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

September 21, 1984

C.A.L. Restaurant, Inc.
d/b/a The Other End
149 Bleecker St.
New York, NY 10012

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, 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
Joseph O. Giaimo
Giaimo & Vreeburg
118-21 Queens Blvd.
Forest Hills, NY 11375
Taxing Bureau's Representative

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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of C.A.L. Restaurant, Inc. d/b/a The Other End	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 9/1/74-8/31/79.	

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Joseph O. Giaimo, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph O. Giaimo
Giaimo & Vreeburg
118-21 Queens Blvd.
Forest Hills, NY 11375

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
21st day of September, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of C.A.L. Restaurant, Inc. d/b/a The Other End	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 9/1/74-8/31/79.	

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C.A.L. Restaurant, Inc.
d/b/a The Other End
149 Bleecker St.
New York, NY 10012

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
21st day of September, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:
of	:
C.A.L. RESTAURANT, INC. d/b/a THE OTHER END	:
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1974 through August 31, 1979.	:

Petitioner, C.A.L. Restaurant, Inc., d/b/a The Other End, 149 Bleeker Street, New York, New York 10012, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1974 through August 31, 1979 (File No. 33743).

A formal hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, Room 65-51, Two World Trade Center, New York, New York 10047, on May 10, 1983 at 2:45 P.M. and continued to its conclusion on June 8, 1983 at 10:30 A.M. with all briefs to be submitted by September 5, 1983. Petitioner appeared by Joseph O. Giaimo, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the five year audit period at issue is excessive in light of the 3 year statute of limitations and whether it was proper for petitioner to be required to retain books and records for the full five year period.

II. Whether the audit performed by the Audit Division based on the markup of purchases was proper.

III. Whether a payment of $6,942.63 covering a partial payment for the sales tax quarter December 1, 1977 through February 28, 1978 was actually made.

FINDINGS OF FACT

1. Petitioner, C.A.L. Restaurant, Inc. d/b/a The Other End, operates a bar and restaurant featuring live entertainment nightly. The bar and restaurant portion of the business, which sells food, liquor and wine by the drink, draught and bottled beer, is separate from the entertainment area which has tables and chairs for a capacity of 200 people, a service bar and a stage for the performers. There are two shows per night beginning 9:00 p.m. and midnight; admission is charged. Food and drinks of all kind are sold to patrons in the entertainment area during showtime. Prior to June 1, 1975, petitioner offered no entertainment.

2. a) A field audit of petitioner's books and records was commenced during the month of November, 1977.

b) A Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law (hereinafter referred to as a "Consent") dated December 9, 1977 was executed on behalf of petitioner by Dale R. Lind, vice president. Said consent extended the time to assess sales and use taxes for the period September 1, 1974 through August 31, 1977 to December 20, 1978.

c) A second consent dated October 31, 1978 and received by the Department of Taxation and Finance on November 20, 1978 was executed on behalf of petitioner by Paul Colby, president. This consent also extended the time to assess sales and use taxes for the period September 1, 1974 through August 31, 1977 to December 20, 1978, thus duplicating the first consent.

d) On December 19, 1978, petitioner was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period September 1, 1974 through November 30, 1976 for basic tax in the amount of $46,715.81 plus

penalty and interest. The estimated assessment was issued because of the impending expiration of the statute of limitations. The assessment had been computed by applying markups of 200 percent and 400 percent to food and beverage purchases respectively, arriving at taxable sales of $143,622.00 per quarter from which quarterly taxable sales reported on sales and use tax returns filed were deducted, and applying the 8 percent tax rate thereon. In addition, the Notice was issued based on the assertion of the Audit Division that petitioner had incomplete records for October and November, 1977 and that there were no cash receipts or disbursements records, guest checks, register tapes or admission tickets available prior to December, 1977.

e) A third Consent dated December 18, 1979 and received by the Department of Taxation and Finance on the same date was executed on behalf of petitioner by Dale R. Lind. This Consent extended the time to assess the period September 1, 1974 through August 31, 1979 to June 30, 1980.

f) A fourth Consent dated June 4, 1980 and received by the Department of Taxation and Finance on June 16, 1980 was executed on behalf of petitioner by Dale R. Lind. This Consent extended the time to assess the period September 1, 1974 through August 31, 1979 to December 31, 1980.

g) A fifth and final Consent dated November 20, 1980 and received by the Department of Taxation and Finance on December 11, 1980 was executed on behalf of petitioner by Paul Colby. This Consent extended the time to assess the period September 1, 1974 through August 31, 1979 to March 30, 1981.

h) On March 25, 1981 petitioner was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes due covering the period December 1, 1976 through August 31, 1979 for basic tax in the amount of $31,125.97, plus

interest. This Notice was issued as a result of the completion of the field audit of the entire period, September 1, 1974 through August 31, 1979.

i) On April 18, 1981 a Notice of Assessment Review was issued to petitioner. This notice reduced the assessment issued on December 19, 1978 (see "d" above) for the periods September 1, 1974 to November 30, 1976 to basic tax of $19,980.73, plus interest (no penalty). It was also issued as a result of the completion of the field audit of the entire period September 1, 1974 through August 31, 1979.

3. The audit of petitioner's records consisted first of picking a base period, which was December 1, 1977 through August 31, 1978, as the Audit Division felt that petitioner's records were most complete for this period. Based upon the prices and sizes of drinks supplied by employees of petitioner, purchase invoices for February and March of 1978, a shot glass analysis conducted in March of 1979 and a general review of food menu prices and food purchase prices, the following markups were determined: food - 125 percent; liquor and wine - 220.173 percent and beer - 272.484 percent. Application of these markups to the purchases available for sale for the base period of December 1, 1977 through August 31, 1978 resulted in food sales of $80,453.84, liquor and wine sales of $147,011.15 and beer sales of $115,608.48 for total beer, wine, liquor and food sales of $343,073.47. When adding the beer, wine, liquor and food sales to admission charges in the amount of $152,193.30, which had been accepted by the Audit Division as reported by petitioner, total audited sales for the base period were determined to be $495,266.77. As taxable sales had been reported in the amount of $423,317.19 for this period, additional taxable sales were determined to be $71,949.58 for the base period.

The results reflected by the audit of the base period December 1, 1977 through August 31, 1978 were projected over the entire audit period as follows:

a) For the period June 1, 1975 through August 31, 1979 a base period margin of error of 16.997 percent was computed (additional taxable sales of $71,949.58 divided by reported taxable sales of $423,317.19).

b) For the period September 1, 1974 through May 31, 1975, as petitioner did not have admission charges, the margin of error was computed without the $152,193.20 included in the denominator. This resulted in a margin of error for this period of 26.538 percent ($71,949.58 divided by $271,123.89).

In arriving at the above audited sales the markups were computed by allowing a 15 percent spillage allowance for liquor drinks and draught beer (most wine was sold by the bottle), a 1½ ounce serving was considered for liquor drinks and a 2¼ ounce serving was considered for cordials and after dinner drinks. Also, the purchases available for sale used for the base period included the total purchases less food, liquor, wine and beer supplied to employees and entertainers in the total amount of $10,853.28.

Use tax on the liquor, wine and beer supplied to employees and entertainers was assessed at cost; applicable margins of error calculated on base period sales were computed at 1.01 percent to be applied to taxable sales for the period June 1, 1975 through August 31, 1979 when entertainers were employed and .922 percent for the period of September 1, 1974 through May 31, 1975 when entertainers were not employed.

Use tax in the amounts of $331.77 and $2,018.01 were determined due on expense purchases and fixed assets respectively for the entire period under audit.

An over and under collection test of guest checks for a six day period was conducted and resulted in an additional margin of error for sales tax collections of 2.796 percent.

