
71 Hicks Ave.
Great Neck, NY 11024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
CASHELARD 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 September 1, 1975	:	
through August 31, 1978.	:	

Petitioner, Cashelard Restaurant, Inc., c/o Michael Keane, President, 944 Eighth Avenue, New York, New York 10019, 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, 1975 through August 31, 1978 (File No. 27538).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 12, 1983 at 9:15 A.M. Petitioner appeared by Saul Katz, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division used proper audit procedures in determining petitioner's sales tax liability.

FINDINGS OF FACT

1. On July 6, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Cashelard Restaurant, Inc., in the amount of \$43,062.25,

plus penalty of \$9,737.49 and interest of \$10,589.95, for a total due of \$63,389.69 for the period September 1, 1975 through August 31, 1978.

2. On December 5, 1978, petitioner, by Michael Keane, president, executed a consent extending period of limitation for assessment of sales and use taxes for the period September 1, 1975 through August 31, 1978 to December 20, 1979.

3. During the period in issue petitioner operated a bar and restaurant named the Blarney Stone¹ which served beer and liquor and a variety of sandwiches. Petitioner had two owners and seven employees.

4. On audit, the auditor found that petitioner maintained a complete set of books; however, no original sales documents such as cash register tapes or guest checks were maintained. Upon examination of the records, the auditor found that sales per the general ledger and Federal tax returns were \$101,563.57 higher than sales reported on petitioner's sales tax returns. Petitioner could offer no explanation for this discrepancy and supplied no records or worksheets explaining how sales tax returns were prepared. Additionally, the auditor found that the books reflected a food markup of 60 percent and a combined beer and liquor markup of 147 percent. Based on the auditor's experience, these figures appeared to be low for a business of this type and therefore, the auditor conducted markup tests on both food and liquor sales.

5. Based on purchase invoices and information supplied by petitioner's manager, the auditor used a three-month test period to compute the markup percentages for food and liquor. The tests revealed a food markup of 129 percent, a beer markup of 291 percent and a liquor markup of 255 percent. The

¹ There are numerous bars and restaurants in New York City named "Blarney Stone". petitioner operates the bar and restaurant of that name at 944 8th Avenue in Manhattan.

aforesaid percentages were applied to food, beer and liquor purchases during the audit period to determine taxable sales. The auditor allowed a 15 percent reduction in sales for spillage, spoilage and free food and drinks.

6. Petitioner disagreed with the results of the audit and hired its own independent auditor to review the audit and recompute the results using figures which petitioner thought were more accurate. In his recomputations, petitioner's auditor allowed for employee meals, food and liquor donated to a local parish church, turkeys allegedly raffled off, unprepared take-out food sold over the counter and greater amounts of spillage, spoilage and free food. No substantiation of any of these items was offered either through documentation or testimony of individuals with personal knowledge of the facts alluded to. The only evidence offered in support of petitioner's claim were several unsworn, signed form statements to the effect that every employee of petitioner drank four to five bottles of beer a day, that the owners each drank two bottles of scotch per week, and that the bartenders free-poured liquor instead of using measured shot glasses. Without sufficient corroboration, the aforesaid statements remained unconvincing.

7. Petitioner also maintained that sales tax was included in the prices of food and liquor and that signs to that effect were posted in the restaurant. Petitioner presented testimony that such signs were posted in 1980 but no evidence as to whether such signs were posted during the period in issue. The auditor had treated the food and liquor sales as though tax was not included in the price. The Audit Division's witness pointed out a possible inconsistency in the auditor's selling price figures in that food prices were odd prices such as \$2.01 or \$3.01, whereas liquor prices were even figures such as \$.80 or \$1.00. The witness indicated that such figures indicated the possibility that

the original auditor had erroneously included sales tax in liquor prices but not in food prices. However, said witness was not the original auditor and had no personal knowledge of the audit and his statements were mere speculation. The weight of the evidence indicated that tax was not included in the selling price and the markup was properly computed as excluding tax.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person required to collect tax, to maintain records of its sales and to make these records available for audit. Such records include sales slips, cash register tapes and receipts. "When 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...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).

B. That inasmuch as petitioner's books indicated a discrepancy between sales per books and sales reported in excess of \$100,000.00 thus establishing that petitioner's records were insufficient or incorrect, the Audit Division was justified in using a markup audit method to determine petitioner's tax liability. Moreover, when restaurant guest checks and cash register tapes are inadequate or unavailable to determine tax due, an audit based on purchases is permissible (Korba v. New York State Tax Commission, 84 A.D.2d 655).

C. That petitioner failed to sustain its burden of proof with respect to allowances for employee meals, free food and liquor, and losses through spillage and spoilage. Petitioner produced no records or credible testimony to show the amounts of food and drink consumed by employees, the amounts of food and liquor given away or raffled off, or the amount of food lost through waste and spoilage.

Absent sufficient substantiation, "[n]either the Tax Commission nor the auditor was required to fix an allowance for those items through speculation" (Korba, supra at 657).

D. That petitioner has failed to meet its burden of proof with respect to showing that the auditor was in error in computing the markup percentages as though tax was not included in the price of food and liquor. Petitioner produced no credible evidence whatsoever indicating whether tax was included in selling prices during the period in issue.

E. That the petition of Cashelard Restaurant, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 6, 1979 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Cashelard 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 9/1/75-8/31/78.		

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Cashelard Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cashelard Restaurant, Inc.
c/o Michael Keane, Pres.
944 8th Avenue
New York, NY 10019

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
27th day of May, 1983.

David Parchuck

James A. 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 :
Cashelard 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 9/1/75-8/31/78. :
_____ :

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Saul S. Katz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Saul S. Katz
71 Hicks Ave.
Great Neck, NY 11024

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
27th day of May, 1983.

David Parchuck

James O. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 481 207 864

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Cashelard Restaurant, Inc.</i>	
Street and No. <i>410 Michael Keane, Pres</i>	
<i>944 8th Avenue</i>	
P.O., State and ZIP Code <i>New York, NY 10019</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 481 207 865

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Saul S. Katz</i>	
Street and No. <i>71 Hicks Ave.</i>	
P.O., State and ZIP Code <i>Great Neck, NY 11024</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