

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Evelyn R. MacFarland : AFFIDAVIT OF MAILING  
D/B/A Country Corner Restaurant :  
:   
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 6/1/80-2/29/84. :

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State of New York :

ss.:

County of Albany :

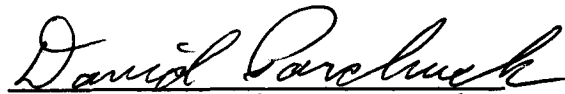
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 25th day of June, 1987, he/she served the within notice of Decision by certified mail upon Evelyn R. MacFarland, D/B/A Country Corner Restaurant the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

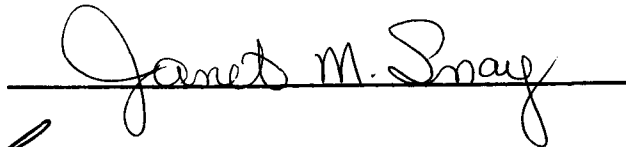
Evelyn R. MacFarland  
D/B/A Country Corner Restaurant  
c/o Edward Keogh  
24379 Willis Lane  
Sunnymead, CA 92388

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  
25th day of June, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

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of :  
Evelyn R. MacFarland : AFFIDAVIT OF MAILING  
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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 25th day of June, 1987, he served the within notice of Decision by certified mail upon William A. Bacas, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

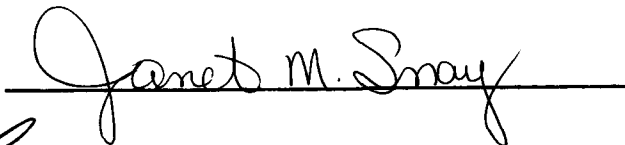
William A. Bacas  
Bacas & Krogmann  
182 Ridge St. - P.O. Box 665  
Glens Falls, NY 128010665

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  
25th day of June, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

June 25, 1987

Evelyn R. MacFarland  
D/B/A Country Corner Restaurant  
c/o Edward Keogh  
24379 Willis Lane  
Sunnymead, CA 92388

Dear Ms. MacFarland:

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

Petitioner's Representative:  
William A. Bacas  
Bacas & Krogmann  
182 Ridge St. - P.O. Box 665  
Glens Falls, NY 128010665

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EVELYN R. MACFARLAND	:	DECISION
D/B/A COUNTRY CORNER 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, 1980	:	
through February 29, 1984.	:	

Petitioner, Evelyn R. MacFarland d/b/a Country Corner Restaurant, c/o Edward Keogh, 24379 Willis Lane, Sunnymead, California 92388, 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, 1980 through February 29, 1984 (File No. 55113).

On October 31, 1986, petitioner advised the State Tax Commission, in writing, that she desired to waive a hearing and to submit the case to the State Tax Commission based upon the entire record contained in the file, with the submission of additional evidence by November 20, 1986. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether the Audit Division properly estimated petitioner's sales tax liability.

FINDINGS OF FACT

1. On February 21, 1984, the Audit Division received notification that Daniel Towers d/b/a Lake Luzerne Venture planned to purchase a business in Lake Luzerne, New York, known as Evelyn R. MacFarland d/b/a Country Corner Restaurant ("restaurant").

2. On February 23, 1984, the Audit Division issued a Notice of Claim to Purchaser.

3. On March 7, 1984, the Audit Division received a Bill of Sale showing a transfer of the furniture and equipment of the restaurant for \$5,000.00. In addition, petitioner's attorney remitted a check in the amount of \$350.00.

4. On March 12, 1984, the Audit Division issued a Notice to Seller to Ms. MacFarland requesting, among other things, copies of Federal income tax returns for the years 1980 through 1982, a final sales tax return, sales tax returns for all periods which petitioner had not filed and payment of all outstanding assessments. The Audit Division also requested that petitioner prepare a Bulk Sale Questionnaire.

5. On March 23, 1984, the Audit Division received a partially completed Bulk Sale Questionnaire. Petitioner attached a letter to this form which stated that she did not have all of the information available at that time to complete the form.

6. On May 18, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner assessing a deficiency of sales tax for the periods ended August 31, 1980 through February 29, 1984 in the amount of \$7,482.75, plus penalty of \$1,383.90 and interest of \$1,710.62, for a total amount due of \$10,577.27. This assessment was in addition to three other notices.

7. On June 21, 1984, the Audit Division issued a Notice of Assessment Review which stated that an error had been made in the computation of the original assessment. As adjusted, the Audit Division's assessment of tax due was \$5,990.63, plus penalty and interest of \$3,683.76, for a total amount due of \$9,674.39. The Notice of Assessment Review explained that this notice was

in addition to an assessment for the period ended May 31, 1982 with a balance then due of \$399.65 and an assessment for the period ended February 29, 1984 with a balance due of \$952.01.

8. On March 11, 1985, petitioner paid the outstanding assessments of \$399.65 and \$952.01.

9. The original notice issued May 18, 1984, as well as the amended notice issued June 21, 1984, were premised upon the Audit Division's estimated markup. This, in turn, was based upon an industry average of restaurants which sold alcoholic beverages.

10. The restaurant did not sell alcoholic beverages.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides that:

"if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases,... scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That the Audit Division, when conducting an audit, must determine the amount of tax due from such information as may be available. If necessary, the tax may be estimated on the basis of external indices (Tax Law § 1138[a]; Matter of George Korba v. New York State Tax Commn., 84 AD2d 655, lv denied 56 NY2d 502). However, the audit method adopted must be reasonably calculated to reflect the taxes due (see Matter of Ristorante Puglia v. Chu, 102 AD2d 348, 350).


C. That reliance upon industry averages is a proper external index upon which to conclude that taxes are due. In this instance, however, the restaurant did not sell alcoholic beverages. Therefore, the Audit Division incorrectly determined that additional sales tax was due.

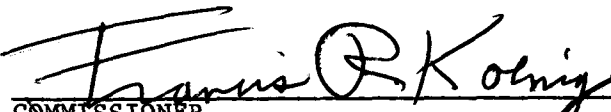
D. That the petition of Evelyn R. MacFarland d/b/a Country Corner Restaurant is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 18, 1984 and adjusted June 21, 1984, is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

**JUN 25 1987**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER