

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William Gottlieb :
d/b/a Inca Bar & 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 6/1/79-5/31/80. :

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 30th day of October, 1985, he served the within notice of Decision by certified mail upon William Gottlieb d/b/a Inca Bar & Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Gottlieb
d/b/a Inca Bar & Restaurant
343 Bleecker St.
New York, NY 10014

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
30th day of October, 1985.

David Parchuck

Connie D. Hagelmueller
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
William Gottlieb	:	
d/b/a Inca Bar & 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 6/1/79-5/31/80.	:	

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 30th day of October, 1985, he served the within notice of Decision by certified mail upon Jack Ullman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Ullman
Ullman, Weisberg & Co.
117 Cuttermill Rd.
Great Neck, NY 11021

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
30th day of October, 1985.

David Parchuck

James A. O'Connell
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 30, 1985

William Gottlieb
d/b/a Inca Bar & Restaurant
343 Bleecker St.
New York, NY 10014

Dear Mr. Gottlieb:

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
Jack Ullman
Ullman, Weisberg & Co.
117 Cuttermill Rd.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM GOTTLIEB	:	DECISION
D/B/A INCA BAR AND 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 June 1, 1979	:	
through May 31, 1980.	:	

Petitioner, William Gottlieb d/b/a Inca Bar and Restaurant, 343 Bleecker Street, New York, New York 10014, 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 June 1, 1979 through May 31, 1980 (File No. 42097).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 4, 1985 at 3:15 P.M., with all briefs to be submitted by June 15, 1985. Petitioner appeared by Ullman, Weisberg & Co., C.P.A.'s (Jack Ullman, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the sales and use tax liability of William Gottlieb d/b/a Inca Bar and Restaurant during the periods in issue.

FINDINGS OF FACT

1. Petitioner, William Gottlieb, was the sole owner and proprietor of Inca Bar and Restaurant ("Inca") during the tax periods at issue.

2. On September 20, 1982, the Audit Division, as a result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to William Gottlieb d/b/a Inca Bar and Restaurant for the period June 1, 1979 through May 31, 1980. The Notice assessed a tax due of \$12,087.36, plus penalty of \$3,021.84 and interest of \$4,043.73, for a total of \$19,152.93.

3. Petitioner filed no New York State and local sales and use tax returns for the periods in issue.

4. At the time the audit occurred, Inca had ceased doing business and no books and records were made available to the Audit Division. Therefore, it was concluded that a determination of sales and use taxes due could be arrived at only through external indices.

5. Based on its experience with similar restaurants operating in the same geographical area, the Audit Division applied a 300 percent markup to Inca's total purchases for 1979, which were \$37,773.00; the latter figure was taken from Inca's 1979 Federal income tax return. This method produced a total gross sales figure of \$151,092.00 for the 1979 calendar year in contrast to the gross sales figure of \$66,649.00 reported on Inca's 1979 federal return.

6. Subsequent to the audit, the petitioner provided the Audit Division with bank deposits and workpapers for the calendar year 1979. Deposits were missing for the months of January, August and September, 1979. The petitioner also submitted a lease showing the premises once occupied by Inca were leased to another party as of March 1, 1980.

7. Inca was not doing business during the last quarter for which taxes were assessed (March 1, 1980 through May 31, 1980) as evidenced by the aforementioned lease.

8. Although the petitioner contended that the 300 percent markup utilized by the Audit Division was too high for a restaurant such as Inca which caters to a working class clientele, he offered no evidence in support of his contentions.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that:

"[e]very person required to collect tax shall keep records of every sale...and of all amounts paid, charged or due thereon and of the tax payable thereon."

Petitioner William Gottlieb failed to maintain books and records as required by law. Moreover, the records submitted by petitioner were so insufficient as to make it virtually impossible to conduct a complete audit.

B. That in light of petitioner's failure to provide complete and adequate records, the Audit Division selected an audit method reasonably calculated to reflect the taxes due (Matter of Carmine Restaurant, Inc. v. State Tax Comm., 99 A.D.2d 581), and petitioner failed to sustain its burden of proof by clear and convincing evidence that the method of audit was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Comm., 85 A.D.2d 858). However, the Audit Division failed to give consideration to the fact that petitioner ceased doing business as of March 1, 1980. Petitioner's liability for sales and use tax due shall be reduced by \$3,021.84 in accordance with Finding of Fact "7".

C. That the petition of William Gottlieb d/b/a Inca Bar and Restaurant is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand

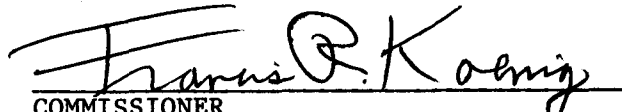
for Payment of Sales and Use Taxes Due issued September 20, 1982; and that,
except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 153 387 603

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>William Gallie</i>
Street and No.	<i>Off Onondaga St.</i>
P.O., State and ZIP Code	<i>343 Bleeker St New York NY 10014</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	

P 153 387 604

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Jack Wilman</i>
Street and No.	<i>Wilman Westergate</i>
P.O., State and ZIP Code	<i>177 Catermill Rd. West Neck NY 10971</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	