

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

June 29, 1983

162 Gardiners Avenue Corp.
162 Gardiners Ave.
Levittown, NY 11756

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
William J. Bernstein
Suoizzi, English & Cianciulli
One Huntington Quadrangle, Suite 1N09
Mellville, NY 11747
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
162 Gardiners Avenue Corp.

:

:

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:
6/1/75-2/28/79.

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 29th day of June, 1983, she served the within notice of Decision by certified mail upon 162 Gardiners Avenue Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

162 Gardiners Avenue Corp.
162 Gardiners Ave.
Levittown, NY 11756

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
29th day of June, 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

162 Gardiners Avenue Corp. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
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State of New York
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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 29th day of June, 1983, she served the within notice of Decision by certified mail upon William J. Bernstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William J. Bernstein
Suozzi, English & Cianciulli
One Huntington Quadrangle, Suite 1N09
Mellville, NY 11747

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
29th day of June, 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	:	
162 GARDINERS AVENUE CORPORATION	:	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 June 1, 1975	:	
through February 28, 1979.	:	

Petitioner, 162 Gardiners Avenue Corporation, 162 Gardiners Avenue, Levittown, New York 11756, 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 June 1, 1975 through February 28, 1979 (File No. 29028).

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 22, 1982 at 10:45 A.M. Petitioner appeared by Suozzi, English & Cianciulli, P.C. (William J. Bernstein, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether a field audit performed by the Audit Division whereby petitioner's purchases were marked up to their selling prices properly reflected the sales made by petitioner.

II. Whether the Audit Division properly determined that a certain amount of food sales were made by petitioner.

III. Whether the Audit Division properly determined a use tax due on fixed asset acquisitions.

FINDINGS OF FACT

1. On December 20, 1979, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against 162 Gardiners Ave., Corp. [sic] covering the period June 1, 1975 through February 28, 1979. The notices asserted a total additional tax due of \$11,633.86 plus penalty and interest of \$3,588.62 for a total of \$15,222.48. The notices were issued as a result of a field audit.

2. Petitioner executed two consents to extend the period of limitation for the issuance of an assessment for the period June 1, 1975 through May 31, 1978. The first, by signature of Steven C. Mosiello, treasurer and vice-president, extended the period to June 20, 1979. The second consent, by signature of John J. Satriano, president, extended the period to December 20, 1979.

3. On audit, the Audit Division prepared to perform a markup test to verify the accuracy of sales as recorded in petitioner's books and reported on sales and use tax returns filed.

The Audit Division visited the business premises for the purpose of determining the portion of liquor being served. The auditor and her supervisor ordered sandwiches, one mixed drink and one "shot" with a ginger ale chaser. Two mixed drinks were delivered and a second request was made for a "shot" with a ginger ale chaser. The audit supervisor then measured the "shot" in a measuring devise and based on the size of that drink determined that petitioner served 3/4 ounces of liquor in all mixed drinks.

The Audit Division requested purchase invoices for the period September 1 through November 30, 1977 in order to perform its markup analysis. Petitioner did not have available and was unable to obtain purchase invoices from a major

supplier totaling \$869.47; therefore, invoices from the same supplier for the months of April and June, 1978 totaling \$829.03 were substituted.

Based on selling prices and other drink sizes obtained from the petitioner, the Audit Division determined a markup of 828 percent on liquor and 279 percent on beer. A spillage allowance of 15 percent was made for liquor and draught beer. The Audit Division then determined that 29 percent of petitioner's liquor and beer purchases constituted liquor and 71 percent was beer. The Audit Division applied the markups determined above to the respective purchases and determined taxable sales of \$221,885.00 for the period June 1, 1975 through February 28, 1978. Petitioner reported taxable sales of \$149,836.00 on sales and use tax returns filed for the same period. The Audit Division determined additional taxable sales of \$72,049.00 or an increase of 48.09 percent. In order to update its audit findings, the Audit Division applied 48.09 percent to taxable sales reported for the period March 1, 1978 through February 28, 1979 and determined, for the entire audit period, additional taxable sales of \$97,205.00.

The Audit Division found no food purchases recorded in petitioner's books. The Audit Division estimated that food sales were \$15.00 per day based on its observation previously made. Food sales were thereby determined to be \$20,250.00 for the audit period.

The Audit Division found that fixed asset acquisitions of \$48,366.56 were made during 1975 based on the Federal corporation tax return filed. Petitioner substantiated that sales tax was paid on \$485.65 of such purchases. The Audit Division held the balance of \$47,880.91 subject to use tax of \$3,351.66.

Prior to the issuance of the notices, the Audit Division corrected certain errors made in the markups and revised the liquor markup to 802.6

percent and the beer markup to 273.7 percent. These revisions changed the rate of increase to taxable sales reported to 45.9 percent. The Audit Division finally determined the additional sales and use tax due of \$11,633.86.

4. Petitioner argued that the markups determined on audit were incorrect in that liquor servings were free-poured. An affidavit was submitted from an employee of petitioner acknowledging that shot glasses were used only when requested by the customer. Petitioner used shot glasses of various sizes ranging from 3/4 ounce to 1 1/2 ounces.

5. Petitioner further argued that it offered promotional sales at reduced prices during the audit period. The audit comment sheets contained notations of such sales as follows:

Sun.	Ladies	50¢
Mon.	Beer-Tap	25¢
Tues.	Mixed	50¢ after 8 p.m.
Wed.	Wine	50¢ after 8 p.m.

The Audit Division, in its markup computations, did not give consideration to these selling prices. Petitioner did not submit any evidence to show the volume of such sales made.

6. Petitioner contended that other errors were made in the markup analysis in that six-packs of beer were sold for off-premises consumption and not considered; that the 15 percent spillage allowance used on audit was not sufficient to cover buy-backs to customers for every three drinks purchased; and that burglaries occurred where beer and liquor was stolen and therefore not sold. Petitioner could not produce any cash register tapes to reflect six-pack sales since register tapes were destroyed when sales entries were made in its cash receipts book. No evidence of buy-backs was submitted. Petitioner did submit two copies of "verification of report" forms (a police department form)

reflecting two burglaries; however, they did not conclusively show the amounts of inventory losses sustained.

7. Petitioner submitted an affidavit from Ruth Erranti for the purpose of showing that food sales were not made by petitioner. The affiant stated that a food concession was operated on petitioner's premises with no purchases or sales having been made by petitioner. Petitioner allowed the operation on its premises as a convenience to its customers. The operation was discontinued after approximately five months due to its unprofitable sales.

8. On June 12, 1975, petitioner purchased the business operation from the Flame Lounge, Inc. The purchase price for the business was \$35,000.00 which included fixtures, goodwill, leasehold and restricted covenant. Petitioner apparently included the full purchase price in depreciable cost on Federal tax returns filed. Petitioner submitted a report of income tax examination changes from the Internal Revenue Service for the year 1977. The report adjusted depreciation for goodwill in the amount of \$1,000.00 claimed for that year. Petitioner depreciated its assets on the straight-line method over a ten-year period. Therefore, \$10,000.00 of the purchase price was attributable to goodwill. Petitioner offered no evidence to show the amount of its purchase price which was attributable to the leasehold and restricted covenant.

Petitioner maintained that a number of the fixed assets held subject to use tax on audit were paid in amounts obviously divisible by 107 percent. Petitioner therefore argued that these purchases should be deleted from the audit results without further substantiation of the tax having been paid. Petitioner offered no purchase invoices to show the collection or payment of the tax thereon.

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 such as purchases.

That petitioner did not have sufficient records available for the determination of an exact amount of its sales. The method employed by the Audit Division using purchases to determine and verify sales was proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

B. That the Audit Division, in determining sales through the markup of purchases method of audit, failed to consider the fact that liquor drinks were not normally served in a shot glass unless specifically ordered and that petitioner free-poured liquor in mixed drinks served (Finding of Fact "4"). That the serving portions of liquor used in the markup performed by the Audit Division are increased to 1½ ounce servings to more properly reflect such sales.

C. That petitioner did not serve food on its business premises. Any food sales made during the audit period were those of another person required to collect tax. (Finding of Fact "7"). Petitioner, therefore, cannot be held liable for the taxes due from another vendor. That the additional sales tax determined due from food sales is hereby cancelled.

D. That petitioner has shown that \$10,000.00 of its asset acquisitions claimed on its Federal tax return was attributable to goodwill from the purchase of the business. The fixed assets held subject to use tax on audit are hereby reduced by such amount.

E. That the petition of 162 Gardiners Avenue Corporation is granted to the extent indicated in Conclusions of Law "B", "C" and "D" above; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 29 1983


PRESIDENT


COMMISSIONER


COMMISSIONER