

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

PACOS RESTAURANT CORP. D/B/A  
LENOX HILL COFFEE SHOP

:

DECISION

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 March 1, 1980  
through February 28, 1983.

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Petitioner, Pacos Restaurant Corp. d/b/a Lenox Hill Coffee Shop, 1105  
Lexington Avenue, New York, New York 10021, 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 March 1, 1980 through February 28, 1983 (File No.  
53292).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices  
of the State Tax Commission, Two World Trade Center, New York, New York, on  
December 3, 1986 at 1:15 P.M. Petitioner appeared by Elias P. Bonaros, Esq.  
The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of  
counsel).

#### ISSUES

I. Whether the Audit Division's use of a three day observation test to  
determine petitioner's taxable sales was proper.

II. Whether the Audit Division **is** bound by the tax liability set forth in  
the Law Bureau's answer.

FINDINGS OF FACT

1. Petitioner, Pacos Restaurant Corp., operated a coffee shop and restaurant known as the "Lenox Hill Coffee Shop" located at 1105 Lexington Avenue, New York, New York. The business hours were from 6:00 A.M. to 1:00 A.M.

2. On March 20, 1984, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1980 through February 28, 1983 for taxes due of \$30,279.33, plus interest of \$8,249.57, for a total of \$38,528.90.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through February 28, 1983 to March 20, 1984.

4. Petitioner maintained inadequate and incomplete books and records. There were no guest checks, cash register tapes, general ledger or cash disbursement records. The only available record of receipts was a day book. In the absence of any verifiable records of receipts, the Audit Division performed an observation test of the business activities on three separate days, November 9, 1983, November 29, 1983 and December 2, 1983. On each occasion sales were observed from 9:00 A.M. to 4:00 P.M. One auditor observed the transactions and periodically the guest checks were given to another auditor who prepared a listing of the amount of the sale and the tax collected. The sales, excluding sales tax, for each day were as follows:

<u>Date</u>	<u>Sales</u>	<u>Hours of Observation</u>
November 9, 1983	\$ 606.15	7
November 29, 1983	658.75	7
December 2, 1983	667.45	7
	<u>\$1,932.35</u>	<u>21</u>

The average sales per hour were \$92.02. This amount was multiplied by 18 hours<sup>1</sup> per day to arrive at average daily sales of \$1,656.36. Estimated sales per quarterly filing period were \$150,729.00 (\$1,656.36 x 91 days). Since the sales were estimated for the period ending November 30, 1983, which was not within the audit period, sales were adjusted to \$142,197.00 representing sales for the period ending November 30, 1982, by considering the annual inflation rate of 6 percent based on the Consumer Price Index. Petitioner reported sales of \$111,037.00 for said period, leaving underreported sales of \$31,160.00 or an error factor of 28.06 percent. This percentage was applied to reported taxable sales for the audit period to arrive at additional taxable sales of \$372,666.00 with tax due thereon of \$30,279.33.

5. Petitioner argued that the sales referred to above in Finding of Fact "4" for the observation test were from 6:00 A.M. to 4:00 P.M. or a 10 hour period for the first two days of observation and from 9:00 A.M. to 4:00 P.M. or a 7 hour period for the last day of the test. Petitioner recomputed average daily sales based on 27 hours for the test period instead of 21 hours. This recomputation showed that the sales reported on sales tax returns were overstated and as a result petitioner claimed at the hearing that a refund *is* due. Petitioner's argument that the observation period on November 9, 1983 was 10 hours was based upon one *of* the auditors handwriting on a paper bag that stated "Lenox Hill Restaurant register readings at 4:00 P.M., 6:00 A.M. to 4:00 P.M.".

6. The handwriting on the paper bag referred to the cash register reading and was not related to the guest checks used to determine the daily sales.

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1 Petitioner was open 19 hours a day; however, the Audit Division allowed one hour for cleanup.

7. The Law Bureau, in its answer to the perfected petition issued on behalf of the Audit Division, affirmatively stated at paragraph 10 that the amount of tax due was reduced at conference to \$18,711.45. At the hearing, counsel for the Audit Division indicated that such statement was in error and the entire amount assessed on the notice of \$30,279.33 was at issue. Counsel explained that a settlement offer in the amount of \$18,711.45 was proposed by a conferee at a pre-hearing conference but was rejected by petitioner. Petitioner took the position that the Audit Division was bound to the reduced liability by virtue of the answer of the Law Bureau.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That petitioner did not have cash register tapes, guest checks, or any other records that would serve as verifiable records of taxable sales. Because of petitioner's inadequate recordkeeping, the audit procedures used by the Audit Division as a basis for determining petitioner's liability were proper in accordance with section 1138(a) of the Tax Law (see Matter of Licata v. Chu, 64 NY2d 873).

C. That the Audit Division reasonably calculated petitioner's tax liability based on the books and records available for audit. When a taxpayer's record-keeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223, lv denied 44 NY2d 645). Petitioner

failed in its burden of establishing that the amount of tax assessed was erroneous (see Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576).


D. That the Audit Division was not bound by an erroneous statement contained in the answer of the Law Bureau. At the hearing the Law Bureau was entitled **to** amend the pleading to conform to the proof in accordance with 20 NYCRR 601.6(c) and such amendment did not **work** to the prejudice of petitioner nor in any way hinder petitioner's presentation of its case.

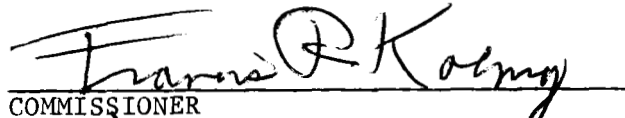
E. That the petition of Pacos Restaurant Corp., d/b/a Lenox Hill Coffee Shop **is** denied and the Notice **of** Determination and Demand for Payment of Sales and **Use** Taxes Due issued March 20, 1984 **is** sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 18 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER