

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
John Klein :
d/b/a Little Jewel : 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 9/1/75-5/31/78. :

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 John Klein d/b/a Little Jewel the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Klein
d/b/a Little Jewel
663 Conklin Rd.
Binghamton, NY 13903

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.

David Parchuck

Bennie E. Hoopes
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Klein :
d/b/a Little Jewel :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 9/1/75-5/31/78.

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 Thomas W. Gent, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

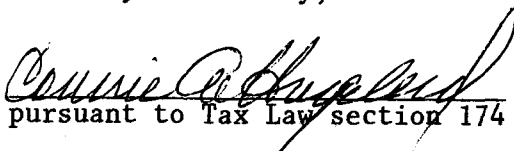
Thomas W. Gent
Suite 502, 84 Court St.
Binghamton, NY 13901

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
ALBANY, NEW YORK 12227

January 18, 1984

John Klein
d/b/a Little Jewel
663 Conklin Rd.
Binghamton, NY 13903

Dear Mr. Klein:

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
Thomas W. Gent
Suite 502, 84 Court St.
Binghamton, NY 13901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN KLEIN	:	DECISION
D/B/A LITTLE JEWEL	:	
	:	
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 September 1, 1975	:	
through May 31, 1978.	:	

Petitioner, John Klein d/b/a Little Jewel, 663 Conklin Road, 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 September 1, 1975 through May 31, 1978 (File No. 25640).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on February 8, 1983 at 10:45 A.M., with all briefs due by April 24, 1983. Petitioner appeared by Thomas W. Gent, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUE

Whether the markup audit method used by the Audit Division to determine petitioner's sales tax liability is proper and, if so, whether the results are accurate.

FINDINGS OF FACT

1. On December 20, 1978, as a result of a field audit, petitioner, John Klein d/b/a Little Jewel, was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. The Notice asserted additional tax of

\$4,882.01, plus penalty and interest of \$1,992.83, for a total asserted due of \$6,874.84 and covered the period September 1, 1975 through May 31, 1978.

2. Petitioner operated a neighborhood bar and grill during the period covered by the audit. Sales consisted mainly of beer (both bottled and draught), liquor and wine; however, there was some food sold. Other than cashing up each day, petitioner, John Klein, did not get involved with the day-to-day operation of the business; he relied on employees to operate the business as he had a full-time position elsewhere. In addition, Mr. Klein was ill during the audit period.

3. All of petitioner's records were maintained by his accountant. Records kept included copies of sales tax returns filed, depreciation schedules, sales journal, purchases journal, purchase invoices, cancelled checks and cash register tapes. No guest checks for food sales were kept and the cash register tapes did not reflect a description of each individual drink sold.

4. In order to verify the taxable sales reported by petitioner, the Audit Division performed a markup of purchases audit. Utilizing the purchase invoices for February and March of 1978, the prices and sizes of drinks supplied by petitioner and from what could be deciphered from the cash register tapes, weighted markups were computed for beer of 151 percent and liquor and wine of 173.3 percent. These markup computations took into consideration that some sales of bottled beer were made by the six-pack at reduced prices. Also, a 15 percent allowance was made for draught beer and liquor drinks to accommodate for spillage, breakage and free drinks supplied to customers (buybacks).

The markups were applied to the beer, liquor and wine purchases made for the entire audit period. Application of the 151 percent markup plus cost was made to total beer purchases of \$68,294.00 to arrive at audited beer sales

of \$171,418.00. Application of the 173.3 percent markup plus cost was made to liquor and wine purchases of \$21,799.00 to arrive at audited liquor and wine sales of \$59,577.00. Food sales were determined by taking food purchases for the entire audit period of \$9,192.00, deducting 15 percent of the purchases (or \$1,379.00) for spoilage and applying 100 percent markup to the balance of \$7,813.00 to arrive at food sales of \$15,626.00. All of the above beer, liquor, wine and food sales were combined to total \$246,621.00. The auditor considered sales tax at the 7 percent rate to be included and thus divided the total sales of \$246,621.00 by 107 percent to arrive at taxable sales per audit of \$230,487.00. Petitioner reported taxable sales of \$161,024.00 on sales and use tax returns filed, so additional taxable sales were determined to be the difference, or \$69,463.00. A margin of error of 43.14 percent was then computed by dividing the additional taxable sales by the reported taxable sales. This margin of error was applied, by each individual reporting quarter, to the taxable sales recorded in petitioner's sales journal. As the taxable sales for the audit period reported in the sales journal totalled \$645.00 more than those reported on the returns filed, petitioner was assessed for additional taxable sales in the amount of \$69,743.00, or slightly more than the \$69,463.00 computed above. Tax assessed at the 7 percent rate was \$4,882.01.

In the above computations, beginning and ending merchandise inventories were not taken into consideration.

The auditor found no computational or posting errors in petitioner's records, such as a daily cash register tape not agreeing with the daily sales posted in the sales journal.

5. Petitioner testified that during the period under audit much of his inventory was pilfered by his employees and that the practice of bartenders and

barmaids supplying customers with free drinks was excessive. He testified that even though he did not witness any stealing, he did, at least on one occasion, witness all of the patrons in the bar being given a free drink. Petitioner also testified that some of the food purchased was given away. Petitioner testified that because of the free drinks and stealing, the business had to be sold. Further testimony rendered on behalf of petitioner indicated that the practice of giving free drinks to customers was excessive and to the point where some customers that were friendly with petitioner's employees drank for free. There was no documentary evidence presented at the hearing to support theft, food given away or free drinks given to customers.

6. Petitioner asserted that at the end of the audit period there was a substantial ending inventory of merchandise not sold. There was no documentary evidence produced or testimony rendered at the hearing to support an inventory adjustment.

7. Petitioner maintained that his records were adequate and therefore no markup audit utilizing a test period should be permitted.

8. 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).

In addition, the audit procedures employed by the Audit Division reflected a deficiency of enough significance so as to conclude that petitioner's sales records were inadequate.

B. That petitioner has not sustained his burden of proof to show that the entire difference between his audited and reported taxable sales was due to stealing, food given away and an excessive number of buybacks. However, the 15 percent spillage, breakage and buyback allowance should be expanded to the extent of applying it to bottled beer not sold by the six-pack and wine (Finding of Fact "5", supra).

C. That the application of a margin of error to the taxable sales in petitioner's sales journal, as described in Finding of Fact "5", is inappropriate. That any difference between the taxable sales in the journal and the taxable sales on returns filed was already accounted for when total purchases were marked up and taxable sales reported on returns filed were deducted. That any margin of error recomputed as a result of this hearing using taxable sales reported on returns filed as a denominator, should be applied to taxable sales reported on returns filed.

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

E. That the petition of John Klein d/b/a Little Jewel is granted to the extent indicated in Conclusions of Law "B", "C" and "D" above; that in all

other respects, the petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1978 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

Roderick A. Cline
PRESIDENT

Francis R. Koenig
COMMISSIONER

Paul J. Smith
COMMISSIONER

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

Sent to	
Thomas W. Gent	
Street and No.	
Suite 502, 84 Court St	
P.O., State and ZIP Code	
Binghamton, NY 13901	
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	

Sent to <i>John Klein</i>	
Street and No. <i>663 Conklin Rd.</i>	
P.O., State and ZIP Code <i>Binghamton, NY 13903</i>	
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	

CERTIFIED
P 440 976 735
MAIL

CERTIFIED

P 440 976 735

~~John Klein
d/b/a Little Jewel
663 Conklin Rd.
Binghamton, NY 13903~~

Is unclaimed ☒ Checked
 Address ☒ Relieved
 Resident Address ☒ Unknown
 No such street ☒ Number
 No such office in state
 Do not delete by this number

JAN 18 84
ALEXANDRIA
M. I.
RECEIVED
JAN 12

TA 26 (9-79)

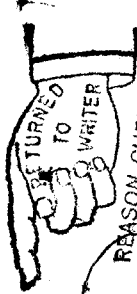
STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



REASON CHECKED

Unclaimed

Address unknown

Insufficient Address

No such street

No such office in state

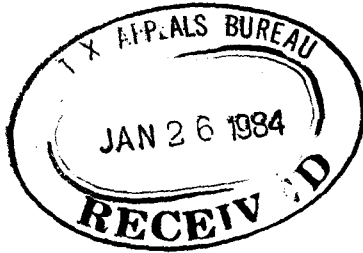
Do not accept for this number

John Klein

d/b/a Little Jewel

663 Conklin Rd.

Binghamton, NY 13903



CERTIFIED

P-440-076 735

MAIL

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

January 18, 1984

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d/b/a Little Jewel
663 Conklin Rd.
Binghamton, NY 13903

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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
Thomas W. Gent
Suite 502, 84 Court St.
Binghamton, NY 13901
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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D/B/A LITTLE JEWEL	:	
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other respects, the petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1978 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

Rodolph W. Chun
PRESIDENT

Francis R. Kolm
COMMISSIONER

Mark J. Jurek
COMMISSIONER