

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
121 LEXINGTON RESTAURANT CORP. :
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 December 1, 1979 :
through May 31, 1983. :

DECISION

In the Matter of the Petition :
of :
AYKUT (A/K/A JOHN) GORKEY, :
OFFICER OF 121 LEXINGTON RESTAURANT CORP. :
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 December 1, 1979 :
through May 31, 1983. :

Petitioners, 121 Lexington Restaurant Corp. and Aykut (a/k/a John) Gorkey, officer of 121 Lexington Restaurant Corp., 2 Grace Court, Apt. 30, Brooklyn, New York 11201, each 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 December 1, 1979 through May 31, 1983 (File Nos. 48753 and 48754).

A consolidated hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 1, 1986 at 9:15 A.M. Petitioners appeared by Aykut Gorkey pro se. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the State Tax Commission has jurisdiction to proceed administratively against petitioners for unpaid sales taxes of 121 Lexington Restaurant Corp.

II. Whether the Audit Division properly determined the additional sales taxes due from petitioner 121 Lexington Restaurant Corp. for the period at issue.

FINDINGS OF FACT

1. During the period at issue, petitioner 121 Lexington Restaurant Corp. ("the corporation") filed eleven New York State and local sales and use tax returns reflecting taxes due, but enclosed no remittance therewith. The returns showed taxes due in the following amounts:

<u>Period Ended</u>	<u>Tax</u>
5/31/80	\$ 2,012.72
8/31/80	1,569.68
11/30/80	1,569.84
2/28/81	1,474.80
5/31/81	1,902.16
8/31/81	1,636.64
11/30/81	1,849.16
2/28/82	1,381.71
5/31/82	1,185.03
8/31/82	982.99
11/30/82	<u>1,369.42</u>
Total Tax Due	\$16,934.15

The corporation's return for the period ended February 29, 1980 was accompanied by a check in the amount of the taxes shown due. The corporation did not file a return for the periods ended February 28, 1983 and May 31, 1983.

2. On September 14, 1983, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against the corporation and petitioner John Gorkey, as an officer of the corporation, for the period December 1, 1979

through May 31, 1983, asserting taxes, penalty and interest due in the amount of \$67,672.30 scheduled as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
2/29/80	\$ 1,727.12	\$ 431.78	\$ 771.18
5/31/80	3,600.00	900.00	1,498.04
8/31/80	3,600.00	900.00	1,388.67
11/30/80	3,600.00	900.00	1,280.47
2/28/81	3,600.00	900.00	1,173.45
5/31/81	3,600.00	900.00	1,064.04
8/31/81	3,600.00	900.00	946.94
11/30/81	3,712.51	928.13	846.37
2/28/82	3,382.50	744.15	654.76
5/31/82	3,217.50	611.33	512.82
8/31/82	3,217.51	514.80	402.85
11/30/82	3,217.51	418.28	294.05
2/28/83	3,217.50	321.75	189.13
5/31/83	3,630.00	254.10	103.06
	<u>\$46,922.15</u>	<u>\$9,624.32</u>	<u>\$11,125.83</u>

The notices contained the following statement:

"THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARINGS PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS."

3. The assessments represent additional taxes in the amount of \$29,575.50¹ found due by the Audit Division as the result of an audit of the corporation's books and records, unpaid sales tax in the amount of \$16,934.15 (see Finding of Fact "1") and bulk sales tax determined to be due of \$412.50, for a total of \$46,922.15. Each of the petitioners timely filed a petition to review the notices.

4. During the period at issue, the corporation operated a restaurant doing business as the Bosphorous East Restaurant at 121 Lexington Avenue in New

¹ The assessment of additional taxes should, properly, have been issued by a Notice of Determination and Demand for Payment of Sales and Use Taxes Due rather than a Notice and Demand; however, the statement on the notice meets all the notice requirements of section 1138(a)(1) of the Tax Law.

York City, specializing in Turkish food. Aykut Gorkey, also known as John Gorkey, was the president of the corporation. In the spring of 1983, Mr. Gorkey proposed to sell the corporation's business assets to Recept Yuksel. On or about June 10, 1983, Mr. Yuksel submitted to the Audit Division a Notification of Sale, Transfer or Assignment in Bulk which indicated a "scheduled date of sale" of May 19, 1983 and a total sales price of \$45,000.00, \$5,000.00 of which was for furniture and fixtures. Subsequently, however, Mr. Yuksel learned of Mr. Gorkey's poor financial condition and the sale was never consummated. Mr. Gorkey continued to operate the restaurant through August 1983 when he was evicted by the landlord.

5. In or about December 1982, the Audit Division attempted to perform an audit of the corporation's books and records. The only records made available by petitioners were copies of sales tax returns, a cash receipts and cash disbursements journal for part of the audit period, and some guest checks. The auditor requested, but was never provided with, the cash receipts and cash disbursements journal for the entire audit period, cancelled checks, Federal tax returns and guest checks for the entire audit period.

6. In view of the apparent inadequacy and/or unavailability of the corporation's books and records, the Audit Division resorted to the use of external indices, i.e. the auditor's observation of the business premises and its experience in auditing similar businesses, to compute the corporation's sales tax liability. The Audit Division estimated that the corporation should have been reporting sales of \$45,000.00 for each three-month sales tax quarter for the period December 1, 1979 through December 31, 1981, and \$39,000.00 per quarter for the period January 1, 1982 through May 31, 1983 during which the corporation lost its liquor license. The Audit Division computed audited

taxable sales of \$596,000.00 which, when reduced by taxable sales reported of \$232,524.00, resulted in additional taxable sales of \$363,476.00 and additional sales tax due thereon of \$29,575.50. The Audit Division also computed a bulk sales tax of \$412.50 on the \$5,000.00 sales price of furniture and fixtures as indicated in the Notification of Sale, Transfer or Assignment in Bulk (see Finding of Fact "4").

7. At the hearing, Mr. Gorkey did not contest the computation of the taxes at issue, but rather expressed his inability to pay.

CONCLUSIONS OF LAW

A. That where timely and correct sales tax returns are submitted, lacking only the remittance of tax shown as due thereon, this Commission is not empowered to administratively determine the liability of persons required to collect tax. Parsons v. State Tax Commission, 34 NY2d 190. Notwithstanding the enactment of Tax Law section 171, paragraph twenty-first (L. 1979, Ch. 714, eff. January 1, 1980), the Tax Law does not confer administrative jurisdiction on the Tax Commission to recover unpaid taxes where correct returns have been filed. Hall v. New York State Tax Commission, 108 AD2d 488. Notwithstanding petitioners' request for a hearing and redetermination of the issue of their liability without objection to the forum, jurisdiction may not be conferred when none exists.

B. That with respect to that part of the assessment in the amount of \$16,934.15 representing unpaid sales taxes where returns were filed lacking the remittance of tax shown as due, this Commission does not have the authority to administratively determine petitioners' liability. With respect to that part of the assessment representing additional taxes due, the Tax Commission is

authorized under section 1138(a) of the Tax Law to administratively determine the tax liability.

C. That in light of petitioners' inability to produce complete and adequate books and records, the Audit Division was justified in employing external indices, in this instance the Audit Division's experience and the auditor's observations, to determine petitioners' sales tax liability. Tax Law §§1135 and 1138.

D. That under the circumstances herein, the audit method selected was reasonable. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223, 228). Petitioners failed to sustain the burden of showing that the method of audit or the amount of tax assessed was erroneous.


E. That the business assets of 121 Lexington Restaurant Corp. were never sold; therefore, the bulk sales tax of \$412.50 is hereby cancelled.

F. That the petitions of 121 Lexington Restaurant Corp. and Aykut (a/k/a John) Gorkey are granted to the extent indicated in Conclusions of Law "B" and "E" and that, except as so granted, are otherwise denied.

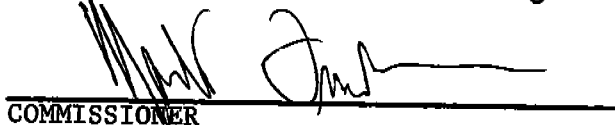
DATED: Albany, New York

STATE TAX COMMISSION

AUG 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER