

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Maggie's Place, Inc. :

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 6/1/78-8/31/81. :
_____ :

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 20th day of February, 1985, he served the within notice of Decision by certified mail upon Maggie's Place, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Maggie's Place, Inc.
21 E. 47th St.
New York, NY 10017

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
20th day of February, 1985.

David Parchuck

James P. Hagelund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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AFFIDAVIT OF MAILING

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 20th day of February, 1985, he served the within notice of Decision by certified mail upon Jack M. Portney, 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 M. Portney
207 Main St., Box 346
Fort Lee, NJ 07024

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
20th day of February, 1985.

David Parchuck

James A. Hagerd
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 20, 1985

Maggie's Place, Inc.
21 E. 47th St.
New York, NY 10017

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
Jack M. Portney
207 Main St., Box 346
Fort Lee, NJ 07024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MAGGIE'S PLACE, INC.	:	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 June 1, 1978	:	
through August 31, 1981.	:	

Petitioner, Maggie's Place, Inc., 21 East 47th Street, New York, New York 10017, 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, 1978 through August 31, 1981 (File No. 38571).

A small claims 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 July 26, 1984 at 2:45 P.M. Petitioner appeared by Jack M. Portney, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division's use of the markup method of audit as a basis for determining petitioner's sales of food, beer, liquor and wine was proper.

FINDINGS OF FACT

1. Petitioner, Maggie's Place, Inc., operated a bar and restaurant located at 21 East 47th Street, New York, New York.
2. On June 25, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1978 through August 31, 1981 for taxes due of \$25,524.38, plus interest of \$6,043.28, for a total of \$31,567.66.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1978 through February 28, 1981 to September 20, 1982.

4. Petitioner did not have guest checks or cash register tapes available for audit. Therefore, in order to verify the accuracy of taxable sales reported, the Audit Division reconstructed such sales by marking up purchases of food, beer, liquor and wine. A combined liquor and wine markup of 391.64 percent was computed using purchases for May, 1981, selling prices in effect at that time, a 15 percent allowance for spillage and 1-1/4 and 1-7/8 ounce servings of liquor and 5 ounce servings of wine. A beer markup of 341.85 percent was computed in the same manner as liquor and wine using an 8 ounce glass. The food markup was estimated to be 150 percent on the basis of statistics published by the National Restaurant Association. Total purchases for the period June 1, 1978 through February 28, 1981 were \$417,399.00, of which \$262,711.00 (62.94%) was food and \$154,688.00 (37.06%) was for liquor, wine and beer. Food purchases were adjusted to \$243,406.00 to allow for employee meals (\$15,730.00) and complimentary hors d'oeuvres (\$3,575.00). Beverage purchases were adjusted to \$146,823.00 to allow for drinks consumed by employees (11 employees @ \$1.00 each per day). The markup percentages were applied to the applicable purchases to arrive at taxable sales of \$1,312,021.00 for the period June 1, 1978 through February 28, 1981. Petitioner reported taxable sales of \$1,059,330.00 for the same period, leaving additional taxable sales of \$252,691.00, or an increase of 23.85 percent. This error factor was applied to taxable sales reported for the period March 1, 1981 through August 31, 1981 to determine additional taxable sales of \$48,782.00 for said period. The total tax due for the combined periods amounted to \$24,114.56.

The Audit Division requested petitioner to retain current guest checks. An analysis of two days' guest checks (July 17th and 25th) disclosed an overcollection error factor of .367 percent. This test was used to estimate additional taxes due of \$459.57 for the audit period.

The Audit Division determined use tax due of \$750.22 on the cost of employee beverages. There was also a use tax of \$200.00 assessed on fixed assets.

5. The Audit Division compared gross sales from the books and records with the sales tax returns filed and found that the sales per books exceeded the returns by \$37,814.04.

Petitioner submitted the results of a federal income tax audit for the years 1978, 1979, 1980 and 1981 which disclosed additional receipts of \$39,279.00. Petitioner conceded that sales tax is due on that amount.

6. During the period in issue, petitioner's cash register did not produce a tape. Petitioner argued that since the cash register tapes never existed, the absence of such tapes does not constitute inadequate books and records. Petitioner argued further that there is no statute or regulation that requires a business to maintain cash register tapes.

7. Petitioner submitted its own markup test on liquor and wine which showed a markup of 155.5 percent. The test differed from the Audit Division's in that the size of the drinks used was $2\frac{1}{2}$ and 3 ounces of liquor and the allowance for spillage was increased to 25 percent. Petitioner had a 1 ounce shot glass on the premises; however, petitioner, at the time of the audit, indicated that liquor was "free poured" rather than using the shot glass. The Audit Division took this into account in allowing the quantity of liquor used in drinks to be $1\frac{1}{4}$ and $1\frac{7}{8}$ ounces.

Additionally, petitioner maintained that the food markup of 150 percent was not applicable to its operation and the allowances given for employee meals, drinks and complimentary food were insufficient.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every 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. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

Petitioner did not have cash register tapes, guest checks or any other record that would serve as a verifiable record of taxable sales. Under such circumstances, the Audit Division's use of a test period and a markup percentage audit was proper in accordance with section 1138(a) of the Tax Law (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576; Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. State Tax Commission, 88 A.D.2d 1028).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate by clear and convincing evidence that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

C. That the petition of Maggie's Place, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 25, 1982 is sustained.

DATED: Albany, New York

FEB 20 1985

STATE TAX COMMISSION

Richard A. Clev
PRESIDENT
James G. K. Omy
COMMISSIONER
[Signature]
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982
★ U.S.G.P.O. 1983-403-517

Sent to <i>Maggie's Place Inc</i>	
Street and No. <i>21 E 47th St</i>	
P.O. State and ZIP Code <i>New York NY 10017</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	

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Street and No. <i>207 Main St Box 346</i>	
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Postage	\$
Certified Fee	
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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	