

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

March 18, 1983

Donald M. Wildey, Sr.
d/b/a The Little Tavern
c/o Steiner & Steiner
90 State Street
Albany, NY 12207

Dear Mr. Wildey:

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
Eugene Steiner
Steiner & Steiner
90 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

Donald M. Wildey, Sr. :

d/b/a The Little 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 :
3/1/77-2/29/80. :

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Donald M. Wildey, Sr. d/b/a The Little Tavern, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald M. Wildey, Sr.
d/b/a The Little Tavern
c/o Steiner & Steiner
90 State Street
Albany, NY 12207

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
18th day of March, 1983.

David Parchuck

Quinn O'Donnell

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Donald M. Wildey, Sr.	:	
d/b/a The Little 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 3/1/77-2/29/80.	:	

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Eugene Steiner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene Steiner
Steiner & Steiner
90 State St.
Albany, NY 12207

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
18th day of March, 1983.

David Parchuck

Connie A. Heylund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DONALD M. WILDEY, SR.	:	DECISION
D/B/A THE LITTLE 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 March 1, 1977	:	
through February 29, 1980.	:	

Petitioner, Donald M. Wildey, Sr. d/b/a The Little Tavern, c/o Steiner and Steiner, 90 State Street, Albany, New York 12207, 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 March 1, 1977 through February 29, 1980 (File No. 31016).

On November 29, 1982 petitioner filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether the Audit Division used proper audit procedures in determining petitioner's sales tax liability.

FINDINGS OF FACT

1. On June 19, 1980, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Donald M. Wildey, Sr. d/b/a The Little Tavern, in the amount of \$4,160.34, plus penalty of \$1,040.08 and interest of \$1,388.81, for a

total due of \$6,589.33 for the periods March 1, 1977 through May 31, 1977 and September 1, 1977 through November 30, 1977. On August 14, 1980 another notice was issued against petitioner in the amount of \$31,229.35, plus penalty of \$6,393.82 and interest of \$5,999.32, for a total due of \$43,622.49 for the period September 1, 1977 through February 29, 1980.

2. On September 3, 1980 the Audit Division issued a Notice of Assessment Review revising the August 14, 1980 notice to delete the tax due for the quarter ending November 30, 1977. Said tax had already been assessed under the June 19, 1980 notice. The adjusted tax due was \$27,942.05, plus penalty and interest of \$10,519.37, for a total due of \$38,461.42.

3. On August 21, 1980 petitioner timely filed a petition protesting the field audit findings as capriciously computed and without basis in fact or law.

4. Petitioner operated a tavern and restaurant which served food and all legal beverages. On or about January 12, 1980 the business was completely destroyed by fire. The fire destroyed all of petitioner's records. During the period in issue, petitioner filed and remitted payment on a sales tax return for the quarter ending May 31, 1977 and filed a return without payment for the quarter ending November 30, 1977. No other returns were filed nor payments made for the period in issue.

5. The auditor obtained some records from petitioner's accountant. Based on these limited records and information received from petitioner, the auditor decided that petitioner's markup of 42 percent was extremely low and he performed a markup test. The auditor used itemized purchases of beer and liquor for the month of March, 1978 from another somewhat similar business and applied petitioner's selling prices and quantities served. The markup test revealed a markup on beer of 213 percent and on liquor of 352 percent. Included in this

markup was an allowance of two bottles of beer per case which was consumed by petitioner. Petitioner claimed a 100 percent markup on food and the auditor used this figure to determine food sales.

6. The auditor then tested sales for the first eleven months of 1979 by applying the audited markup results to purchases for this period. The results of the test were then compared to petitioner's journal and income tax returns for the test period and the auditor determined a margin of error of 239 percent. This margin of error was applied to sales as reported on income tax returns for the years 1977 and 1978 and the first eleven months of 1979 to arrive at taxable sales for the audit period. The auditor also computed use tax due on the self-consumed bottles of beer at the rate of two bottles per case as stated by petitioner.

7. Petitioner presented no evidence in any form refuting the findings of the auditor or explaining why the findings were erroneous.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "(i)f necessary, the tax may be estimated on the basis of external indices." Inasmuch as petitioner's records had been almost completely destroyed and those remaining were completely inadequate to use in conducting an audit, the auditor was justified in resorting to use of a markup test and a test period based on external indices in determining petitioner's tax liability.

B. That the burden of proof is on the petitioner. Since petitioner provided no proof whatsoever to substantiate his allegation that the audit findings were "computed capriciously" he has failed to meet his burden of proof.

C. That the petition of Donald M. Wildey, Sr. d/b/a The Little Tavern is denied and the notices of determination and demand for payment of sales and use taxes due issued June 19, 1980 and August 14, 1980, as modified by the Notice of Assessment Review issued September 3, 1980, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 389 758 736
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Donald M. Wilkey, Sr. 210 1/2 The Little Tavern c/o Steiner & Steiner	
Street and No. 90 State St.	
P.O., State and ZIP Code Albany, NY 12207	
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 389 758 737
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Eugene Steiner Steiner & Steiner	
Street and No. 90 State St.	
P.O., State and ZIP Code Albany, NY 12207	
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