

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

July 8, 1983

5 Brothers Tavern, Inc.  
c/o Angelo Mentasti  
75-24 65th Dr.  
Middle Village, NY

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  
Harold N. Eder  
21 East 40th St.  
New York, NY 10016  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
5 BROTHERS TAVERN, 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,	:	
1973 through May 31, 1977.	:	

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Petitioner, 5 Brothers Tavern, Inc., c/o Angelo Mentasti, 75-24 65th Drive, Middle Village, New York 11379, 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, 1973 through May 31, 1977 (File No. 23561).

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 September 21, 1982, at 1:15 P.M. Petitioner appeared by Harold N. Eder, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

#### ISSUE

Whether the additional tax due as determined by the Audit Division for failure to submit records for audit was proper and actually due and owing.

#### FINDINGS OF FACT

1. On August 17, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against 5 Brothers Tavern, Inc. and its officers covering the period December 1, 1973 through May 31, 1977. The Notice was issued as a result of petitioner's failure to submit its

records for audit. The Notice asserted additional tax due of \$24,857.75 plus penalty and interest of \$10,768.18 for a total of \$35,625.93.

2. Petitioner, by signature of one of its officers, Angelo Mentasti, consented to extend the period of limitation for the issuance of an assessment for the period December 1, 1973 through November 30, 1976 to December 19, 1977.

3. From November 18, 1976 to August 17, 1977, numerous contacts by the Audit Division were made in order to set an appointment for a field audit of petitioner's books and records. Except for July 7 or 8, 1977, all appointments made were cancelled by petitioner's accountant. On July 7 or 8, 1977, most of petitioner's records were left at its accountant's office and were not available at the business location where the audit was to be conducted. Petitioner had a daybook wherein it recorded gross sales exclusive of sales tax for the periods December, 1973 through June, 1974 and October, 1976 through May, 1977 as follows:

<u>DATE</u>	<u>AMOUNT</u>
December, 1973	\$11,022.65
January, 1974	10,335.75
February	9,733.00
March	10,374.34
April	9,933.60
May	10,639.50
June	9,721.45
October, 1976	8,414.91
November	7,690.53
December	8,782.06
January, 1977	7,895.67
February	7,455.35
March	8,829.79
April	8,402.73
May	8,310.40

No sales documents were available nor were purchase invoices submitted which were needed to perform any type of audit. The Audit Division attempted to contact the accountant further, without success, and on August 17, 1977 issued the above Notice due to the unavailability of the requested records.

The Audit Division determined the tax deficiency by holding 200 percent of petitioner's reported gross sales subject to tax and asserted additional tax due of \$24,857.75.

4. Petitioner contended that the books and records needed for audit were left with an individual employed by the Tax Department on January 6, 1978 for an audit to be conducted and that no receipt was acquired for those records. Petitioner did not attempt to retrieve those records, nor could it specifically recall the individual's name.

5. Petitioner retained some business records and submitted the following at the hearing:

(a) A check register covering the period March 6, 1973 through December 11, 1974.

(b) Purchase invoices and/or statements from suppliers covering the period December 1, 1973 through August 31, 1977.

(c) Petitioner testified at the hearing as to drink sizes served and selling prices. These were based on recollection only. The Audit Division's workpapers contained selling prices as of the date of the initial contact.

6. Based on information contained in the file and the records submitted:

(a) Petitioner underreported sales on the following sales and use tax returns as determined by a comparison of the returns with the daybook presented:

	<u>Sales Per Daybook</u>	<u>Sales Reported</u>	<u>Difference</u>
12/73-2/74	\$ 31,091.40	\$25,747.00	\$ 5,344.40
03/74-5/74	30,947.44	25,910.00	5,037.44
12/76-2/77	24,133.08	22,770.00	1,363.08
03/77-5/77	25,542.92	21,515.00	4,027.92
	<u>\$111,714.84</u>	<u>\$95,942.00</u>	<u>\$15,772.84</u>

(b) Petitioner's check register disclosed that petitioner made liquor and wine purchases totaling \$14,873.30 and beer purchases totaling \$17,196.98 during the period December, 1973 through November, 1974.

(c) Based on a 1 ounce serving portion of liquor, and a "spillage allowance" of 15 percent (liquor not sold), petitioner's liquor markup was 365 percent. Petitioner testified that the liquor was served in one ounce portions.

(d) Petitioner's markup on beer averaged 275 percent for both draught beer and bottled beer. Petitioner served 7 ounces of draught beer at a selling price of 30¢. Petitioner's selling price for bottled beer was 90¢ during 1977, the time of the auditor's contact.

(e) The purchases made by petitioner in (b) above were capable of yielding sales of \$124,524.17 based on selling prices available. Petitioner reported sales of \$97,769.00 on sales and use tax returns filed covering the same period, December 1, 1973 through November 30, 1974.

7. Petitioner offered no documents of its sales or any books of original entry reflecting sales for the audit period.

8. Petitioner did not show reasonable cause for not making its records available for audit.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides 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.

B. That the business records submitted into evidence and the testimony offered reveal a percentage rate of omission on the filed returns of 27.37 percent as compared to the 100 percent as determined by the Audit Division.

C. That the petition of 5 Brothers Tavern, Inc. is granted to the extent indicated in Conclusion of Law "B" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
5 Brothers Tavern, 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 :  
12/1/73-5/31/77. :

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 8th day of July, 1983, she served the within notice of Decision by certified mail upon 5 Brothers Tavern, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

5 Brothers Tavern, Inc.  
c/o Angelo Mentasti  
75-24 65th Dr.  
Middle Village, NY

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  
8th day of July, 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 :  
5 Brothers Tavern, 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 12/1/73-5/31/77. :  
: 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 Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon Harold N. Eder the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold N. Eder  
21 East 40th St.  
New York, NY 10016

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  
8th day of July, 1983.





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State of New York  
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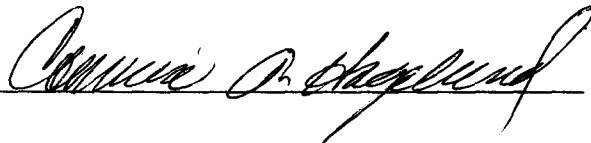
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OATHS PURSUANT TO TAX LAW  
SECTION 174



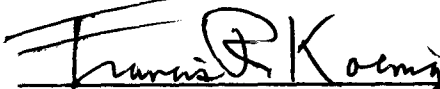
Sales and Use Taxes Due issued August 17, 1977 with applicable penalty and interest thereon; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

JUL 08 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 208 016

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>5 Brothers Tavern, Inc.</i>	
Street and No. <i>c/o Angelo Mentasti</i>	
<i>75-24 65th Dr.</i>	
P.O., State and ZIP Code <i>Middle Village, NY</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 481 208 017

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Harold N. Eder</i>	
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