

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

Paul Decelle
49 W. 55th St.
New York, NY 10019

Dear Mr. Decelle:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PAUL DECELLE

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 November 1,
1976 through March 30, 1979.

Petitioner, Paul Decelle, 49 West 55th Street, New York, New York 10019,
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 November 1,
1976 through March 30, 1979 (File No. 32602).

A formal hearing was held before Arthur Bray, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New York
on March 14, 1983 at 1:15 P.M. with all briefs to be submitted by April 4,
1983. Subsequently, the Audit Division submitted additional documentation on
July 29, 1983 and petitioner was given until September 5, 1983 to respond to
same. Petitioner appeared pro se. The Audit Division appeared by John P.
Dugan, Esq. (Angelo A. Scopellito, Esq. of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales and use
tax liability based upon an examination of the available records of Hermitage
Restaurant, Inc.

FINDINGS OF FACT

1. On March 27, 1980, the Audit Division issued to petitioner a Notice
and Demand for Payment of Sales and Use Taxes Due for the periods ending May 31,

1978, August 31, 1978, November 30, 1978, and February 28, 1979. The Notice was issued to petitioner on the ground that petitioner was personally liable for the sales and use tax deficiencies which had previously been determined against Hermitage Restaurant, Inc. ("the corporation"). New York State and Local Sales and Use Tax Returns were filed for each of the periods assessed and partial payments were submitted with some of the returns. Therefore, petitioner's liability for tax was determined as follows:

<u>PERIOD ENDING</u>	<u>SALES & USE TAX REPORTED DUE</u>	<u>CREDIT CLAIMED FOR PREPAYMENT</u>	<u>AMOUNT REMITTED</u>	<u>TAX DUE</u>	<u>PENALTY</u>	<u>INTEREST</u>
5/31/78	\$18,365.92	\$8,320.00	\$1,500.00	\$ 8,545.92	\$2,136.48	\$1,814.30
8/31/78	12,087.60			12,087.60	2,780.15	2,203.57
11/30/78	6,109.52		1,500.00	4,609.52	921.90	702.03
2/28/79	4,369.00			4,369.00	742.73	534.33

2. On March 27, 1980, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. The Notice was issued because of the corporation's failure to file sales and use tax returns. This Notice was based upon the average taxable sales as reported on previous returns filed. The Notice assessed tax due as follows:

<u>PERIOD ENDING</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	<u>INTEREST DUE</u>
11/30/77	\$24,957.84	\$6,239.46	\$6,796.02
3/30/79	1,456.32	364.08	309.18

Subsequently, the portion of this assessment which pertained to the period ended November 30, 1977 was cancelled due to payment. The assessment for the month of March, 1979 was based upon an estimate of petitioner's liability. The estimate, in turn, was based upon average taxable sales reported on previous returns filed by the corporation.

3. On March 27, 1980 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner as the president of the corporation. The Notice, which was based upon an audit of the corporation, assessed a tax due of \$27,617.53 plus penalty of \$6,703.13 and interest of \$7,277.00 for a total amount due of \$41,597.66.

4. At the time the audit was commenced, the corporation was in the process of bankruptcy proceedings and was no longer in operation. The auditor was advised that the records were in a warehouse in Manhattan. The auditor then went to the warehouse and found portions of the sales journal, cash disbursements journal, purchase journal, and check disbursements journal. No records were available for the period April 1, 1978 through March 30, 1979. Although some customer checks were found, no documents were available which disclosed the selling price of the beverages.

5. Upon examining the corporation's records, the auditor found that there was a small difference between gross sales per books and gross sales reported for the period December 1, 1976 through February 28, 1978. These differences were ignored because they were immaterial. The auditor accepted the 150 percent markup shown on the books for food, chocolate, and cigarette sales. However, the auditor concluded that the markup of 150 percent which was reflected on the books for beverage sales was too low. Therefore, on the basis of Audit Division experience with restaurants of the type and location, the auditor concluded that a 300 percent markup on beverage purchases was appropriate. The application of the adjusted markup of 300 percent to beverages resulted in adjusted taxable sales of \$1,523,505.00 for the period December 1, 1976 through February 28, 1978. This amount was compared to the taxable sales reported for the same period of \$1,283,156.00 and it was determined that 18.7 percent of

sales had not been reported. The percentage was then multiplied by reported taxable sales during the entire audit period resulting in additional unreported taxable sales of \$339,032.00.

6. The corporation did not file a sales and use tax return for the period September 1, 1977 to November 30, 1977. Therefore, in performing the foregoing computations, the amount of cash receipts disclosed by the books for this period were used as the corporation's reported taxable sales. In addition, for the last month of the audit period, the auditor estimated that the corporation's reported taxable sales would have been one-third of the amount reported in the prior sales tax quarter.

7. The auditor examined the corporation's purchases of furniture and fixtures for the period December 1, 1976 through March 28, 1978. Through an examination of these invoices, the auditor found that there were purchases of \$6,892.81 upon which no sales or compensating use tax had been paid. This resulted in a tax due of \$551.42.

8. The leasehold improvements of the restaurant were examined for the period December 1, 1976 to February 28, 1978. Upon examination, the auditor found leasehold improvements of \$8,581.60 subject to sales and compensating use tax resulting in a tax due of \$686.53.

9. A test of overcollection of sales tax was made for the period March 1, 1978 to March 22, 1978. The auditor found that the corporation overcollected sales tax at a rate of .023 percent. This percentage was applied to the reported taxable sales during the audit period resulting in a tax due based upon an overcollection of sales tax of \$494.97.

10. The corporation operated the restaurant Hermitage, which opened for business on December 13, 1976 and specialized in French cuisine. At the time

the restaurant opened, petitioner was responsible for its administration. Petitioner decided what bills were to be paid, when they were to be paid, and signed all checks. In December, 1978 the officers of the corporation resigned and petitioner acquired the title of president. The Hermitage was a moderately priced restaurant.

11. After Hermitage was in operation, it received an unfavorable review by a food critic. The result of the unfavorable review was that sales declined dramatically. On September 1, 1978, in an attempt to save the business, petitioner changed the menu and trade name of the restaurant to Bastogne. Bastogne served less expensive food than Hermitage and specialized in Belgian cuisine. The corporate name of the restaurants was never changed.

12. When Hermitage (later Bastogne) was in operation, petitioner maintained all of the original sales and purchase records. Petitioner retained the services of an accountant who recorded all of the corporation's income and expenses according to documents provided by petitioner.

13. After the restaurants ceased operation and the corporation went into bankruptcy proceedings, the books and records were turned over to a representative of its creditors. The records were then stored in a warehouse. Later, the documents were moved to a second warehouse. Petitioner has not had access to the documents since they were conveyed to the representative of the creditors of the corporation.

14. It was petitioner's practice to purchase wine and liquor as it was needed from a retail liquor establishment which was located in the vicinity of the restaurant. Petitioner did not markup the price of wines and liquors as much as other establishments serving the same type of cuisine, because he felt

it was necessary to keep the price of the beverages in line with the prices of the meals being served.

15. Petitioner acknowledged at the hearing that he was a responsible officer during the period at issue and only challenged the amount of the assessment.

16. Petitioner maintained at the hearing that the assessment was too high because it failed to take into account the declining sales during the audit period.

CONCLUSIONS OF LAW

A. That the amount assessed in the Notice and Demand for Payment of Sales and Use Taxes Due is based upon the actual returns filed by the corporation showing tax due and is sustained.

B. That the amount of \$1,456.32 of tax plus penalty and interest which was assessed for the month of March, 1979 is sustained, since petitioner has not established that this assessment was erroneous.

C. That resort to the use of a test period to determine the amount of tax due must be based on an insufficiency of record keeping which makes it virtually impossible to determine such liability and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 AD 2d 44). In view of the corporation's failure to produce a complete set of guest checks or any records for the last year of the audit period, it was impossible to verify its sales and use tax liability. Accordingly, it was proper for the Audit Division to utilize a test period and external indicies to determine the amount of sales and use taxes due [Tax Law §1138(a)]. However, in view of the facts: that it was petitioner's practice to purchase wine and liquor from retail establishments; that Hermitage was a moderately priced restaurant and Bastogne was an inexpensive restaurant;

and that it was the practice of each restaurant to price its wine and liquor in accordance with the price of its food, the Audit Division's application of a 300 percent markup to wines and liquors based upon the appearance and location of the restaurants was inappropriate. On the basis of the foregoing, as well as the respective time periods that Hermitage and Bastogne were in operation, it is found that the use of a markup of 225 percent on wines and liquors would more accurately reflect the taxable sales of wine and liquor. Therefore, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due should be adjusted accordingly.

D. That since the Audit Division selected a reasonable method to determine the amount of tax due with respect to the portions of the assessment premised upon the failure to pay sales and use taxes due on the corporation's purchases of furniture and fixtures, leasehold improvements and overcollection of sales tax, petitioner was required to establish that the audit method or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD 2d 858). Petitioner has failed to establish that the audit method or amount of tax collected with respect to these items was erroneous. It is noted that the assessment was based on the declining sales reflected on the returns filed; accordingly, the restaurant's declining sales were taken into account and petitioners argument mentioned in Finding of Fact "16" is without merit.

E. That reasonable cause does not exist for the cancellation of penalty since petitioner did not file New York State sales and use tax returns during a portion of the period in issue and since other returns filed by petitioner were either filed without any remittance or were filed with a partial remittance.


F. That the petition of Paul Decelle is granted to the extent of Conclusion of Law "C" and the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, noted in Finding of Fact "3", accordingly; the petition is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

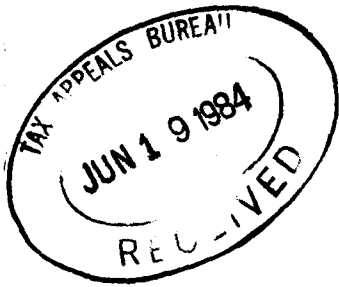
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STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227



29 L. H.
5 5-29-84
JUN 14 1984

Paul Dezelie
49 W. 55th St.
New York, NY 10019



CERTIFIED

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MAIL

TA 26 (9-79)

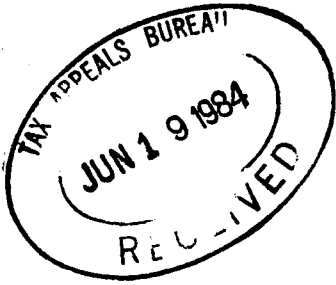
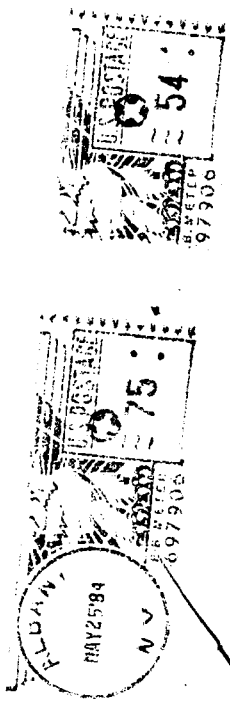
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5/29 L. M.
6/5 5:29-84
JUN 14 1984

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SENDER
UNCLAIMED

Paul Dezelle
49 W. 55th St.
New York, NY 10019



P 440 976 962

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
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(See Reverse)

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Street and No. <i>49 W. 55th St.</i>	
P.O., State and ZIP Code <i>NY, NY 10019</i>	
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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 Data	

PS Form 3800, Feb. 1982

CERTIFIED
P 440976 962
MAIL

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1976 through March 30, 1979.

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CONCLUSIONS OF LAW

A. That the amount assessed in the Notice and Demand for Payment of Sales and Use Taxes Due is based upon the actual returns filed by the corporation showing tax due and is sustained.

B. That the amount of \$1,456.32 of tax plus penalty and interest which was assessed for the month of March, 1979 is sustained, since petitioner has not established that this assessment was erroneous.

C. That resort to the use of a test period to determine the amount of tax due must be based on an insufficiency of record keeping which makes it virtually impossible to determine such liability and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 AD 2d 44). In view of the corporation's failure to produce a complete set of guest checks or any records for the last year of the audit period, it was impossible to verify its sales and use tax liability. Accordingly, it was proper for the Audit Division to utilize a test period and external indicies to determine the amount of sales and use taxes due [Tax Law §1138(a)]. However, in view of the facts: that it was petitioner's practice to purchase wine and liquor from retail establishments; that Hermitage was a moderately priced restaurant and Bastogne was an inexpensive restaurant;

and that it was the practice of each restaurant to price its wine and liquor in accordance with the price of its food, the Audit Division's application of a 300 percent markup to wines and liquors based upon the appearance and location of the restaurants was inappropriate. On the basis of the foregoing, as well as the respective time periods that Hermitage and Bastogne were in operation, it is found that the use of a markup of 225 percent on wines and liquors would more accurately reflect the taxable sales of wine and liquor. Therefore, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due should be adjusted accordingly.

D. That since the Audit Division selected a reasonable method to determine the amount of tax due with respect to the portions of the assessment premised upon the failure to pay sales and use taxes due on the corporation's purchases of furniture and fixtures, leasehold improvements and overcollection of sales tax, petitioner was required to establish that the audit method or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD 2d 858). Petitioner has failed to establish that the audit method or amount of tax collected with respect to these items was erroneous. It is noted that the assessment was based on the declining sales reflected on the returns filed; accordingly, the restaurant's declining sales were taken into account and petitioners argument mentioned in Finding of Fact "16" is without merit.

E. That reasonable cause does not exist for the cancellation of penalty since petitioner did not file New York State sales and use tax returns during a portion of the period in issue and since other returns filed by petitioner were either filed without any remittance or were filed with a partial remittance.


F. That the petition of Paul Decelle is granted to the extent of Conclusion of Law "C" and the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, noted in Finding of Fact "3", accordingly; the petition is, in all other respects, denied.

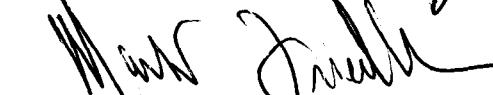
DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER