STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition   :

of

A. T. Korba's Restaurant   :

                                                              AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Sales & Use Tax   :

under Article 28 & 29 of the Tax Law

for the Period 6/1/73 - 5/31/76.   :

State of New York
County of Albany

    Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of June, 1980, he served the within notice of Determination by mail upon A. T. Korba's Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

    A. T. Korba's Restaurant
    10 Lake Ave.
    Binghamton, NY 13905

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
6th day of June, 1980.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition   :

of

   A. T. Korba's Restaurant   :

                                                  AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision   :

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for the Period 6/1/73 - 5/31/76.   :

State of New York
County of Albany

    Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of June, 1980, he served the within notice of Determination by mail upon Gerard A. Navagh the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

    Mr. Gerard A. Navagh
    420 Lexington Ave.
    New York, NY 10017

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
6th day of June, 1980.

Joanne Knapp

June 6, 1980

A. T. Korba's Restaurant
10 Lake Ave.
Binghamton, NY 13905

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:

> NYS Dept. Taxation and Finance
> Deputy Commissioner and Counsel
> Albany, New York 12227
> Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gerard A. Navagh
420 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition   :

             of   :

                                 :

A. T. KORBA'S RESTAURANT   DECISION

                                 :

for Revision of a Determination or for
Refund of Sales and Use Tax under   :
Articles 28 and 29 of the Tax Law for
the Period June 1, 1973 through May 31, :
1976.

                                 :

Petitioner, George Korba d/b/a Korba's Restaurant, (named herein as "A. T. Korba's Restaurant"), 10 Lake Avenue, Binghamton, New York 13905, filed a petition for revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period June 1, 1973 through May 31, 1976 (File No. 17572).

A formal hearing was held before Jerome M. Hesch, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on July 11, 1979 and August 28, 1979. Petitioner appeared by Gerard A. Navagh, Esq. The Audit Division appeared by Peter Crotty, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether additional sales tax was due for the twelve calendar quarters at issue.

II. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was timely issued.

FINDINGS OF FACT

1. On September 16, 1976, pursuant to an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, A. T. Korba's Restaurant, in the amount of $6,504.40,

plus penalty and interest of $2,491.93, for a total of $8,996.33 for the period June 1, 1973 through May 31, 1976.

2. George Korba is the proprietor of Korba's Restaurant in Binghamton, New York. The restaurant has three classes of sales to which the sales tax is applicable.

3. First, cigarettes are sold from a vending machine. The price for each pack includes sales tax.

4. Second, beer and liquor (wines are classified under liquor) are sold at the bar under unit pricing, i.e. the stated price includes sales tax. The total for each bar sale is rung on the cash register. The cash register does not separately state sales tax. No guest checks are prepared for bar sales.

5. Third, food and beverages are sold at tables serviced by waitresses. A guest check and a duplicate are prepared for all orders at each table. The duplicate is given to the kitchen for the ordering of food. All bar charges for beer and liquor are recorded on the back of the guest check by the cash register and the total for beverages is entered on the front of the guest check under the total for food. The subtotal on the guest check given to a customer represents the sum of the charges for food and beverages. The sales tax for both food and beverages is separately stated as one item on the guest check. The total charge on the guest check includes food, beverages and sales tax. Only the charges on the guest check for food and beverages are rung on the cash register. The amount of sales tax is not rung on the cash register. The cash register does not date the guest checks and the waitresses generally do not date them.

6. The duplicates given to the kitchen are only used to maintain control over food leaving the kitchen. They were not used to verify whether the corresponding guest checks were rung on the cash register.

7. The restaurant maintains no records as to how many books of guest checks are issued and used. There is no attempt to match the guest checks to the cash register tapes. Voided guest checks are thrown away. Since the guest checks were not dated, it would have been impossible for the auditor to match the guest checks against the register tapes. Therefore, the auditor could not have verified whether all guest checks were recorded on the register tapes.

