

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wooden Nickel Lounge, Inc. of Olean : 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 :
Periods Ended 5/31/79-2/28/82. :

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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Wooden Nickel Lounge, Inc. of Olean, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wooden Nickel Lounge, Inc. of Olean
816 W. State St.
Olean, NY 14760

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
17th day of January, 1986.

David Parchuck

Connie Onofre

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wooden Nickel Lounge, Inc. of Olean : AFFIDAVIT OF MAILING
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of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Periods Ended 5/31/79-2/28/82. :

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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Paul B. Kelly, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul B. Kelly
70 West Main St.
Allegany, NY 10706

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
17th day of January, 1986.

David Parchuck

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

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

January 17, 1986

Wooden Nickel Lounge, Inc. of Olean
816 W. State St.
Olean, NY 14760

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
Paul B. Kelly
70 West Main St.
Allegany, NY 10706
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

WOODEN NICKEL INC. OF OLEAN

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods Ended May 31,
1979 through February 28, 1982. :

DECISION

Petitioner, Wooden Nickel Inc. of Olean, 816 West State Street, Olean, New York 14670, 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 periods ended May 31, 1979 through February 28, 1982 (File No. 42480).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 13, 1985 at 1:15 P.M., with all briefs submitted by May 15, 1985. Petitioner appeared by Paul B. Kelly, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional tax due from petitioner.

FINDINGS OF FACT

1. Petitioner, Wooden Nickel Inc. of Olean, operates a bar at 816 West State Street, Olean, New York. Petitioner sold drinks and alcoholic beverages. Petitioner did not engage in the sale of food during the audit period.

2. On December 6, 1982, after audit of petitioner's books and records, the Audit Division issued to petitioner a Notice of Determination and Demand

for Payment of Sales and Use Taxes Due for the quarterly periods ended May 31, 1979 through February 28, 1982. The notices asserted liability of \$27,035.26 of sales and use taxes, together with \$5,589.72 in accrued penalty and \$6,051.67 in accrued interest to the date of the notice, for a total of \$38,676.65. Valid consents authorizing assessment of taxes for the periods herein at any time on or before December 20, 1982 had been timely completed and filed.

3. The auditor performed a purchase markup audit of petitioner:

(a) Petitioner completed a bar fact sheet listing selling prices and volume for drinks sold. Markups of 311.4 percent for "top shelf" liquor, 435.5 percent for "bar" liquor, and 173.1 percent for wine were determined which, when allocated according to 1981 purchases of same, resulted in a "weighted" markup of 374.9 percent for liquor. Said markup made a 15 percent allowance for spillage and theft. A weighted markup of 303.15 percent was determined for beer.

(b) Purchases for the quarterly period ended February 28, 1982 were not available so an estimate for such purchases was determined by averaging purchases of four quarters, June 1979 through May 1980. The ratio of beer purchases to total purchases and liquor purchases to total purchases for the period January, 1980 through November, 1981 was determined and then applied to total purchases (including the February 28, 1982 estimate).

(c) Total beer and liquor purchases as above determined were marked up pursuant to the previously determined markups resulting in \$710,487.00 in audited taxable sales (excluding sales tax).

(d) Asset purchases for the total audit period were reviewed resulting in \$50,246.00 in purchases for which invoices showing tax paid were not produced.

4. Petitioner did not file sales and use tax returns for the quarters ended May 31, 1981, August 31, 1981, November 30, 1981 and February 28, 1982.

Petitioner's office copies of such returns and petitioner's sales journal indicate the following taxable sales for such periods:

<u>Quarter</u>	<u>Sales</u>
5/31/81	\$46,903.00
8/31/81	\$50,982.00
11/30/81	\$43,361.00
2/28/82	\$36,635.00

5. Petitioner's sales tax returns for the audit period, including those not filed (Finding of Fact "4"), indicate taxable sales of \$552,377.00 and payments thereon of \$26,214.72.

6. Petitioner's sales journal for the year 1980 indicates sales of \$250,271.00. Petitioner's copy of its Federal Corporation Income Tax Return for the same period indicates sales of \$261,727.00. Petitioner's sales journal for the year 1981 indicates sales of \$194,764.04 for such period. Petitioner's copy of its Federal Corporation Income Tax Return for the same period indicates sales of \$180,757.00. There are similar discrepancies with respect to petitioner's purchases as reported in its purchases journal and on its Federal returns.

7. Petitioner's sales journals indicate sales for the total audit period of \$616,202.28.

8. Petitioner's quarterly sales tax returns and sales journals reflect quarterly taxable sales of:

<u>Quarter Ended</u>	<u>Returns</u>	<u>Sales Journal</u>
5/31/79	\$46,400	\$46,400
8/31/79	50,663	50,663
11/30/79	40,523	40,523
2/28/80	42,970	48,011
5/31/80	49,276	64,200
8/31/80	60,147	78,278
11/30/80	45,409	59,431
2/28/81	39,107	54,312

9. The returns for the periods May 31, 1979, November 30, 1979, February 28, 1980, May 31, 1980, August 31, 1980, November 30, 1980 and February 28, 1981 were not timely filed.

10. The weighted markups for beer did not take into account spillage, breakage and theft.

11. The weighted markup for liquor and beer did not account for happy hour "two drinks for one price" and other specials routinely made by petitioner.

12. The Audit Division's auditor did not request to see petitioner's cash register tapes. The testimony at the hearing of petitioner's president was that there existed at the time of the audit full and complete cash register tapes for the total audit period, yet the bar questionnaire he signed at the time of the audit indicated otherwise. Petitioner's accountant testified that whenever petitioner's cash register tapes were checked against petitioner's totals of same, they (the records) were always in agreement. Yet there remains unexplained discrepancies between petitioner's sales as reported per its sales tax returns, federal income tax returns and sales journal, all of which were compiled from petitioner's cash register tapes or summaries thereof.

13. That no cash register tapes from any complete day, week, month or quarter within the audit period have been shown to exist.

14. That no invoices or other documentary proofs were submitted to show that sales taxes were paid or were not otherwise due and owing upon the purchase of assets by petitioner.

CONCLUSIONS OF LAW

A. That section 1138 of the Tax Law provides that when a sales and use tax return is not filed or when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as shall be available.

Petitioner did not file returns for several of the periods covered by the audit of its books and records and its books and records disclosed that at least half of the returns it had filed during the audit period were insufficient and incorrect.

B. That in determining petitioner's taxable sales, credit was not given for happy hour sales, in general, and spillage, theft and breakage with respect to beer purchases. Accordingly, taking into account such factors, petitioner's sales for the audit period are determined to be \$616,202.28 as reflected in its sales journal.

C. That petitioner has failed to prove that sales tax was paid upon its asset acquisitions and the audit in that respect is sustained in full.

D. That based upon petitioner's filing and payment record, penalty was properly imposed.

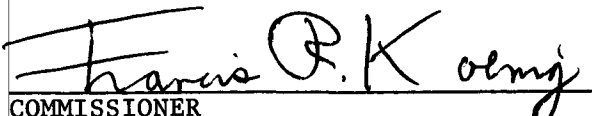
E. That the petition of Wooden Nickel Inc. of Olean is, in all respects denied, except to the extent that the Audit Division is directed to recompute petitioner's gross sales pursuant to Conclusion of Law "B", and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, together with applicable interest and penalty as allowed by law, is in all other respects sustained.


DATED: Albany, New York

JAN 17 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commission
TAX APPEALS BUREAU

W. A. Harriman Campus
ALBANY, N.Y. 12227

CERTIFIED

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Wooden Nickel Lounge, Inc.
816 W. State St.
Olean, NY 14760

RECEIVED

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TAX APPEALS BUREAU

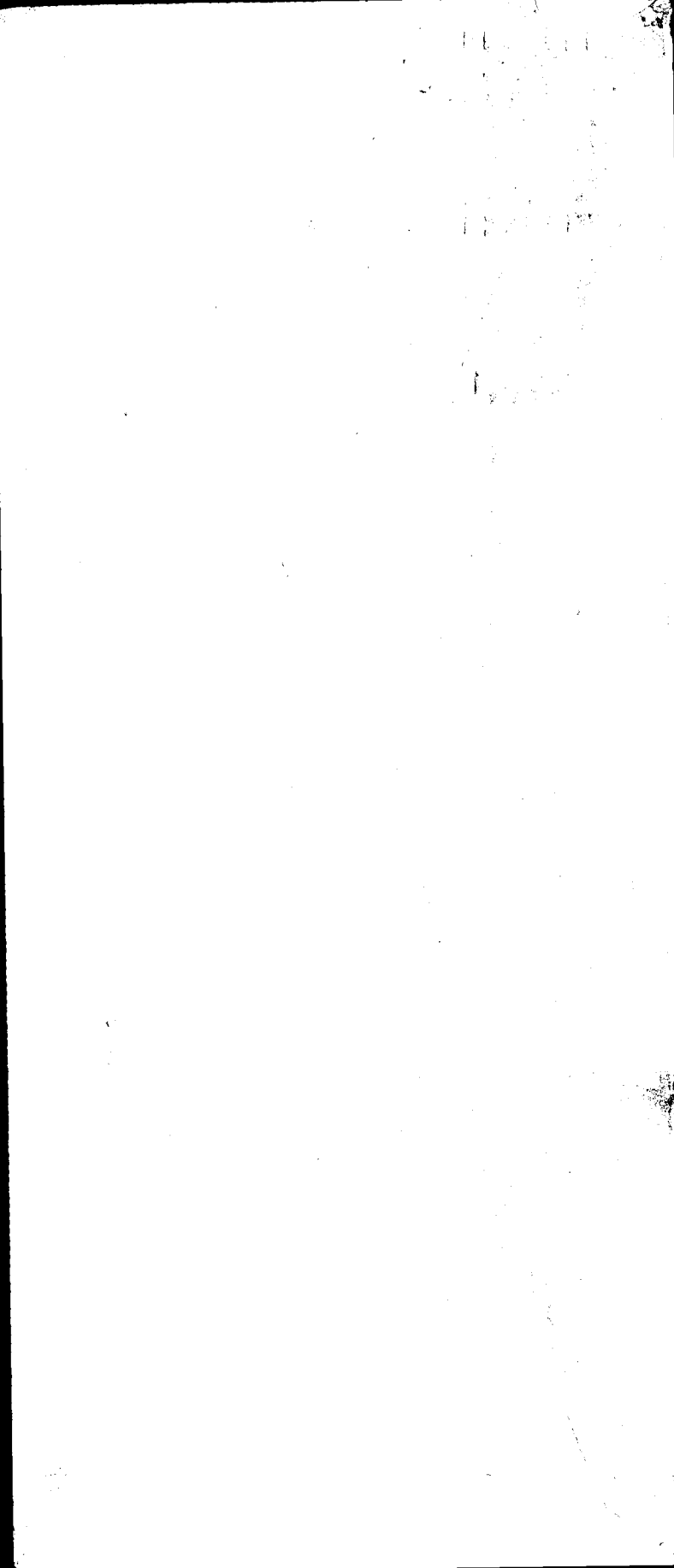
1/21/86

4/2nd Notice

2-6-86

Return

2-17-87



TA-36 (9/76)

State of New York - Department of Taxation and Finance
Tax Appeals BureauREQUEST FOR BETTER ADDRESS

Requested by <i>Tax Appeals Bureau</i> Room 107 - Bldg. #9 State Campus Albany, New York 12227	<i>Tax Appeals Bureau</i> Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>3/6/86</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition <i>Dec. 11/17/86</i>
Name <i>Wooden Nickel Lounge, Inc.</i>	
Address <i>816 W. State St.</i> <i>Olean, N. Y. 14760</i>	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	<i>Unclaimed</i>

Searched by <i>DP</i>	Section	Date of Search <i>3/6/86</i>
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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

January 17, 1986

Wooden Nickel Lounge, Inc. of Olean
816 W. State St.
Olean, NY 14760

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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
Paul B. Kelly
70 West Main St.
Allegany, NY 10706
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WOODEN NICKEL INC. OF OLEAN	:	DECISION
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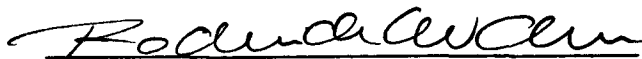
D. That based upon petitioner's filing and payment record, penalty was properly imposed.

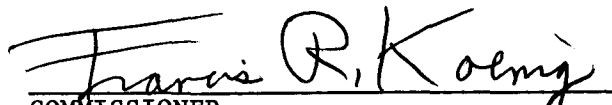
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DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER