

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Morton Levine & Max Gordon :
d/b/a Gordon & Levine : 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 9/1/72 - 8/31/75. :

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 17th day of October, 1980, he served the within notice of Determination by mail upon Morton Levine & Max Gordon, d/b/a Gordon & Levine, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

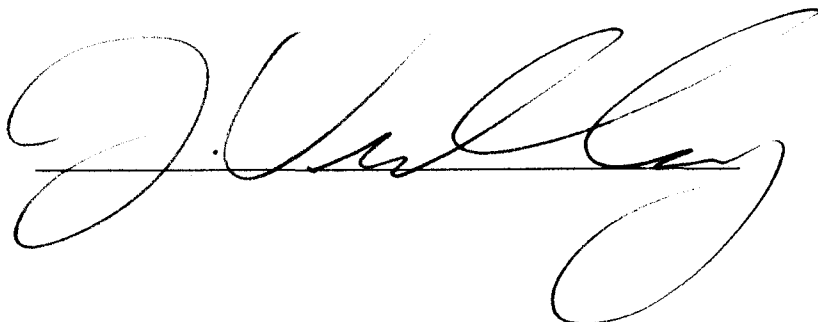
Morton Levine & Max Gordon
d/b/a Gordon & Levine
889 Livonia Ave.
Brooklyn, NY 11207

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
17th day of October, 1980.

Deborah A Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Morton Levine & Max Gordon :
d/b/a Gordon & Levine : AFFIDAVIT OF MAILING
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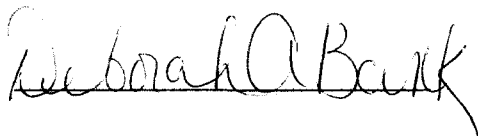
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of October, 1980, he served the within notice of Determination by mail upon Mathew Ehrlich the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

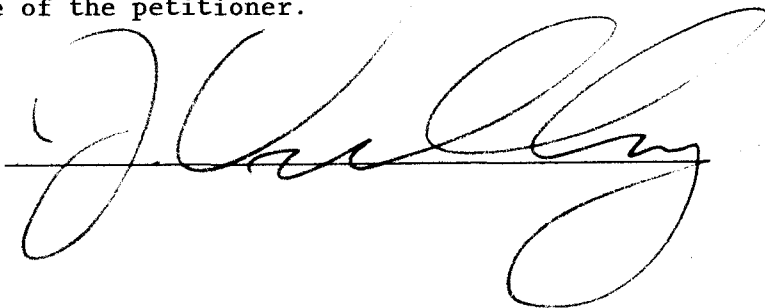
Mr. Mathew Ehrlich
33 S. Grove St.
Freeport, NY 11520

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
17th day of October, 1980.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
MORTON LEVINE and MAX GORDON	:	
d/b/a GORDON & LEVINE	:	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 September 1, 1972 through	:	
August 31, 1975.	:	

Applicants, Morton Levine and Max Gordon d/b/a Gordon & Levine, 889 Livonia Avenue, Brooklyn, New York 11207, 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 September 1, 1972 through August 31, 1975 (File No. 15853).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 21, 1979 at 2:45 P.M. Applicants appeared by Matthew Ehrlich, CPA. The Audit Division appeared by Peter Crotty, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the results of the examination of applicants' books and records properly reflected their additional sales tax liability.

FINDINGS OF FACT

1. On May 10, 1976, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants imposing additional sales tax due of \$10,856.60, plus penalties and interest, for the period September 1, 1972 through August 31, 1975.

2. On July 6, 1976, applicants, Morton Levine and Max Gordon d/b/a Gordon & Levine, filed a protest to the Notice of Determination.

3. Applicants operated a retail wine and liquor store in Brooklyn, New York.

4. On audit, the Audit Division used applicants' cost and verbally stated selling prices of liquor and wine purchased during December, 1975 to arrive at audited markups of 36.6 percent for liquor and 60.8 percent for wine. These markups were applied to applicants' purchases; however, purchases for the months of September through December, 1972 were estimated due to the unavailability of records for those months. The application of the audited markups to purchases allocated to each category resulted in additional taxable sales of \$147,388.00 and sales tax due thereon of \$10,856.60.

5. Applicants contended that the purchases estimated for the months of September through December, 1972 were unusually high. The Audit Division stipulated that the average monthly purchases made during 1973 should be used to more accurately reflect applicants' purchases for the periods in which they were estimated. Based on this stipulation, audited purchases are reduced by \$18,347.00.

6. The selling prices quoted by applicants for the markup tests included the sales tax. Labels affixed to the bottles were produced which showed the sale amount, sales tax and total selling price. The Audit Division stipulated that the prices used in the markups included sales tax.

7. No adjustment was made in the audit for pilferage. Applicants contended that the liquor store was located in a high crime neighborhood and that the business was absentee-managed; consequently, applicants argued that there was a high rate of pilferage.

1. The first part of the document is a letter from the President of the United States to the Congress.

2. The second part is a report from the Secretary of the Treasury on the state of the Union.

3. The third part is a report from the Secretary of the Navy on the state of the Navy.

4. The fourth part is a report from the Secretary of the War on the state of the War.

5. The fifth part is a report from the Secretary of the Interior on the state of the Interior.

6. The sixth part is a report from the Secretary of the Agriculture on the state of the Agriculture.

7. The seventh part is a report from the Secretary of the Commerce on the state of the Commerce.

8. The eighth part is a report from the Secretary of the Education on the state of the Education.

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16. The sixteenth part is a report from the Secretary of the Interior on the state of the Interior.

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27. The twenty-seventh part is a report from the Secretary of the Interior on the state of the Interior.

28. The twenty-eighth part is a report from the Secretary of the Agriculture on the state of the Agriculture.

29. The twenty-ninth part is a report from the Secretary of the Commerce on the state of the Commerce.

30. The thirtieth part is a report from the Secretary of the Education on the state of the Education.

Applicants presented two witnesses who lived near the liquor store, one of whom was a former employee. Testimony was given to the fact that other former employees of the business were known to have pilfered large quantities of liquor and wine from the store. Cases of liquor and wine were taken from the premises after the close of business by employees who had keys to the establishment. Applicants fired an employee in August, 1975 because of the pilferage problem.

8. Applicants' books and records were not sufficient for the verification of an exact amount of taxable sales or sales tax.

9. Applicants acted in good faith.

CONCLUSIONS OF LAW

A. That the Audit Division's computation of total audited purchases (\$365,180.00) is to be reduced by \$18,347.00 to more accurately reflect applicants' purchases for those periods in which purchases were estimated; and that purchases shall be further reduced by 5 percent to allow for the high rate of pilferage.

B. That the markup applied to liquor purchases is adjusted to 26.5 percent and the markup applied to wine purchases is adjusted to 48.9 percent to reflect the amount of sales excluding the sales tax.

C. That except as noted in Conclusions "A" and "B" above, the audit performed was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

D. That the penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the application of Morton Levine and Max Gordon d/b/a Gordon & Levine is granted to the extent indicated in Conclusions "A", "B" and "D" above. The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 10, 1976; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

James H. Stewart
James H. Stewart

OCT 17 1980