Petitioner's sales tax return for the quarter December 1, 1977 through February 28, 1978 computed tax due in the amount of $11,411.52, however the Department of Taxation and Finance has a record of payments totalling only $4,468.89 which leaves a tax deficiency of $6,942.63 for this period.

The Audit Division determined petitioner's sales tax liability to be $46,842.36 and a use tax liability of $4,264.34 for a total tax liability of $51,106.70 for the entire audit period as a result of all the above mentioned adjustments.

4. Petitioner asserted that the five year audit period was excessive as the audit period should be no longer than three years and that it was not proper for the Audit Division to request records to audit prior to the "normal" three year audit period. Petitioner also asserted that it was not proper to project, with the use of a base period, additional taxable sales over the entire audit period due to the fluctuating cost of living and the effect it would have on petitioner's purchase prices and sales prices. A summary of all daily sales for the days when entertainers performed on petitioner's premises was produced to show that thorough and complete records were kept. Said summary for a particular day showed the date, name of performer, amount paid to the performer, amount received at the door, profit or loss from admissions, food and beverage sales in the showroom, percentage of attendance based on house capacity, number of tickets sold and average amount spent per show patron.

5. It was alleged by the Audit Division that at the outset of the audit many records were not made available to the auditor (see Finding of Fact "2d"). However, it was the testimony of two officers of petitioner that all records requested were furnished.

6. The original auditor left the employ of the Audit Division prior to the completion of the field audit. A replacement auditor and his team leader completed the audit in late 1980 and early 1981. The replacement auditor was not at the hearing to testify, however the team leader testified that he had visited the premises of petitioner on several occasions to assist with the audit, but never observed the operation of petitioner during business hours.

7. With regards to the audit performed:

a) Petitioner asserted that the food markup should have been 100 percent rather than the 125 percent determined by the Audit Division. There was no documentary evidence produced to support this.

b) Petitioner presented a summary of its analysis demonstrating that a reduction should be made in the liquor and wine markup to compensate for cocktail drinks sold. The analysis centered around the fact that certain brands of liquor were purchased for cocktails and summarized that $229.65 should be deducted from the test period liquor and wine sales (February and March, 1978).

c) Petitioner alleged that for every four or five drinks sold a free drink is given away (termed a buyback). This was estimated based on petitioner's policy that a patron gets a free drink for every three purchased, but considers that not all patrons have drinks in multiples of three. Petitioner stated also that a liberal free pouring of liquor drinks was encouraged as a matter of policy. Petitioner claims that it has always tried to build the business to capacity against the perils of rising prices of merchandise and entertainment, thus these policies were always in effect, especially prior to the period when entertainment was provided and petitioner was first trying to get established.

d) Petitioner contended that the results of the six day over and under sales tax collection test did not reflect a missing guest check in the amount of $4.10. This, when taken into consideration, would reduce the margin of error from 2.796 percent to 1.5048 percent.

8. Petitioner filed its sales tax return for the quarter of December 1, 1977 through February 28, 1978 reflecting taxable sales of $142,644.00 which would yield a tax due of $11,411.52. The Department of Taxation and Finance's records reflect that two payments were made, one in the amount of $1,987.60 processed with the Department's deposit serial number of 77436521 and the other

in the amount of $2,481.29 processed with the Department's serial number of 77016767. There is no record in the Department of payment of the balance of $6,942.63. Although petitioner maintains that this payment was made, as well as all sales tax payments within and without the audit period, no documentary evidence was produced at the hearing to reflect such payment.

9. At the hearing, petitioner did not contest the amounts of use tax assessed on beer, wine and liquor furnished to employees and entertainers, expense purchases and fixed assets.

CONCLUSIONS OF LAW

A. That section 1147(b) of the Tax Law provides, in pertinent part,

> "(E)xcept in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law the tax may be assessed at any time...".

Section 1147(c) of the Tax Law further provides, in pertinent part,

> "Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period."

That within the criteria set forth in the Tax Law cited above, there is no such thing as an excessive audit period per se. However, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 19, 1978 because of the impending expiration of the statute of limitations is not valid and must be cancelled. The three year limitation in the Tax Law benefits and protects the taxpayer and the Audit Division should not be allowed to circumvent this provision (Brown v. New York State Tax Commission, 199 Misc. 349, affd. 279 A.D. 837, affd. 304 N.Y. 651). Furthermore, it must be noted that the base period selected for testing was December 1, 1977 through August 31,

1978, thus records were available for at least that portion of the assessment issued December 19, 1978. In addition, even after said assessment was issued, the Audit Division obtained consents from petitioner which purported to extend the period already assessed. Moreover, the periods covered by said assessment were not included in the second assessment issued on March 25, 1981 but were included in the Notice of Assessment Review issued on April 18, 1981 which was after the extended assessment date specified in the final Consent.

B. That the audit of petitioner's records utilizing purchases was allowable by virtue of section 1138 of the Tax Law since petitioner's records were inadequate to determine the exact tax due (Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44). The audit reflected a significant discrepancy in petitioner's sales records thus demonstrating that they were insufficient.

C. That $229.65 should be deducted from the test period liquor and wine sales (February and March, 1978) and that such markup should be adjusted for same to allow for cocktail sales.

That the 15 percent allowance for spillage to account for spillage and buybacks for liquor and draught beer should be extended to cover bottled beer breakage and buybacks; however, there was insufficient evidence produced at the hearing to justify a larger percentage.

That the over and under sales tax collection test be reduced from 2.796 percent to 1.5048 percent to reflect the missing guest check in the amount of $4.10.

D. That petitioner has failed to show that the payment (or payments) totalling $6,942.63 was (or were) made against the sales tax return for the period November 1, 1977 through February 28, 1978.

E. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 19, 1978 is cancelled in accordance with Conclusion of Law "A" above; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 25, 1981 is reduced in accordance with Conclusion of Law "C" above, and except as so granted, said Notice is sustained and the petition of C.A.L. Restaurant, Inc. d/b/a The Other End is denied.

DATED: Albany, New York

SEP 21 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 693 168 637

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to T.L. Restaurant, Inc.	
Street and No. c/o The Other End	
P.O., State and ZIP Code 149 Bleecker St.	
Postage NY, NY 10012	$
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

★ U.S.G.P.O. 1983-403-517

P 693 168 638

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Joseph O. Giaimo	
Street and No. Giaimo & Vreeburg	
P.O., State and ZIP Code 18-21 Queens Blvd.	
Postage Forest Hills, NY 11375	$
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

★ U.S.G.P.O. 1983-403-517

TA-36 (9/76) State of New York - Department of Taxation and Finance
Tax Appeals Bureau

REQUEST FOR BETTER ADDRESS

Requested by	Unit	Date of Request
Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	10/29/84

Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition
	Tax. Dec. - 9/21/84

Name
C. A. L. Restaurant, Inc.

Address
d/b/a The Other End
149 Bleecker St.
New York, N.Y. 10012

Results of search by Files

☐ New address:	
☐ Same as above, no better address	
☒ Other:	Unclaimed

Searched by	Section	Date of Search
D. D.		10/29/84

PERMANENT RECORD

FOR INSERTION IN TAXPAYER'S FOLDER

TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK NO.
555810

☐ HOLD

DATE
9-25
1ST NOTICE
10-16
2ND NOTICE
10-27
RETURN

Detached from PS Form 3849—A Oct. 1980

CERTIFIED
P 693 168 637
MAIL

ALBANY SEP 21'84 NY
U.S. POSTAGE
P.O. METER 697906
1 29 :

C.A.L. Restaurant, Inc.
d/b/a The Other End
149 Bleecker St.
New York, NY 10012

RETURNED
REASON
Unclaimed ✓
Attempted — Unknown
Insufficient address
No such street ____ number ____
No such office in state
Do not remail in this envelope

RECEIVED
OCT 26 1984
TAX APPEALS BUREAU