

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Lug Kee Co., Inc.

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 6/1/74 - 5/31/77. :

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 13th day of March, 1981, he served the within notice of Decision by mail upon Lug Kee Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lug Kee Co., Inc.
22 Bowery
New York, NY 10013

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
13th day of March, 1981.

Cruxie P. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Lug Kee Co., Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/74 - 5/31/77. :

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 13th day of March, 1981, he served the within notice of Decision by mail upon Murray Appleman 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. Murray Appleman
225 Broadway
New York, NY 10007

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
13th day of March, 1981.

Ann R. Hagelund

J. Vredenburg

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

March 13, 1981

Lug Kee Co., Inc.
22 Bowery
New York, NY 10013

Gentlemen:

Please take notice of the Decision 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
Murray Appleman
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LUNG KEE CO., INC.	:	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 June 1, 1974	:	
through May 31, 1977.	:	

Petitioner, Lung Kee Co., Inc., 22 Bowery, New York, New York 10013, 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 June 1, 1974 through May 31, 1977 (File No. 24270).

A small claims 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 October 23, 1980 at 9:15 A.M. Petitioner appeared by Murray Appleman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's available books and records were proper.

FINDINGS OF FACT

1. Petitioner, Lung Kee Co., Inc., operated a Chinese grocery store located at 22 Bowery, New York, New York.

2. On July 10, 1978, 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 for the period June 1, 1974 through May 31, 1977 for taxes due of \$17,219.08, plus minimum statutory interest of \$3,456.30, for a total of \$20,675.38.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to December 20, 1978.

4. On audit, the Audit Division analyzed purchase invoices for the months of July 1976 and January 1977. The auditor initially requested purchase invoices for a one-year period of June 1, 1976 through May 31, 1977, however, the invoices were not available for the entire year. The test months were agreed to by the petitioner. The two month analysis disclosed the following taxable categories and percentage to total purchases for the test months: general taxable 4.41, beer 4.44, soda .30, candy .73 and cigarettes .74. These percentages were applied to total purchases for the audit period from the general ledger of \$2,051,161.37 to determine total purchases for each taxable category. A markup test was performed for items in each of the foregoing categories using costs and selling prices in effect at the time of the audit. The markups were applied to applicable purchases to arrive at taxable sales of \$245,437.70. Petitioner reported taxable sales of \$29,582.73, leaving additional taxable sales of \$215,854.97 or an increase of 729.665 percent.

5. Petitioner argued that based on Chartair, Inc. v. State Tax Commission, 64 A.D.2d 44, the Audit Division is required to establish the insufficiency of record-keeping before it is authorized to use test periods and that the audit performed as described herein lacked such a foundation. Petitioner went on to argue that section 1135 of the Tax Law does not provide for any specific record-keeping requirements and that no regulations have been adopted by the tax commission for record-keeping standards expected of vendors. Petitioner, therefore reasoned that vendors are being placed in an unfair position, since the tax commission can consider any books and records as inadequate.

6. Petitioner's available cash register tapes did not distinguish between sales of taxable and nontaxable items and did not show any sales tax collected. Petitioner estimated its taxable sales by applying 1.3 percent to gross sales.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law provides that "every person required to collect tax shall keep records of every sale...and all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt...upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately.

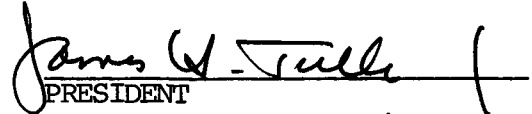
B. That petitioner failed to keep records of taxable sales or sales tax collected as specifically required by section 1135 of the Tax Law. Therefore, the Audit Division could not determine the exact amount of petitioner's taxable sales Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, not for lv. to app. den. 44 N.Y.2d 645, Matter of Leonard Goldner v. State Tax Commission, 70 A.D.2d 978. That it was petitioner's own failure to maintain proper books and records and as such, exactness in the determination of sales tax liability was not required Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023, affd. 44 N.Y.2d 684. That since petitioner's record-keeping was insufficient, the audit procedures and tests adopted by the Audit Division to determine petitioner's taxable sales and taxes due were proper pursuant to section 1138(a) of the Tax Law Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44 and that petitioner has failed to sustain the burden of showing error Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929.

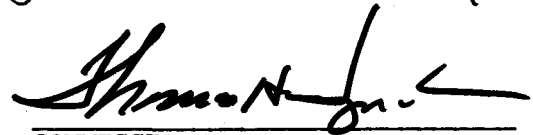
C. That the petition of Lung Kee Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 10, 1978 is sustained.

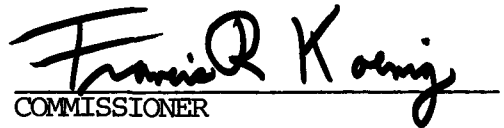
DATED: Albany, New York

MAR 13 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER