

P 481 208 378

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Glow Lench, Inc 2nd	
Street and No. OSCAR Kimmeldorf	
Indio + QS Officer	
P.O., State and ZIP Code 2134 87th Ave 10026	
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

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(See Reverse)

Sent to GERARD ZWIRN	
Street and No. KAANGOLA + ZWIRN	
277 Broadway	
P.O., State and ZIP Code NEW YORK NY 10007	
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

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

November 10, 1983

Philip Gush
d/b/a Top's Tavern
1132 Lackawanna Ave.
Elmira, NY 14901

Dear Mr. Gush:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip Gush :
d/b/a Top's Tavern : 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 :
10/1/77-11/30/79. :

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 Philip Gush d/b/a Top's Tavern, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Gush
d/b/a Top's Tavern
1132 Lackawanna Ave.
Elmira, NY 14901

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. Smuelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PHILIP GUSH	:	DECISION
D/B/A TOP'S TAVERN	:	
	:	
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 October 1, 1977	:	
through November 30, 1979.	:	

Petitioner, Philip Gush d/b/a Top's Tavern, 1132 Lackawanna Avenue, Elmira, New York 14901, 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 October 1, 1977 through November 30, 1979 (File No. 30357).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on March 10, 1983 at 10:45 A.M. Time was allowed until April 15, 1983 for additional evidence. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUES

I. Whether the markup audit performed by the Audit Division was proper and, if so, whether it accurately reflected petitioner's sales tax liability.

II. Whether petitioner is liable for tax due on purchases made during the audit period.

FINDINGS OF FACT

1. On June 27, 1980, as a result of a field audit, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner, Philip Gush d/b/a Top's Tavern. Said Notice covered the period October 1, 1977

through November 30, 1979 and assessed tax in the amount of \$6,131.46, plus interest of \$832.03, for a total of \$6,963.49.

2. Petitioner operated a neighborhood bar and grill which sold beer, liquor, wine and a minimal amount of food. Business commenced on October 1, 1977 when petitioner purchased the business assets from a Mr. Charles W. Rice.

3. Petitioner kept the following records: copies of sales tax returns, Federal and New York State income tax returns, depreciation schedules, cash receipts journals, cash disbursement journals, cash register tapes, purchase invoices and cancelled checks. The cash register tapes showed amounts and category of sale (beer, wine, liquor or food); they did not show each item sold.

4. The Audit Division's auditor analyzed petitioner's books and found that recorded beer, liquor and wine sales for the period October 1, 1977 through November 30, 1979 reflected a 67 percent markup. The auditor deemed this low for petitioner's type of business and proceeded to perform a markup of purchases audit to verify petitioner's taxable sales.

Using invoices for the three-month period December, 1978, January and February, 1979 and prices and sizes of drinks supplied by petitioner, markups of 215 percent for beer and 253 percent for liquor and wine were computed which took into consideration a 15 percent "spillage" allowance for draught beer and liquor. Food sales were accepted as reported on petitioner's books. Sales of beer, liquor and wine were considered tax included to recognize "unit pricing" as provided for in regulation 20 NYCRR 532.1(b)(4).

Application of the above markups and allowances to total purchases per petitioner's books resulted in audited and additional taxable sales as follows:

Beer Purchases \$35,849.10 x 215% markup plus cost	\$112,924.66
Liquor and Wine Purchases \$17,030.24 x 253% markup plus cost	60,116.74
Total Beer, Wine and Liquor Sales Including Tax	<u>\$173,041.40</u>
Less Tax	11,320.46
Taxable Sales of Beer, Wine and Liquor	<u>\$161,720.94</u>
Food Sales Per Books	3,426.69
Total Taxable Sales Per Audit	<u>\$165,147.63</u>
Taxable Sales Reported on Returns Filed for the Same Period	84,928.39
Additional Taxable Sales	<u>\$ 80,219.24</u>

Based upon the above, a margin of error for taxable sales of 94.46 percent was computed by dividing the additional taxable sales of \$80,219.24 by taxable sales reported on returns filed of \$84,928.39.