8. The cashier at the register is generally Mrs. Korba. The bartender, and occasionally a waitress, also handle cash at the register.

9. Sales taxes attributable to purchases of food, beer and liquor are determined by Mr. Korba at the end of each business day. He obtains from the cash register the total sales for food, beer and liquor for each day and multiplies these totals by seven percent (7%). The total sales for each category and the sales tax determinations are entered on a worksheet. A separate worksheet is maintained for each month.

10. A bookkeeper prepares a sales ledger at the end of each month from the worksheet maintained by Mr. Korba. The ledger lists separate daily sales for food, beer and liquor and totals for the month are taken. The bookkeeper uses the daily sales tax figures prepared by Mr. Korba and sales taxes for cigarettes to prepare the quarterly sales tax returns.

11. All employees are provided with one meal a day from the kitchen. An employee is charged one dollar ($1.00) for each meal. The Korbas consume most of their meals at their restaurant and frequently take food home. Not all of the foods purchased are served because of some spoilage and waste. No testimony was offered as to the number of meals served to employees or personally consumed by the Korbas. No estimates were made as to the amount of spoilage or waste. The business records do not contain any information as to spoilage and waste

or meals served to employees and the Korbas.

12. A two-day audit was commenced on July 26, 1976 by an auditor from the Audit Division. The audit covered the three-year period from June 1, 1973 through May 31, 1976.

13. The auditor's first step was to randomly examine a few cash register tapes to verify that the total sales for food, beer and liquor appearing on the tapes were properly reflected in the monthly ledgers prepared by the bookkeeper. The auditor did not examine the guest checks. He assumed all guest checks retained by the applicants and available for his examination had been rung on the cash register and appeared on the register tapes.

14. The auditor computed an average markup for each of the three categories of sales based on the purchases and sales recorded in the restaurant's books. The books reflected an average markup for the three years under examination of 141% for beer, 163% for liquor and 58% for food. The auditor was of the opinion the markup for food was on the low side.

15. The auditor then initiated a procedure designed to verify the accuracy of the sales figures reported in the business' books. A three-month test period, from December 1, 1975 through February 29, 1976, was selected for the test check.

16. A weighted-average markup was obtained for a three-month test period. The procedure used for beverages incorporated a 15% spillage factor. This procedure involved an examination of all purchases and resulted in an estimate of the maximum number of drinks that could be sold. Using the prices supplied by Mr. Korba on a bar factsheet the auditor arrived at a sales figure for that number of drinks. A comparison of these sales figures with the cost of the beverages resulted in a 129% markup for beer and a 176% markup for liquor.

17. A three-month weighted-average markup was obtained for food. Mr. Korba supplied the auditor with figures for the average weight for each main dish. Using the total weight of all main dish purchases the auditor determined the number of main dishes available for sale and the cost of each main dish. The cost of each main dish was increased by a "burden factor" of 32.4%. This burden factor was based on a finding that 32.4% of all purchases for food were for associated groceries and condiments. The cost of each main dish, adjusted by the burden factor, was compared to menu prices in effect during the test period to arrive at a markup for each main entree on the menu. The weighted-average markup for food during the test check period was 115%.

18. The auditor concluded that the higher test check markup for food as compared to the markup obtained from the books indicated that not all sales were recorded on the books.

19. The auditor applied the test check markups for food, beer and liquor to the purchases of food, beer and liquor made during the three years under audit to arrive at a determination for sales greater than the amounts reported on the books.

20. In determining the total number of meals that were available for sale, the auditor made no allowance for meals consumed by employees and the Korbas or for waste and spoilage of the main dish portions. The burden factor only makes an allowance for associated groceries and condiments.

CONCLUSIONS OF LAW

A. That an auditor cannot use external indicies to ascertain the petitioner's sales if <u>reliable</u> records are available and the exact amount of sales tax could have been determined from those records. <u>Matter of Babylon Milk & Cream Co. v. State Tax Commission</u>, 5 A.D.2d 712 (1957), <u>aff'd.</u>, 5 N.Y.2d 736 (1958); <u>Matter of Chartair Inc. v. State Tax Commission</u>, 65 A.D.2d 44 (1978). (emphasis supplied).

B.   That if the petitioner's records are not reliable, so that it is virtually impossible to verify sales reported by petitioner, then use of external indicies may be resorted to in order to determine sales. Chartair, supra; Matter of Meyer v. State Tax Commission, 61 A.D.2d 223 (1978).

C.   That the auditor is allowed to resort to external indicies to verify the accuracy of petitioner's records. Holland v. United States, 348 U.S. 121 (1954).

D.   That the test check used by the auditor was proper as it relied on information gathered from petitioner's records and information supplied to the auditor by petitioner.

E.   That the auditor was justified in concluding that he could not determine petitioner's sales from available records because the variance between the test check markup for food and the markup for food obtained from the purchase and sales figures recorded on petitioner's books was significant. Therefore, the auditor can make an independent determination of sales.

F.   That the use of a weighted average markup as applied to purchases recorded on petitioner's books is a proper method to determine sales where petitioner's records are not reliable. Gasper v. Commissioner, 225 F.2d 284 (6th Cir. 1955). Tax Law §1138(a).

G.   That application of the markups obtained by use of the three-month test check to purchases recorded on petitioner's books for the entire three-year period was a reasonable method to determine sales. Matter of Hillman Periodicals v. Gerosa, 308 N.Y. 982 (1955).

H.   That the auditor was justified in not examining the undated guest checks because it was impossible to ascertain which recorded sales on the register tapes they corresponded to and there were no records that would allow the auditor to ascertain whether all of the guest checks retained by petitioner

represented all of the restaurant table sales.

I.   That once it is established that the auditor's independent determination of sales was permissible, the burden is upon petitioner to show that this determination should be overturned. In meeting his burden of proof petitioner must show that the auditor's procedures were erroneous and must establish the extent of the error. People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346 (1925).

J.   That petitioner failed to establish that the procedures used for independent determination of sales were unreasonable. Since petitioner presented no evidence as to the number of meals consumed by employees and petitioner's family, or as to the amount of waste and spoilage, it was impossible for the auditor to take these factors into account in reducing the number of meals available for sale to customers. Had petitioner established the amount of the purchases not available for sale, he would have met his burden of proof of showing the amount of the error in the auditor's projections. Therefore, petitioner has not met his burden of proof. Kohlman & Co., supra.

K.   That the issuance of the assessment on September 16, 1976 was not barred by the three year statute of limitations. Tax Law §1147(b).

L.   That although the auditor did not take into account inventories of food on hand at the beginning and end of the three-month test check, it was reasonable to disregard inventories. The perishable nature of food means that it generally cannot be stockpiled. One can assume that all purchases during the test period were used for sales during that period. Even if the auditor had attempted to take inventories into account, he could not have done so because petitioner did not supply him with that information and it was not obtainable from the business' records.
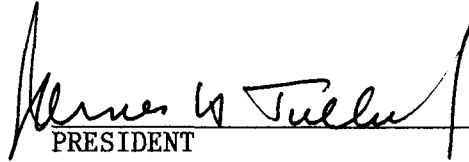
M.   That the petition of A. T. Korba's Restaurant is denied and the

Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 16, 1976 is sustained.
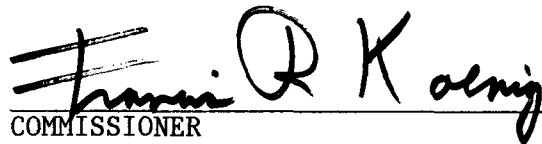
DATED: Albany, New York

STATE TAX COMMISSION

JUN 6 1980

_____
PRESIDENT

_____
COMMISSIONER

_____
COMMISSIONER