

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
LUM'S RESTAURANT

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 and 29 of the :
Tax Law for the ~~year(s)~~ or Period ~~(s)~~ :
December 1, 1966 through November 30,
1969.

State of New York
County of Albany

John Huhn , being duly sworn, deposes and says that
~~he~~ he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13 day of September , 1978, ~~he~~ he served the within
Notice of Determination by ~~(certified)~~ mail upon Lum's Restaurant

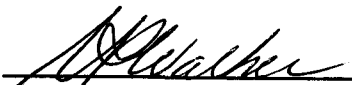
~~representative of~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Lum's Restaurant
138-28 Northern Boulevard
Flushing, New York 11454

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) 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)~~
~~xxxxx~~ 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

13 day of September , 1978.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

LUM'S RESTAURANT

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 and 29 of the :
Tax Law for the ~~XXXXXX~~ Period (X) :
December 1, 1966 through November 30,
1969.

State of New York
County of Albany

John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13 day of September , 1978, she served the within
Notice of Determination by ~~XXXXXX~~ mail upon Seymour Reich, Esq.

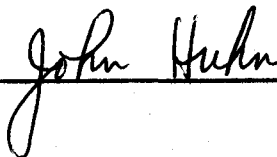
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Seymour Reich, Esq.
Seymour Reich & Co.
56 Pine Street
New York, New York 10005
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) 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

13 day of September , 1978







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

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

September 13, 1978

**Lum's Restaurant
138-28 Northern Boulevard
Flushing, New York 11454**

Gentlemen:

Please take notice of the **Determination**
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1138 & 1243** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Michael Alexander
MICHAEL ALEXANDER
Supervising Tax
Hearing Officer

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application :
of :
LUM'S RESTAURANT, a Partnership : DETERMINATION
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, 1966 through :
November 30, 1969. :

Applicant, Lum's Restaurant, 138-28 Northern Boulevard,
Flushing, New York 11454, filed an application 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, 1966 through
November 30, 1969 (File No. 00178).

A formal hearing was held before Michael Alexander, Hearing
Officer, at the offices of the State Tax Commission, Two World
Trade Center, New York, New York, on September 15, 1976 at 2:45 P.M.
and on April 22, 1977 at 9:00 A.M. Applicant appeared by Seymour
Reich, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq.
(Richard Kaufman, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau properly determined the amount of
additional tax, if any, owed by applicant.

FINDINGS OF FACT

1. Applicant, Lum's Restaurant, is a partnership which operates a Chinese restaurant in Flushing, New York. As the result of an audit, applicant was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 16, 1971, assessing \$18,874.37 in taxes, penalty and interest for the period December 1, 1966 through November 30, 1969.

2. At the formal hearing, applicant conceded its liability on the following items: an \$810.21 liability for fixed assets, a \$9.90 liability for repairs and a \$469.95 liability for over-collections.

3. The remainder of the assessment was based on the auditor's computation of taxable sales of \$240,938.28 during the audit period. This figure was the result of a) determining a mark-up on items sold by applicant, b) applying this mark-up to the cost of goods purchased by applicant and c) subtracting from the resultant figure total reported sales.

4. The mark-up utilized by the Sales Tax Bureau was calculated by comparing the selling price of an item (the price of which was related to the auditor) to the cost of the ingredients stated to be contained therein. Applicant's menu contains over fifty items. The Sales Tax Bureau did not know which menu item was utilized to compute the mark-up. The item had a selling price of \$4.25 and a cost of \$2.37. The difference (\$1.88), when compared with the cost of the item, constitutes a mark-up of 79% as follows: $\frac{\$1.88}{\$2.37} = 79\%$.

However, the Sales Tax Bureau then utilized a mark-up on food served in the restaurant of 100% and on food served for take-out of 85%. The basis for the difference between the 100% and 85% mark-up figures was portion-size differences between on-the-premises consumption and take-out food.

5. The Sales Tax Bureau utilized a mark-up on beer of 200% and a mark-up on liquor of 250%. No adequate basis for these mark-ups was presented.

6. The Sales Tax Bureau increased taxable sales for the audit period by \$240,938.28.

7. The Sales Tax Bureau made no adjustments to applicant's purchases to reflect inventory on hand at the opening and closing of the audit period. Inventory had increased \$14,788.00 from the opening to the closing of the audit period.

8. The Sales Tax Bureau computed the cost of food consumed by employees at sixty cents per meal. Applicant's employees were not restricted as to the menu item they could eat. The average meal served to customers during the audit period was \$3.30. On the Bureau's figure of 72,780 employee meals, the cost difference between the Bureau's computation and applicant's, utilizing the Bureau's mark-up figure for on-premises meals, totaled \$76,419.00.

9. The effect of Findings of Fact "8" and "9" on the increased taxable sales computed by the Bureau would be to reduce that figure

from \$240,938.28 to \$58,524.29 (see Finding of Fact "6" above), using the mark-up employed on food consumed at the restaurant (100%).

10. Applicant reported total taxable sales during the audit period of \$2,377,173.00.

11. Applicant presented detailed information based on the monthly reports of its accountant and the further analysis of its operations, which indicated that the ST-100's that were submitted during the audit period accurately reflected the taxable sales which occurred during said period.

12. On February 8, 1973, applicant made a payment of \$21,810.71 to the Sales Tax Bureau under protest.

13. Applicant, Lum's Restaurant, acted both on the advice of its accountant and in good faith at all times.

CONCLUSIONS OF LAW

A. That the mark-up utilized by the Sales Tax Bureau on food, liquor and beer was arbitrary and unfounded.

B. That the amount of the adjusted purchases to which these mark-ups were applied was incorrect, due to the failure of the Sales Tax Bureau to make proper adjustments for applicant's opening and closing inventory and food consumed by employees.

C. That applicant's taxable sales during the audit period amounted to \$2,377,173.00.

D. That the application of Lum's Restaurant is granted to the extent that the Sales Tax Bureau is directed to refund the tax and interest paid by applicant on February 8, 1973, less the amount conceded and interest paid thereon, together with such interest as may be lawfully owing and that, except as so granted, is in all other respects denied.

DATED: Albany, New York
September 13, 1978

STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER