

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dubonnay's Cafe, Ltd. : AFFIDAVIT OF MAILING
and Frank Colett, as Officer :
:
for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax :
under Article(s) 28 & 29 of the Tax Law for the
Period 9/1/79 - 11/30/81. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of July, 1986, he/she served the within notice of Decision by certified mail upon Dubonnay's Cafe, Ltd., and Frank Colett, as Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dubonnay's Cafe, Ltd.
and Frank Colett, as Officer
50 Westside Avenue
Haverstraw, NY 10927

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
3rd day of July, 1986.

David Parchuck

Janet M. Snay

Authorized to administer oaths
pursuant to Tax Law section 174

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

July 3, 1986

Dubonnay's Cafe, Ltd.
and Frank Colett, as Officer
50 Westside Avenue
Haverstraw, NY 10927

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DUBONNAY'S CAFE, LTD.	:	DECISION
and FRANK COLETT, AS OFFICER	:	
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 November 30, 1981.	:	

Petitioners, Dubonnay's Cafe, Ltd. and Frank Colett, as officer, 50 Westside Avenue, Haverstraw, New York 10927, 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 November 30, 1981 (File Nos. 46792 and 49138).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1986 at 1:15 P.M. Petitioner, Dubonnay's Cafe, Ltd., appeared by its President, Frank Colett and petitioner, Frank Colett, appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' additional sales tax liability.

FINDINGS OF FACT

1. Petitioner, Dubonnay's Cafe, Ltd. (hereinafter "the corporation"), a New York corporation, owned and operated a tavern known as Dubonnay's at Lake Road and Kings Highway, Valley Cottage, New York from February, 1979 until the

end of November, 1981. Petitioner, Frank Colett, was the president of the corporation and operator of the tavern.

2. On December 15, 1981, the corporation sold the business to J.P.A. Lake Road Cafe, Ltd. A Notification of Sale, Transfer or Assignment in Bulk bearing the date of December 28, 1981 was filed by the escrow agent, Attorney Ralph T. Romano, said document having been received by the Sales Tax Bureau of the Department of Taxation and Finance on January 4, 1982. The Notification stated that the total sales price of the business was \$170,000.00. No amount was listed for furniture and fixtures.

3. On March 29, 1982, the Audit Division issued to the corporation a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through November 30, 1981, asserting total tax due in the amount of \$4,025.89, plus penalty of \$539.12 and interest of \$414.27, for a total amount due of \$4,979.28. The Notice informed the corporation that a markup of its purchases reported on the completed Bulk Sale Questionnaire resulted in an increase in reported taxable sales of 9 percent. For the period ended November 30, 1981, in addition to asserting sales tax due in the amount of \$137.41, the Audit Division estimated that, upon its sale of the tavern business to J.P.A. Lake Road Cafe, Ltd., furniture and fixtures in the amount of \$50,000.00 were transferred and, therefore, asserted bulk sales tax due of \$2,125.00. At the hearing held herein, the Audit Division stated that this bulk sales tax estimate was incorrect and, after examination of the contract of sale, bill of sale and consent to assignment of lease, agreed that only \$15,000.00 was subject to tax. Therefore, the Audit Division reduced its assessment of bulk sales tax due from \$2,125.00 to \$637.50 and the total tax due for this period from \$2,262.41 to \$774.91. On the same date, the Audit Division issued

a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Frank Colett for the same periods and amounts of tax, penalty and interest, said Notice stating that Frank Colett was personally liable as an officer of the corporation under sections 1131(1) and 1133 of the Tax Law. As in the case of the Notice issued to the corporation, the Audit Division agreed to a reduction in the assessment for the period ended November 30, 1981 from \$2,262.41 to \$774.91.

4. Subsequent to the issuance of the aforesaid assessments to the corporation and to Frank Colett as officer of the corporation, a field audit of the tavern was performed for the period September 1, 1979 through November 30, 1981. Petitioners were requested to provide register tapes, daily summaries, general ledgers, guest checks, cash receipts and disbursements journals, purchase records and invoices and Federal tax returns. The only records which were provided were incomplete bank statements and purchase invoices for beer and liquor from the year 1981. On December 26, 1980, a broken sprinkler head at the tavern resulted in a flood in the basement where all business records were stored, thereby destroying all purchase invoices of merchandise prior to said date. Purchase invoices for 1981 were made available by the corporation's representative from which the Audit Division determined total merchandise purchases for said year in the amount of \$83,030.00. The auditor attempted to perform a markup test, but information regarding sizes and prices of drinks was not made available. Based upon industry averages, a markup of 200 percent on beer and 250 percent on wine and liquor was used, resulting in a percentage of error on reported sales of 30.148 percent. From this calculation of the percentage of error, the Audit Division determined that, in addition to the assessments of March 29, 1982 in the amount of \$4,025.89, additional sales tax

in the amount of \$4,141.31 was due and owing. Accordingly, on December 30, 1982, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through November 30, 1981 was issued by the Audit Division to each of the corporation and Frank Colett, as officer of the corporation, in the amount of \$4,141.31, plus penalty of \$977.10 and interest of \$1,109.72, for a total amount due of \$6,228.13.

5. Petitioner Frank Colett contends that a "happy hour" was held at the tavern each day between the hours of 3:00 p.m. and 7:00 p.m. at which time all drinks were discounted. However, no credible evidence was presented which would confirm the existence of a daily "happy hour" nor was any evidence presented to show drink prices charged during such periods.

6. Neither in his petition nor at the hearing held herein did petitioner Frank Colett contest the Audit Division's determination that, as an officer of the corporation, he was a person who, pursuant to the provisions of section 1131(1) of the Tax Law, was required to collect any taxes imposed by Article 28 of the Tax Law. Petitioner Frank Colett was, therefore, properly determined to be personally liable for the sales tax due from the tavern business.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person to collect tax, to maintain records of its sales and to make such records available for inspection and examination. Where records are not provided or are incomplete or insufficient, the tax due may be determined on the basis of external indices (Tax Law §1138[a]).

B. That petitioners' records were not complete and could not be used by the Audit Division to determine petitioners' 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).

C. That the Audit Division reasonably calculated petitioners' 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). The burden rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858). Petitioners have not sustained their burden of proving that the audit method employed or the amount of tax assessed was erroneous.

D. That the petition of Dubonnay's Cafe, Ltd. and Frank Colett are denied and the notices of determination and demand for payment of sales and use taxes due dated March 29, 1982 and December 30, 1982, after modification in accordance with Finding of Fact "3", are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986

Rodriguez
PRESIDENT

Francis R. Koening
COMMISSIONER

[Signature]
COMMISSIONER

P 319 372 881

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
Dunbennay's Cafe Ltd.	
at Frank O. Colet's Office	
50 Westside Ave.	
P.O., State and ZIP Code	
Haverstraw, N.Y. 10927	
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	