

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

January 18, 1984

Jimmy L. Baldwin
d/b/a The Stadium
71 Rotary Ave.
Binghamton, NY 13905

Dear Mr. Baldwin:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Richard J. Grace
Decker, Grace & Shephard
29 Riverside Dr., P.O. Box 1116
Binghamton, NY 13902
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Jimmy L. Baldwin
d/b/a The Stadium : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/75-11/30/78.

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Jimmy L. Baldwin, d/b/a The Stadium the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jimmy L. Baldwin
d/b/a The Stadium
71 Rotary Ave.
Binghamton, NY 13905

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jimmy L. Baldwin :
d/b/a The Stadium : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
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State of New York }
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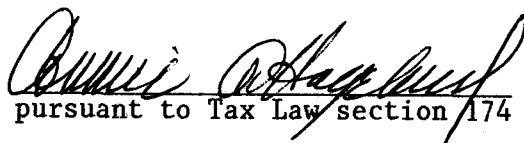
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Richard J. Grace, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard J. Grace
Decker, Grace & Shephard
29 Riverside Dr., P.O. Box 1116
Binghamton, NY 13902

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 January, 1984.



pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JIMMY L. BALDWIN	:	DECISION
d/b/a THE STADIUM	:	
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,	:	
1975 through November 30, 1978.	:	

Petitioner, Jimmy L. Baldwin, d/b/a The Stadium, 71 Rotary Avenue, Binghamton, New York 13905 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, 1975 through November 30, 1978 (File No. 29486).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, 2nd Floor, Room 206, Binghamton, New York 13901 on February 9, 1983 at 2:45 P.M. with all briefs to be submitted by April 25, 1983. Petitioner appeared by Richard J. Grace, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUE

Whether the markup of purchases audit performed by the Audit Division was proper and if so, whether the results were accurate.

FINDINGS OF FACT

1. On January 11, 1979, petitioner, Jimmy L. Baldwin, d/b/a The Stadium, was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Said Notice was issued as a result of petitioner's failure to submit requested information to the Audit Division, asserted taxes due in the

amount of \$10,680 plus penalty and interest and covered the period December 1, 1975 through November 30, 1978.

Petitioner protested the above Notice and as a result, petitioner's records were made available for audit and a field audit was commenced. Subsequently, the audit workpapers and schedules were contaminated with a dangerous chemical due to an explosion in the Binghamton, New York State Office Building. Because of this, the records were again made available and audited a second time and, as a result, the tax asserted due was reduced to \$3,005.24.

2. Petitioner operated a small neighborhood bar and grill in Binghamton, New York until November, 1978 when it was sold. Mainly beer (bottled and draught), liquor and wine were sold however there were some sandwich and bar snack sales.

3. Petitioner, Jimmy L. Baldwin, had a full time position elsewhere at the time he operated the bar and grill. Petitioner employed several bartenders during the period under audit, however, he picked up the cash each morning and recorded the sales for the previous day from the daily cash register tape into his books and records.

4. Cash register tapes were the main source documents supporting sales. The cash register tapes showed the amounts of individual rings but did not give a description of the item or items sold represented by each ring.

5. Upon initial review of petitioner's records it was determined by the Audit Division that petitioner's markups were low for the type of business petitioner was engaged in. Therefore, in order to verify taxable sales as reported, the Audit Division performed a markup of purchases audit.

Purchase invoice prices utilizing all purchase invoices for the three month period of March, April and May, 1978 were used along with drink prices

and sizes obtained from petitioner to arrive at weighted markups for beer of 136 percent and liquor and wine of 170 percent. Due to the length of time between the audit and the close of business, petitioner could not supply the auditor with all of the exact prices charged, so a range of prices for beer and mixed drinks were supplied; the auditor used the medium price where ranges were supplied. All drink sizes, as supplied, were used by the auditor except the size of liquor serving used for mixed drinks. Petitioner indicated a liquor serving of 1 3/8 ounces for mixed drinks, however because petitioner purchased some 7/8 ounce liquor pourers during the audit period a 1 ounce serving was used in the audit computations. Other considerations given were that happy hour sales at reduced prices were 25 percent of total beer, wine and liquor sales; that 75 percent of draught beer sales was by the glass and 25 percent was by the pitcher at lower prices; that a 7 ounce bottle of beer sold for 40 cents as determined from cash register tapes; and that there were some six-pack sales at lower prices. Also, a 15 percent allowance was made for draught beer and liquor to cover spillage, breakage and free drinks given to customers (buybacks).

To arrive at tax due, the 136 percent markup plus cost was applied to total beer purchases made in the audit period of \$46,018.00 to arrive at total beer sales of \$108,602.00. The 170 percent markup plus cost was applied to total liquor and wine purchases made in the audit period of \$22,828.00 to arrive at total liquor and wine sales of \$61,636.00. Food sales for the audit period were determined by deducting beer, liquor and wine purchases from cost of goods sold reported on Federal Schedules C to arrive at food purchases of \$12,793.00 and applying an estimated 50 percent markup plus cost to arrive at total food sales of \$19,189.00. Thus, total beer, wine, liquor and food sales

totalled \$190,808.00 and, as the auditor deemed that this amount included sales tax this was divided by 107 percent (7 percent sales tax rate) to arrive at total taxable sales of \$177,035.00. From this was deducted taxable sales reported on returns filed of \$134,102.00 which resulted in additional taxable sales of \$42,933.00. The additional taxable sales was divided by the reported taxable sales to compute an error rate of 32.015 percent. The error rate was applied to the taxable sales reported in each quarter to get additional taxable sales and tax due for each quarter which resulted in total additional tax due for the audit period of \$3,005.24.

6. Petitioner maintained that his books and records were adequate and therefore the use of a markup of purchases audit utilizing a test period is prohibited.

7. Petitioner testified that the average liquor portion served as a shot or in mixed drinks was 1 3/8 ounces, and not 1 ounce as used in the audit, and that the 7/8 ounce pourers were never used in the normal bar operation but only for some parties where drinks were sold at reduced prices.

8. Further testimony adduced in behalf of petitioner was that employees could drink moderately for free while working; many pitchers and kegs of beer were donated such as to ball teams sponsored by petitioner and special trips to sporting events; that most sales of 7 ounce bottles of beer were for less than 40 cents; that more than 25 percent of draught beer was by the pitcher; that occasional case sales of beer was made at reduced prices; that the liquor drink prices used by the auditor were too high; and that sometimes liquor was bought in volume to take advantage of specials. There was no documentary evidence submitted by petitioner either at or after the hearing to support any of the above allegations.

9. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return filed is incorrect or insufficient, the amount of the tax due shall be determined by the Tax Commission from such information as may be available, such as purchases. That petitioner's records were not adequate in order for the Audit Division to determine petitioner's exact sales tax liability; therefore, the Audit Division's use of a markup of purchases audit utilizing a test period is permitted (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That petitioner's average liquor drink was 1 3/8 ounces rather than 1 ounce as used by the auditor (Finding of Fact "7" supra).

C. That petitioner has failed to sustain his burden of proof with regards to any of the allegations made in Finding of Fact "8" supra; however, due to the nature of petitioner's business the 15 percent spillage, breakage and buyback allowance is to be expanded to include bottled beer not sold by the six-pack.

D. That the penalty is to be cancelled and interest is to be computed at the minimum statutory rate.


E. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to petitioner on January 11, 1979 is to be reduced first, to conform to the results of the field audit performed (Finding of Fact "5" supra) and second, in consideration of Conclusions of Law "B", "C", and "D"

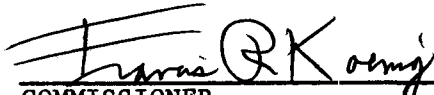
above, and that in all other respects the Notice is sustained and the petition of Jimmy L. Baldwin d/b/a The Stadium is denied.

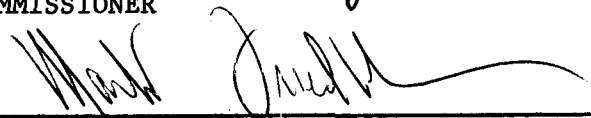
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 724

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to	
Jimmy L. Baldwin	
Street and No.	
71 Rotary Ave.	
P.O., State and ZIP Code	
Binghamton, NY	
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	

P 440 976 723

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to	
Richard J. Grace	
Street and No.	
29 Riverside P.O.	
P.O., State and ZIP Code	
Binghamton, NY 13902	
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	