

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

May 6, 1983

William Leudemann
d/b/a Country Tavern
756 Horseblock Road
Farmingville, NY 11738

Dear Mr. Leudemann:

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 Laws 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
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herbert Grodin
32 Delaware Ave.
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

William Leudemann

d/b/a Country 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 Ending 2/28/77 - 11/30/79.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon William Leudemann, d/b/a Country Tavern the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Leudemann
d/b/a Country Tavern
756 Horseblock Road
Farmingville, NY 11738

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
6th day of May, 1983.

David Parchuck

James R. 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 :
William Leudemann :
d/b/a Country 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 Ending 2/28/77 - 11/30/79. :

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Herbert Grodin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Grodin
32 Delaware Ave.
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 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
6th day of May, 1983.

David Parchuck

Annice 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	:	
WILLIAM LEUDEMANN	:	DECISION
D/B/A COUNTRY 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 December 1, 1976	:	
through November 30, 1979.	:	

Petitioner, William Leudemann d/b/a Country Tavern, 756 Horseblock Road, Farmingville, New York 11738, 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 November 30, 1979 (File No. 30950).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on June 15, 1982 at 10:45 A.M. Petitioner appeared by Herbert Grodin, CPA and Paul Beeber, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of the markup method of audit as a basis for determining petitioner's taxable sales was proper and, if so,

II. Whether the additional taxable sales resulting from the use of such procedure were correct.

FINDINGS OF FACT

1. Petitioner, William Leudemann d/b/a Country Tavern, operated a restaurant and bar located at 756 Horseblock Road, Farmingville, New York 11738.

2. On May 20, 1980, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1976 through November 30, 1979 for taxes due of \$7,261.59, plus minimum statutory interest of \$1,092.49, for a total of \$8,354.08.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to December 20, 1980.

4. On audit, the Audit Division performed markup tests for beer, liquor and wine using purchases for the months of June, July and August, 1979. The tests revealed a beer markup of 273.76 percent and a combined liquor and wine markup of 313.17 percent. The selling prices of drinks were provided by petitioner. The liquor markup was computed using a 1½ ounce serving of liquor. A 15 percent allowance was given for spillage. The Audit Division estimated the food markup at 100 percent. The foregoing markup percentages were applied to applicable purchases for the audit period to determine total sales of \$465,997.73. Petitioner reported sales of \$364,103.00 for the same period, leaving additional taxable sales of \$101,894.73 and tax due thereon of \$7,131.98.

The Audit Division also asserted use taxes of \$129.61 based on its review of expense purchases for the test period of June, July and August, 1979. An error rate of .07943 was determined for the test period and was used to project the use tax liability for the audit period.

5. Petitioner did not retain cash register tapes and as a result, the Audit Division could not independently verify the sales recorded in petitioner's books and records.

6. Petitioner's books and records show food sales of \$189,238.00 and food purchases of \$84,217.00, or a reported markup of 125 percent. Petitioner made several arguments affecting food cost, such as food given away at the bar and food spoilage, to show that its food sales were \$104,864.00. Since the books and records show food sales of \$189,238.00, petitioner's arguments are without merit.

The Audit Division estimated food sales of \$155,473.00 and thereby understated its assessment.

7. With respect to the liquor markup, petitioner argued that it poured 20 drinks from a quart of liquor, rather than 20.86 as determined by the Audit Division and that consideration was not given to its practice of giving a free drink to a customer who purchased three drinks. Petitioner offered no substantial evidence to support these arguments.

Petitioner agreed with the markup on beer computed by the Audit Division.

8. The only item found subject to tax on the Audit Division's review of expense purchases was trash removal services. Petitioner paid the sales tax to the vendor of such services.

CONCLUSIONS OF LAW

A. That petitioner's failure to retain cash register tapes as required by section 1135 of the Tax Law justified the Audit Division's use of the audit procedures founded on markup percentages to determine beer and liquor sales (Matter of McCluskey's Steak House, Inc. v. State Tax Commission, 80 A.D.2d 713; Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D.2d 947).

That the audit procedure was reasonable under the circumstances and that petitioner failed to overcome its burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

B. That in accordance with Finding of Fact "8", the use taxes of \$129.61 are cancelled.

C. That the petition of William Leudemann d/b/a Country Tavern is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Wm. Henderson</i>	
Street and No. <i>100 West 100th St</i>	
P.O., State and ZIP Code <i>156 West 100th St Amherst NY 14138</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 481 207 688

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Herbert Groder</i>	
Street and No. <i>38 De Laune Ave</i>	
P.O., State and ZIP Code <i>Jericho 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