Upon analysis of petitioner's books, the auditor discovered that the taxable sales as recorded were higher than those reported on the returns. To adjust for this, as well as compute the additional sales tax due resulting from the above, the 94.46 percent margin of error was applied to the taxable sales, exclusive of sales tax, recorded in petitioner's books of \$86,084.55 to arrive at additional taxable sales of \$81,316.00. This was multiplied by the 7 percent sales tax rate to arrive at a tax figure of \$5,692.12. Added to this was the tax due per petitioner's books of \$6,025.87, to arrive at \$11,717.99. Finally, from this figure was deducted actual sales tax paid with returns filed of \$5,944.93 to determine additional sales tax due of \$5,773.06.

5. The auditor reviewed petitioner's 1978 Federal income tax return depreciation schedule C-1. Among other items, this schedule reflected furniture, fixtures and equipment in the amount of \$4,000.00 acquired in October, 1977, beverage coolers in the amount of \$800.00, also acquired in October, 1977 and refrigeration in the amount of \$320.00 acquired in January, 1978. These items were deemed taxable by the auditor, and because petitioner could not show that sales tax was paid on these items which totalled \$5,120.00, tax was assessed at 7 percent to determine use tax in the amount of \$358.40. This was added to the

additional sales tax determined in Finding of Fact "4" of \$5,773.06 to compute the total tax assessed of \$6,131.46.

6. Petitioner asserted that all books and records concerning the sales tax liability were available and accurate. On this basis, it is petitioner's contention that the audit method used in the instant case utilizing a three-month test period must be annulled, as the actual records were available for a detailed audit.

7. Petitioner asserted that a higher than average amount of fancy and/or expensive liquors were included in the three-month test of purchases. However, there was no evidence presented to show how the inclusion of these purchases was detrimental to petitioner.

8. The audit method did not take into consideration the following two items:

(a) Petitioner sponsored a softball team in the summer and a hockey team in the winter, each season running approximately twelve weeks. When petitioner's baseball or hockey team lost, petitioner had to provide a half-keg of beer. There are no records to indicate the won and lost record of the teams sponsored or the kind(s) of beer supplied; therefore, a 50 percent win/loss record and a \$20.00 cost to petitioner per half-keg of beer would reflect a reasonable estimate.

(b) Petitioner had "happy hour" every Monday through Friday from 4:00 P.M. to 6:00 P.M.; 25 percent of all drinks sold during the period under audit were sold during "happy hour" at a 5 cent per drink reduction in price.

9. Petitioner asserted that when the business was purchased in October, 1977, that there was only a building and land acquisition. Petitioner failed

to show that the sales tax was paid on the tangible personal property recorded on its books or that the items in question were nontaxable.

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 by the Tax Commission from such information as may be available, such as purchases.

B. That the Audit Division's use of a markup test to determine the accuracy of petitioner's records disclosed that the records were not sufficient to determine petitioner's exact sales tax liability (Matter of Jack Berger d/b/a Seven Pines Restaurant, State Tax Commission, April 2, 1982; Good Times Lakeview Inn, Inc., State Tax Commission, June 18, 1982).

C. That the adjustment made in Finding of Fact "4", beyond arriving at the additional taxable sales of \$80,219.24, is erroneous; this adjustment had already been considered when total purchases were marked up and sales reported on returns were deducted.

That petitioner's audited taxable sales should be recomputed to reflect an additional \$480.00 allowance for draft beer given away to the sponsored baseball and hockey teams in that tax is to be computed on the \$480.00 cost rather than the marked up selling price (Finding of Fact "8(a)").

That petitioner's sales should be further reduced to reflect that 25 percent of the drinks sold by petitioner were sold at a 5 cent price reduction during "happy hour" (Finding of Fact "8(b)").

D. That petitioner has failed to show that tax was paid on the items described in Finding of Fact "5", or that said items were not subject to tax. Therefore, the tax on these purchases in the amount of \$358.40 is sustained.

E. That the petition of Philip Gush d/b/a Top's Tavern is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 27, 1980 accordingly with such additional interest as may be due and owing; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983

Rodnick As Chin
PRESIDENT

Francis R. Kearney
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

P 470 316 221

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NOT FOR INTERNATIONAL MAIL

(See Reverse)

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