

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Jack I. Yates :  
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 9/1/79-5/31/82. :  
:

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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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Jack I. Yates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack I. Yates  
115 Club St.  
Cape Vincent, NY 13618

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  
15th day of April, 1985.

David Parchuck

Annice A. Dayland

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Victor Chini, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor Chini  
Chini & Chini  
915 State Tower Bldg.  
Syracuse, NY 13202

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  
15th day of April, 1985.

David Parchuck

James P. Hagedorn  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 15, 1985

Jack I. Yates  
115 Club St.  
Cape Vincent, NY 13618

Dear Mr. Yates:

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  
Victor Chini  
Chini & Chini  
915 State Tower Bldg.  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JACK I. YATES	:	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 September 1, 1979	:	
through May 31, 1982.	:	

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Petitioner, Jack I. Yates, 115 Club Street, Cape Vincent, New York 13618, 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, 1979 through May 31, 1982 (File No. 39982).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 17, 1984 at 1:15 P.M. Petitioner appeared by Victor Chini, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioner, Jack I. Yates, operated a bar located at 115 Club Street, Cape Vincent, New York.
2. On October 20, 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 September 1, 1979 through May 31, 1982 for taxes due of \$2,115.75, plus interest of \$408.29, for a total of \$2,524.04.

3. On audit, the Audit Division determined that petitioner's reported markup per the books and records for 1981 was 132 percent. Based on the auditor's experience, this markup appeared low for the type of business. Additionally, the auditor found that the sales journal was incomplete in that there were no entries for several months and cash register tapes were not available for audit.

Because of petitioner's insufficient recordkeeping, the Audit Division performed a markup test in order to verify the accuracy of taxable sales reported on the sales tax returns. Petitioner furnished the Audit Division with selling prices and the serving sizes of liquor drinks and beer. The Audit Division computed a weighted average markup of 213 percent based on an analysis of purchase invoices for the period March through May, 1982. This markup was applied to liquor, beer and wine purchases for 1981 which resulted in taxable sales of \$39,035.00. Petitioner reported taxable sales of \$28,280.00 for the same period, leaving additional taxable sales of \$10,755.00 for an underreporting factor of 38.03 percent. This percentage was applied to taxable sales reported for the audit period to determine additional taxable sales of \$30,225.00 and tax due thereon of \$2,115.75.

4. Following a pre-hearing conference with the Tax Appeals Bureau, the Audit Division agreed to reduce the liability to \$1,263.50.

5. Petitioner's cash register did not produce a tape. Petitioner made daily entries for sales in the sales journal from a reading off the cash register.

6. Petitioner's accountant, Walter Ross, analyzed purchases of beer, liquor and wine for 1981. His analysis resulted in a markup of 105.7 percent (205.7 percent of cost to sales). The primary difference between this analysis and the Audit Division's was in the computation of the unit cost of a drink. Petitioner used purchases for the entire year of 1981 and computed sales of \$24,570.55. The books and records reflected sales of \$28,280.00 for 1981.

Based on the foregoing analysis, petitioner concluded that sales taxes were overpaid as opposed to underreported.

#### 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 or any other record that would serve as a verifiable record of taxable sales. Hand-recorded entries in a ledger of gross sales figures for each day were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971). Under such circumstances, the Audit Division's use of a test period and 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. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223).


Petitioner has the burden of demonstrating by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc., supra). The evidence offered by petitioner (Finding of Fact "6") did not meet this burden.

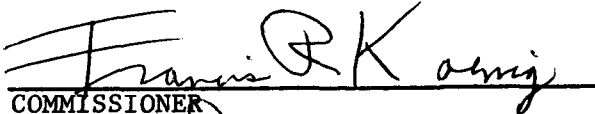
C. That the petition of Jack I. Yates is granted to the extent that the additional taxes due are reduced to \$1,263.50. The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 20, 1982; and that, except as so granted, the petition is in all other respects denied.

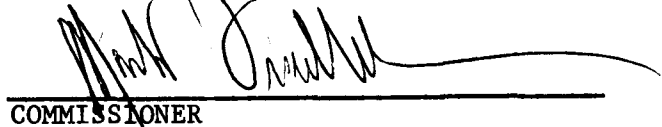
DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 693 169 728

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>Vesta Chini</i>
Street and No.	<i>Chini &amp; Chini</i>
P.O., State and ZIP Code	<i>915 State Town Rd 4</i>
Postage	<i>Syracuse NY 13202</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 693 169 727

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>John J. Yates</i>
Street and No.	<i>115 Clark St</i>
P.O., State and ZIP Code	<i>Capri Vancas NY</i>
Postage	<i>13618</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