

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

July 8, 1983

Peter Sharak  
d/b/a Sharkeys Bar & Grill  
56 Glenwood Ave.  
Binghamton, NY 13905

Dear Mr. Sharak:

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  
Donald I. Hayes  
P.O. Box 331  
Windsor, NY 13865  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Peter Sharak :  
d/b/a Sharkeys Bar & Grill : 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 :  
12/1/73-11/30/76. :

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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 Peter Sharak d/b/a Sharkeys Bar & Grill, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter Sharak  
d/b/a Sharkeys Bar & Grill  
56 Glenwood Ave.  
Binghamton, NY 13905

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.

Connie R. Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
Peter Sharak	:	
d/b/a Sharkeys Bar & Grill	:	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 12/1/73-11/30/76.	:	

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State of New York  
County of Albany

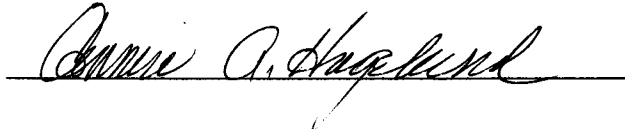
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of July, 1983, she served the within notice of Decision by certified mail upon Donald I. Hayes the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald I. Hayes  
P.O. Box 331  
Windsor, NY 13865

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.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
PETER SHARAK	:	DECISION
d/b/a SHARKEY'S BAR & GRILL	:	
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 November 30, 1976.	:	

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Petitioner, Peter Sharak d/b/a Sharkey's Bar & Grill, 56 Glenwood Avenue, Binghamton, New York 13903, 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 November 30, 1976 (File 18894).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, State Office Building Annex, 164 Hawley Street, Binghamton, New York, on December 1, 1981, at 10:45 A.M. Petitioner appeared by Donald I. Hayes. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of sales tax purportedly overpaid.

FINDINGS OF FACT

1. On May 18, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Peter Sharak d/b/a Sharkey's Bar and Grill covering the period December 1, 1973 through November 30, 1976. The Notice asserted additional tax due of \$420.37 plus penalty and interest of \$141.44 for a total of \$561.81.

2. A field audit was conducted by the Audit Division on which a markup of purchases audit was performed to verify petitioner's taxable sales. This was done since petitioner did not retain cash register tapes or guest checks for verification of his sales. The application of the markups to petitioner's purchases of beer, liquor and wine resulted in taxable sales of \$237,509.41. The Audit Division accepted food sales as reported by petitioner of \$308,855.06 for total taxable sales as a result of the audit of \$546,364.47. Petitioner reported taxable sales of \$552,278.00 on sales and use tax returns filed; therefore, the Audit Division accepted taxable sales as reported by petitioner.

The Audit Division reviewed expense purchases made during the audit period and found that \$381.87 in sales tax was not paid on such purchases. Fixed asset purchases were reviewed and a purchase of \$550.00 was found on which sales tax of \$38.50 was not paid. The Audit Division thereby determined the tax deficiency of \$420.37.

3. On January 14, 1977, during the course of the field audit, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax covering the period December 1, 1973 through November 30, 1976 in the amount of \$2,438.83. The refund claim was filed on the grounds that petitioner erroneously reported sales tax on his sales and use tax returns filed by remitting tax on his total receipts, including sales tax, rather than extracting the sales tax to determine the taxable base.

4. The Audit Division denied petitioner's claim for refund on the grounds that neither guest checks nor cash register tapes were available to substantiate said claim.

5. Petitioner is in agreement with the purchases held subject to use tax resulting in tax due of \$420.37 found on audit. Petitioner argued, however,

that the refund is due him since he complied with all the requirements set forth in ST-155, Record Keeping Instructions for Sales Tax Vendors, Section III, which relates to unit pricing for bars and grills. An analysis was made daily of the cash register tape; and sales were recorded in a day book of food, beer and liquor sales by the petitioner's bookkeeper.

6. Petitioner later amended his refund application to \$2,403.29 due to mathematical errors on the original application. Petitioner submitted his daily sales summaries showing the amount of sales erroneously reported with the sales tax included therein.

7. The Audit Division found all sales to be in agreement when a comparison of sales and use tax returns, cash receipts journal, and federal tax returns was made. The markups on petitioner's books and those determined by the Audit Division were as follows:

<u>BOOK MARKUP</u>		<u>AUDIT MARKUP</u>	
Beer	170%	Beer	121%
Liquor	114%	Liquor	183%
Food	129%	Food	Accepted

The Audit Division found that petitioner's selling prices of food were lower than average for petitioner's type of establishment and therefore accepted the food sales as reported. Based on the above analysis, the Audit Division concluded that there were misrings (liquor recorded as beer) on the cash register and did not increase taxable sales in any category.

8. The Audit Division assessed full penalty and interest on the tax due since petitioner did not sign a consent to fix the tax. Petitioner had reasonable cause for not signing the consent when he felt that he was entitled to a refund.

CONCLUSIONS OF LAW

A. That the Audit Division properly conducted an indirect audit of petitioner's books and records to verify sales as reported on returns filed. That the audit conducted, which consisted of accepting food sales as reported (55.92% of all sales reported) and marking up purchases of beer, liquor and wine concluded that the returns were filed substantially correct. That further, petitioner's method of reporting sales did not provide for the extraction of any sales tax in the sales recorded in his books. Petitioner therefore overreported sales and consequently overreported sales tax in filing his sales and use tax returns.

B. That section 1139(a) of the Tax Law provides for the refund of sales tax erroneously paid if application therefore is filed within three years after the date when the tax was payable by such person.

C. That the petition of Peter Sharak d/b/a Sharkey's Bar and Grill is granted to the extent that the refund application is modified to \$2,403.29 pursuant to Finding of Fact "6", and that the additional use tax of \$420.37 found due on audit with minimum statutory interest thereon offset the refund claim.

D. That the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 18, 1977 in accordance with Conclusion of Law "C" above, and to process petitioner's net claim for refund.

DATED: Albany, New York

JUL 08 1983

STATE TAX COMMISSION

Rodnicka W. C.  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. Smith  
COMMISSIONER

P 481 208 011

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Peter Sharak</b>	
Street and No. <b>416 1/2 Sharkeys Bart Grp II</b>	
<b>56 Glenwood Ave.</b>	
P.O., State and ZIP Code <b>Binghamton, NY 13905</b>	
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 481 208 012

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Donald T. Hayes</b>	
Street and No. <b>P.O. Box 331</b>	
P.O., State and ZIP Code <b>Windsor, NY 13865</b>	
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