

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Kermith K. Kossow :  
d/b/a Kossow's Triangle Restaurant : **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 :  
12/1/76-11/30/79. :

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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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Kermith K. Kossow d/b/a Kossow's Triangle Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kermith K. Kossow  
d/b/a Kossow's Triangle Restaurant  
1788 New Michigan Rd.  
Canandaigua, NY 14424

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  
31st day of December, 1984.

David Parchuck

Nicole Williams

Authorized to administer oaths  
pursuant to Tax Law section 174

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## NOTED INFO XAT T-100

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Директор, И.А.А.      «\_\_\_» \_\_\_\_\_ 20\_\_г.      «\_\_\_» \_\_\_\_\_ 20\_\_г.

06-02-2007 9:45 AM

120778-17-077  
under Article 28 of the Law for the Control  
of a Derivation or Method of Using a Drug  
for Administration of a Substance or Material

100-44368-100

*E. coli*

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WILLIAM K. BISHOP

1/10/2000 10:00 AM

12 August 1991

44-38861-226

Service within the State of New York.

That equipment further says that the said address is the post office  
herein and that the address set forth on this card is the true address of the person

of the following:

Sworn to before me this

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 08-14-2010 BY 60322 UCBAW

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Kermith K. Kossow	:	
d/b/a Kossow's Triangle Restaurant	:	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 12/1/76-11/30/79.	:	

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Samuel J. Ianacone, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel J. Ianacone  
Harris, Beach, Wilcox, Rubin & Levey  
Two State St.  
Rochester, NY 14614

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  
31st day of December, 1984.

David Parchuck

Nicola J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

December 31, 1984

Kermith K. Kossow  
d/b/a Kossow's Triangle Restaurant  
1788 New Michigan Rd.  
Canandaigua, NY 14424

Dear Mr. Kossow:

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  
Samuel J. Ianacone  
Harris, Beach, Wilcox, Rubin & Levey  
Two State St.  
Rochester, NY 14614  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
KERMIT K. KOSSOW	:	DECISION
D/B/A KOSSOW'S TRIANGLE RESTAURANT	:	
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, 1976	:	
through November 30, 1979.	:	

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Petitioner, Kermit K. Kossow d/b/a Kossow's Triangle Restaurant, 1788 New Michigan Road, Canandaigua, New York 14424, 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, 1976 through November 30, 1979 (File No. 33082).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on December 6, 1983 at 1:15 P.M., with all evidence to be submitted by March 23, 1984. Petitioner appeared by Samuel J. Ianacone, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas P. Sacca, Esq., of counsel).

ISSUE

Whether petitioner made additional taxable sales as determined by the Audit Division upon field audit.

FINDINGS OF FACT

1. On December 20, 1980, as the result of a field audit, petitioner, Kermit K. Kossow d/b/a Kossow's Triangle Restaurant, was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for tax in the

amount of \$12,601.30, plus interest of \$2,399.92, for a total of \$15,001.22.

Said Notice covered the period December 1, 1976 through November 30, 1979.

Petitioner signed three consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law, thereby extending the time to assess the period of December 1, 1976 through August 31, 1977 to December 20, 1980.

2. Petitioner operates a small neighborhood bar and grill. The premises consist of a barroom and a small dining room. Alcoholic beverages are the bulk of the sales, with food sales consisting of hamburgers and cheeseburgers. Some cold sandwiches were also sold during the audit period. Beer sales were made mainly by the bottle, however, some six packs were sold to go. There was no draught beer sold.

3. Petitioner's sales records were not adequate in order for the Audit Division to determine petitioner's exact sales tax liability.

4. Petitioner's tax liability was determined by the Audit Division by marking up purchases which were taxable upon resale. As petitioner's beverage purchases were combined in his purchase journals, the Audit Division initially determined the percentages of beer and liquor purchases by examining invoices for the periods March through May, 1977, June through August, 1978 and November, 1979. These percentages were then applied to total beverage purchases for each sales tax quarter in the audit period to determine total beer and total liquor purchases for the entire audit period. Markups were then developed by using invoices for November, 1979 and prices and sizes of drinks sold as supplied by petitioner. Petitioner sold local, premium and high-priced beer. The markups ranged from 247 percent to 333 percent, so the auditor used a weighted markup of 250 percent for beer. The markup for liquor was similarly determined and

the weighted markup was found to be 210 percent. The liquor markup took into consideration a 15 percent allowance for spillage, buybacks and overpours. These markups were applied to the total beer and liquor purchases previously determined. Total food purchases for the audit period, taken from petitioner's purchase journals, were marked up an estimated 75 percent over cost. The 75 percent markup was developed by acknowledging an Audit Division guideline of 125 percent over cost for similar businesses, but also taking into consideration what the auditor thought to be fair for petitioner's operation. The auditor then combined the beer, liquor and food sales determined and arrived at audited taxable sales for the audit period of \$383,608.00. From this amount were deducted taxable sales reported of \$203,589.00 to arrive at additional taxable sales of \$180,019.00 and tax due of \$12,601.30.

5. Petitioner purchased kegs of beer during the audit period for his customers who used the kegs for special functions, parties, etc. These kegs were sold to customers at cost, and totalled \$8,753.04 for the audit period. These purchases were included when the beer sales were determined by the auditor.

6. Petitioner gave away free to customers (buybacks) 3 percent of his beer purchases. Petitioner alleged that 3 to 4 percent of his beer and liquor purchases were pilfered; however, no evidence was offered to support this contention. Petitioner's general ledger for 1977 showed a year end adjustment reducing restaurant purchases by \$7,870.00 and increasing bar purchases by \$7,870.00; no explanation was given for the adjustment.

7. Petitioner alleged that his food sales only yielded a 2 to 3 percent markup, that food was sold only as a convenience to his bar patrons and that he suffered some pilferage of food during the audit period. There was no documentary evidence produced to reflect the actual food markup. Petitioner's general

ledger for 1977 indicated food purchases of \$10,616.15 while food sales for 1977 were reported in the general ledger as \$2,020.76.

8. Petitioner contended that 10 percent of his beer sales were sales of six packs sold at twenty-five to fifty cents over cost to accommodate good customers and that this was not taken into consideration by the auditor. However, no evidence was submitted to support this contention.

9. The beer and liquor sales prices supplied by petitioner to the Audit Division included 7 percent sales tax; this was not considered when determining the audited taxable sales.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of the tax due shall be determined from such information as may be available, such as purchases. 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 the Audit Division is directed to make the following adjustments:

The kegs of beer sold to customers at cost are to be deducted from the beer purchases prior to application of the markup and taxed separately at cost (Finding of Fact "5", supra).

A 3 percent allowance for beer sold by the bottle is to be made to compensate for buybacks.



The final audited beer and liquor sales are to be reduced by the 7 percent sales tax included prior to the computation of the amount of additional tax due (Finding of Fact "9", supra).

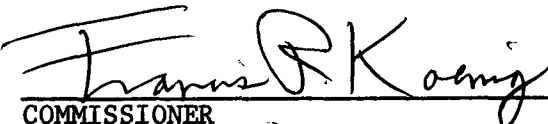
C. That the petition of Kermit K. Kossow d/b/a Kossow's Triangle Restaurant is to be granted to the extent indicated in Conclusion of Law "B" above; that, in all other respects, the petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1980 is sustained, together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 470 316 324

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Kenneth K. Kassar</i>	
Street and No. <i>Old Kassar Triangle Rest</i>	
P.O., State and ZIP Code <i>1788 New Michigam St</i>	
Postage <i>Domundagun NY 14424</i>	
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 470 316 325

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Samuel S. Samuels</i>	
Street and No. <i>Samuel Road Cedar Ridge</i>	
P.O., State and ZIP Code <i>1408 State St</i>	
Postage <i>Richester NY 14612</i>	
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