

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard & Patricia Stringer : AFFIDAVIT OF MAILING
d/b/a Barrel Tavern :
:
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 6/1/79-5/31/82. :

State of New York :

ss.:

County of Albany :

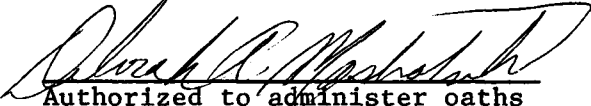
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 13th day of March, 1987, he/she served the within notice of Decision by certified mail upon Richard & Patricia Stringer, d/b/a Barrel Tavern the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

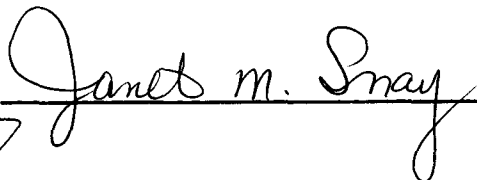
Richard & Patricia Stringer
d/b/a Barrel Tavern
P.O. Box 340
Dexter, NY 13634

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
13th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

March 13, 1987

Richard & Patricia Stringer
d/b/a Barrel Tavern
P.O. Box 340
Dexter, NY 13634

Dear Mr. & Mrs. Stringer:

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	:	
RICHARD STRINGER AND PATRICIA STRINGER	:	DECISION
D/B/A BARREL TAVERN	:	
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 May 31, 1982.	:	

Petitioners, Richard Stringer and Patricia Stringer, d/b/a Barrel Tavern, P.O. Box 340, Dexter, New York, 13634 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 May 31, 1982 (File No. 47987).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on August 15, 1986 at 9:00 A.M., with additional evidence to be submitted by September 15, 1986. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

ISSUES

I. Whether a default order should be taken against the Audit Division because of the Law Bureau's failure to serve an answer on the petitioners within sixty days from the date the Secretary to the State Tax Commission acknowledged receipt of an acceptable perfected petition.

II. Whether petitioners are liable for penalty and interest determined to be due.

FINDINGS OF FACT

1. On June 3, 1983, as the result of a field audit, the Audit Division issued against petitioners, Richard Stringer and Patricia Stringer d/b/a Barrel Tavern, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through May 31, 1982, asserting a tax due of \$4,909.94, plus penalty of \$1,175.42 and interest of \$1,535.34, for a total amount due of \$7,620.70.

2. Mr. and Mrs. Stringer operated a small tavern, serving legal beverages and bar snacks. They initially registered as vendors, using the name Barrel Tavern, on June 22, 1977; however, the business was moribund until June 1979.

3. On audit, it was determined that Barrel Tavern actively began doing business in June 1979, but failed to file any sales tax returns or to remit sales tax to the State. In June 1982, Mr. and Mrs. Stringer obtained a second certificate of authority, registering as Fun Spots, Inc. Their registration indicated that they began doing business in June 1982.

4. Because petitioners did not have sales journals or cash register tapes, the auditor deemed the books and records to be inadequate for the purpose of determining taxable sales. Using a test period and markup of purchases procedure, the auditor estimated taxable sales for the period of \$70,142.00 with a tax due on that amount of \$4,909.94. The auditor apportioned the total tax due to the twelve quarters in the audit period, assessing tax of \$433.23 in each of the first eleven quarters and \$144.41 in the final quarter.

5. The determination of tax due followed an informal conference between the Audit Division and Mr. and Mrs. Stringer held on March 10, 1983. On March 28, 1983, Mrs. Stringer met with the Audit Division a second time, and she executed a Consent to Fixing of Tax Not Previously Determined and Assessed.

6. The consent form signed by Mrs. Stringer includes two statements as follows:

"I agree to submit with this consent a remittance payable to the 'New York State Tax' for the full amount of tax plus penalty and/or interest, which is computed to the date of this consent."

"After issuance of Notice and Demand (AU-16.1) which includes tax, penalty and/or interest accrued, I agree to pay the amount due."

7. On the consent signed by Mrs. Stringer, the second of the two statements quoted above was checked.

8. At the time the consent form was executed, tax due, plus penalty and interest, amounted to approximately \$6,700.00. The Stringers agreed to the total amount of tax assessed for the audit period. However, they argued that audited sales should have been apportioned in such a way as to reflect the fact that sales had increased over the audit period and that the Audit Division's failure to do so had resulted in an overstatement of interest and penalty. They calculated their own liability at approximately \$5,700.00, an amount which was intended by them to include interest and penalty, and offered the auditor a check in this amount in satisfaction of the entire assessment. The auditor refused the check.

9. At hearing, Mr. and Mrs. Stringer continued to dispute the imposition of penalty and interest, but they did not present any documentary evidence to show that the tax assessed within each quarter was erroneous. Furthermore, they argued that their offer to pay tax plus a portion of the interest should have been accepted and should have stopped interest from accruing beyond that point.

10. Mr. Stringer filed a perfected petition on July 3, 1985. The Law Bureau served an answer on or about September 4, 1985.

CONCLUSIONS OF LAW

A. That in light of petitioners' failure to file returns and to maintain adequate books and records, the Audit Division was warranted in estimating taxable sales on the basis of whatever information was available to it (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869). Furthermore, petitioners agreed that the total tax assessed was correct, and they presented no documentary evidence to establish that the audit methodology resulted in an overstatement of interest and penalty due.

B. That there is no provision in the Tax Law authorizing the State Tax Commission to cancel or reduce minimum interest on tax determined to be due and remaining unpaid.

C. That the State Tax Commission may remit penalties and that portion of the interest exceeding the statutory minimum, if it determines that failure to comply with the Tax Law was due to reasonable cause and not to willful neglect (Tax Law §1145). Petitioners did not establish that reasonable cause existed for their failure to file returns or remit tax due for a period of approximately three years.

D. That inasmuch as petitioners were not prejudiced by the Law Bureau's failure to file an answer within sixty days, there is not sufficient ground for the taking of a default judgment against the Audit Division.


E. That the petition of Richard Stringer and Patricia Stringer d/b/a Barrel Tavern is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 3, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER