

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Kulik Restaurant, 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:  
3/1/79-2/28/81.

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 24th day of May, 1982, he served the within notice of Decision by certified mail upon Kulik Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kulik Restaurant, Inc.  
851 Madison Avenue  
Albany, NY 12208

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  
24th day of May, 1982.

*Charles R. Hagelund*

*J. Kulik*

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Joseph Kulik  
Indiv. & as Officer of Kulik Restaurant : AFFIDAVIT OF MAILING

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State of New York  
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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 24th day of May, 1982, he served the within notice of Decision by certified mail upon Richard V. D'Alessandro the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard V. D'Alessandro  
111 Washington Avenue  
Albany, NY 12210

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  
24th day of May, 1982.

*Gennie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
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AFFIDAVIT OF MAILING

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Sworn to before me this  
24th day of May, 1982.

*Carrie D. Hagellund*

*J. Kulik*

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

May 24, 1982

Joseph Kulik  
Indiv. & as Officer of Kulik Restaurant  
851 Madison Avenue  
Albany, NY 12208

Dear Mr. Kulik:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Richard V. D'Alessandro  
111 Washington Avenue  
Albany, NY 12210  
Taxing Bureau's Representative

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

May 24, 1982

Kulik Restaurant, Inc.  
851 Madison Avenue  
Albany, NY 12208

Gentlemen:

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Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Richard V. D'Alessandro  
111 Washington Avenue  
Albany, NY 12210  
Taxing Bureau's Representative

## STATE TAX COMMISSION

## DECISION

Petitioner, Joseph Kulik, individually and as an officer of Kulik Restaurant, Inc., 152 South Allen Street, Albany, New York 12208, 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, 1979 through February 28, 1981 (File No. 33441).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, State Campus, Albany, New York, on September 9, 1981 at 9:30 A.M. and on September 10, 1981 at 9:30 A.M. Petitioners appeared by Richard V. D'Alessandro, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

#### ISSUES

I. Whether petitioner Kulik Restaurant, Inc. timely filed petitions for the period ended May 31, 1979 through the period ended August 31, 1980.

II. Whether the State Tax Commission has jurisdiction to determine the sales tax liability of petitioner Joseph Kulik for the period ended May 31, 1979 through the period ended May 31, 1980.

III. Whether petitioner Joseph Kulik was a person required to collect tax on behalf of Kulik Restaurant, Inc. and is therefore personally liable for sales taxes unpaid by the corporation.

IV. Whether the Audit Division correctly determined the amounts of the sales tax liability of petitioner Kulik Restaurant, Inc. for the periods ended August 31, 1980, November 30, 1980 and February 28, 1981.

#### FINDINGS OF FACT

1. On or about October 18, 1979, Kulik Restaurant, Inc. ("Restaurant") filed a New York State and Local Sales and Use Tax Return for the period ended May 31, 1979, reflecting taxes due in the amount of \$13,885.32, but enclosed no remittance therewith. For the period ended August 31, 1979 through the period ended May 31, 1980 Restaurant similarly failed to remit payments but filed returns showing taxes due in the following amounts:



<u>PERIOD ENDED</u>	<u>DATE FILED</u>	<u>TAX</u>
8/31/79	10/18/79	\$ 14,561.94
11/30/79	1/11/80	14,482.05
2/29/80	7/18/80	13,754.34
5/31/80	7/18/80	14,968.07

For the periods ended August 31, 1980, November 30, 1980 and February 28, 1981, Restaurant did not file sales tax returns.

2. The Audit Division issued assessments to Restaurant, asserting taxes due as reflected on its returns filed, plus penalty and interest, as follows:

<u>PERIOD ENDED</u>	<u>DATE ISSUED</u>	<u>TAX</u>
5/31/79	1/14/80	\$ 13,885.32
8/31/79	1/14/80	14,561.94
11/30/79	2/22/80	14,482.05
2/29/80	8/18/80	13,754.34
5/31/80	8/18/80	14,968.07

With reference to those periods for which Restaurant did not file returns, the Audit Division issued estimated assessments for tax, penalty and interest, scheduled as follows:

<u>PERIOD ENDED</u>	<u>DATE ISSUED</u>	<u>TAX</u>
8/31/80	12/10/80	\$ 18,710.08
11/30/80	4/1/81	18,710.08
2/28/81	2/9/81	15,000.00*

\* Under Jeopardy

3. On May 7, 1981, Restaurant filed a letter of protest and petitions in response to all the aforementioned assessments.

4. On February 9, 1981, the Audit Division issued to petitioner Joseph Kulik a Notice of Determination and Demand under Jeopardy for Payment of Sales and Use Taxes Due, asserting taxes for the period ended February 28, 1981 in the estimated amount of \$15,000.00.

On February 21, 1981, the Audit Division issued to Mr. Kulik a Notice and Demand for Payment of Sales and Use Taxes Due for the period ended March 31, 1979 through the period ended August 31, 1980, asserting taxes, penalty and interest due, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
5/31/79	\$ 5,385.32	\$ 2,730.64	\$ 2,099.45	\$ 10,215.41
8/31/79	14,561.94	3,058.01	2,475.53	20,095.48
11/30/79	14,482.05	2,606.77	2,027.49	19,116.31
2/29/80	13,754.34	2,063.15	1,512.98	17,330.47
5/31/80	14,968.07	1,796.17	1,197.44	17,961.68
8/31/80	18,710.08*	1,683.91	935.50	21,329.49
	<u>\$81,861.80</u>	<u>\$13,938.65</u>	<u>\$10,248.39</u>	<u>\$106,048.84</u>

\* Estimated

5. On April 30, 1981 and May 7, 1981, Mr. Kulik filed a letter of protest and petitions in response to all the aforementioned assessments.

6. The assessments estimated for the periods ended August 31, 1980 and November 30, 1980 were computer-generated.

In accordance with the program instructions for generating delinquency assessments, the computer first searches the sales tax master file, i.e., the master record of all sales tax returns filed by taxpayers, to ascertain whether the particular taxpayer filed a return, in any condition, for the period in question. After determining that no return has been filed, it scans all sales tax returns filed for prior periods by that taxpayer to determine the greatest tax ever reported. According to the program, the computer multiplies that amount by 125 percent to arrive at the estimated assessment. The sales tax master file prints a Notice of Determination and Demand, reflecting the estimated tax, plus penalty and interest, and transmits the tax, penalty and interest

amounts to the accounts receivable system for storage. In general, the delinquency run is conducted 45 days after the due date for the return.

In the instant case, the greatest tax reported by Restaurant was for the period ended May 31, 1980. The amount \$14,968.07 was multiplied by 125 percent to arrive at an estimated assessment of \$18,710.08.

7. A tax compliance agent computed the estimated jeopardy assessment for the period ended February 28, 1981, taking into consideration returns filed by Restaurant for prior periods, effects of inflation and the holiday season. He did not apply any particular formula.

8. Kulik Restaurant, Inc. (known in the Albany area simply as "Joe's") was a New York corporation, incorporated on January 1, 1940 and engaged in the restaurant, catering and delicatessen business. The business premises consisted of a delicatessen with a display case, counter and booths; a dining room with twelve booths and a small bar; a kitchen; and an office. Restaurant employed approximately 30 to 35 persons.

Since the inception of the business, Mr. Kulik has been president of the corporation.

9. Mr. Kulik's two sisters owned stock in the corporation and Mr. Kulik himself owned a small number of shares, although certificates were never actually issued to them.

10. Prior to 1979, Mr. Kulik signed, on behalf of the corporation, sales tax returns and renewal applications for a retail liquor or wine license, among other documents.

11. In late 1978, at which time Mr. Kulik was 71 years of age and experiencing some personal problems due to his wife's illness, he considered "taking a partner": "I knew I had to get out of there. I knew I had to unload [the

business] or else it would collapse on top of me. I could not take it any longer. I was physically and mentally right at the bottom."

Mr. Sanford Berkman, who occasionally ate at the restaurant, had a good business reputation in the community as the result of managing a local country club. A mutual friend, one Lester Comet (phonetic), introduced Mr. Berkman to Mr. Kulik. After Kulik decided to offer Berkman equal participation in Restaurant, all further negotiations were conducted through Comet. A written agreement between Kulik and Berkman was contemplated but never consummated; so the agreement between the two men remained a verbal one.

Berkman made an initial investment of \$10,000.00, which sum was deposited into the regular corporate account, and became manager on January 1, 1979. Their agreement and understanding was that Berkman would supervise and control the daily operations of Restaurant; and that Kulik would act as maitre d' hotel and participate in the catering end of business, especially the ordering of food and beverages. They hoped that within two years, Berkman would be able to buy out Kulik and take over the business.

After his initial investment, Berkman made additional loans to the corporation, totalling \$7,000.00.

12. In early 1979, through a mutual friend, Kulik retained the services of Richard E. Friedman, CPA to complete the preparation of and to file corporation franchise tax reports for 1977 and 1978. On March 13, 1979, Restaurant retained Friedman to perform monthly accounting services; to prepare financial statements and sales tax, withholding tax and corporation tax returns; and to conduct such conferences as were necessary to keep the corporate officers abreast of the financial affairs of the corporation. The letter of engagement was executed by Friedman and Berkman.

Friedman instituted the one-rite (one entry) accounting system and computerized the payroll records.

Upon initiation of the aforementioned changes, Berkman fired the two Restaurant bookkeepers because he did not think they were capable of adapting to the new system. He subsequently interviewed one Veronica (Pounds) Richardson and hired her, with Friedman's approval. She reported directly to Berkman. Among her duties were the maintenance of all books of original entry and filing of bills, after Berkman's review thereof, in the accounts payable file.

13. Restaurant always maintained two checking accounts, a regular corporate ("catering") account and a "special" tax account. In general, a check was drawn on the regular account and the funds deposited to the tax account each week. When Berkman became manager of Restaurant, Kulik instructed him to continue this practice of making weekly deposits to the tax account.

Kulik and Berkman were authorized signatories on the regular account. Kulik, Berkman and Friedman were authorized signatories on the tax account. Berkman testified that he believed two signatures were required on checks drawn on either account; however, the pertinent corporate resolutions provided for checks to be signed by any one of the authorized persons.

Berkman kept the checkbooks in his desk (in the Restaurant office) in a locked drawer. He left a key in the office in order that Kulik could have access to the checkbooks if necessary.

Each evening, either Berkman or Mrs. Richardson placed the cash and checks accumulated over the business day in a night bag for deposit by Berkman in the bank.

Monthly checking account statements and cancelled checks were forwarded by the bank to Restaurant and turned over to Friedman in connection with his

duties. When his work for the month was completed, Friedman returned the statements and checks to Restaurant for filing.

Berkman frequently signed Kulik's name, as well as his own, to checks, though Kulik never specifically authorized him to do so. If Kulik happened to be present in the office when Berkman was issuing a check, Berkman asked Kulik to sign his (Kulik's) name.

For approximately one month in late summer or early fall, 1980, Richardson kept the checkbooks. Friedman decided that Berkman was not properly managing the accounts and recommended that the management thereof be given to Richardson. Richardson signed Kulik's and Berkman's names to checks. This practice came to a halt and management of the accounts was returned to Berkman, when the bank refused to accept the signatures and honor the checks. A bank representative telephoned the restaurant and informed Kulik that checks were being returned for insufficient signatures.

14. Friedman prepared Restaurant's sales tax returns for the period ended May 31, 1979 through the period ended August 31, 1980 and submitted them to Berkman for his review and signature. Friedman advised Berkman as to the due date and the party to whom the check should be made payable. If Berkman was unavailable, Friedman left the return with Richardson, with instructions to deliver it to Berkman.

Friedman likewise prepared and submitted to Berkman the franchise tax reports and withholding tax returns for Restaurant.

According to Friedman's testimony, "I never came in contact with Mr. Kulik on any financial matters or anything with the preparing or filing or payment of any taxes."

15. The 1978 franchise tax report lists one corporate officer, Joseph Kulik. The 1979 report lists Kulik as president and Berkman as vice-president.

16. Berkman made the renewal applications for Restaurant's retail liquor or wine license to the New York State Liquor Authority for the years 1979 and 1980.

17. In connection with certain violations by Restaurant of the Albany County Sanitary Code and the New York State Sanitary Code, a hearing was held at the Albany County Health Department on August 28, 1980, attended by Berkman and an attorney representing Restaurant.

18. On January 17, 1980, Restaurant entered into a contract with Bejera Corporation, doing business as G & G Equipment Company, for the purchase of certain restaurant equipment, which contract was executed on behalf of Restaurant by Kulik.

19. During the period at issue, Berkman hired some waitresses and dishwashers. On occasion, employees were discharged by either Kulik or Berkman.

20. During the period at issue, it was a struggle to keep the business going. As Kulik testified, "I know that we were tight right along...".

Berkman made all decisions regarding which creditors were paid. Berkman testified, "I personally felt that you can't do business without merchandise, and I was paying the creditors and the payroll." With respect to the policy for payment of bills, Kulik assumed, "[W]hoever yelled the loudest got [paid] first."

When Friedman gave Berkman the sales tax returns to submit to the Audit Division, Berkman placed them in his desk drawer "because we did not have the money to pay them." Berkman subsequently filed the returns for the period ended May 31, 1979 through the period ended May 31, 1980, with no remittance.

Friedman did not prepare a sales tax return for the period ended November 30, 1980: "I first of all wanted to give up doing the account because I saw that no bills were being paid... I felt there was no rush to get all the records accumulated and prepared to submit a tax return to somebody that was not going to pay it."

Berkman never filed the return prepared for the period ended August 31, 1980. At the formal hearing, Friedman produced his file copy thereof, reflecting sales tax due for said period in the amount \$18,851.83.

21. According to Kulik's testimony, he never supervised Berkman or checked his performance as manager; never reviewed Restaurant's financial records; never demonstrated any interest or concern about taxes. When from time to time he inquired of Berkman whether he was taking care of taxes, Berkman replied that he was.

According to Berkman's testimony, Kulik was aware of the accruing tax liabilities. "We had meetings every so often, and it was brought out in the meeting that the taxes were not paid."

On October 31, 1979, the Audit Division issued a subpoena to Restaurant, commanding the appearance and testimony of an officer (or officers) relative to franchise taxes due for 1976. Berkman telephoned Friedman, seeking his advice. Friedman met with Audit Division representatives, returned to the restaurant and requested Berkman to immediately issue a check for the taxes and interest, and thereafter personally delivered the check to the Audit Division District Office. Berkman did not inform or consult with Kulik concerning this matter.

In Fall, 1980, Kulik's daughter, as lessor and owner of Restaurant's business premises, received an assessment for two years' unpaid real property



taxes. Kulik maintained that this assessment was his first knowledge that Restaurant was not paying its taxes.

22. On August 12, 1980, a tax compliance agent went to the Restaurant business premises and told the cashier that he wished to speak with the owner. The cashier contacted Kulik. When the agent stated that his visit concerned unpaid sales tax, Kulik requested that the agent return the following day to speak with Berkman. Thereafter, the agent had no further contact with Kulik.

On August 13, the agent again visited the business premises. This time he asked to see Berkman. When told that Berkman was unavailable, the agent left a message for Berkman to telephone him. Within a week, Berkman telephoned the agent, and they scheduled a meeting to be held at the restaurant.

On or about August 25, Berkman, Friedman and the agent met to discuss the liquidation of Restaurant's accrued sales tax liabilities for the period ended May 31, 1979 through the period ended May 31, 1980. Berkman and Friedman proposed the payment of \$500.00 weekly. On October 3, 1980, at the Albany District Office, Berkman signed a Payment Agreement incorporating that proposal. Before leaving the restaurant for the District Office, Berkman told Kulik that he was going to attempt to resolve Restaurant's tax matters; Kulik encouraged him to try "to work it out." Restaurant made payments for eight weeks, by checks signed by Berkman. (Berkman signed Kulik's name and his own name.) The bank dishonored the check issued on December 2, 1980 for lack of sufficient funds. The Audit Division subsequently rejected the agreement, and on December 12, 1980, the agent so advised Berkman.

A new agent was thereafter assigned to the Kulik matter. He instructed an Audit Division employee to go to the place of business and tell the officer(s)

to immediately begin making payment of \$500.00 per week, until a more satisfactory deferred payment agreement could be negotiated and executed.

23. On January 23, 1981, the business premises were seized by the Department of Taxation and Finance. On that date, the second agent met Kulik for the first time: "It had surprised me a bit that he had not made any personal appearances or done anything himself personally up until that point, and when I saw him that morning, he appeared to be in such an elderly state that I did not think he could be functioning in a place like that on a day-to-day basis."

A few days after the seizure took place, the Audit Division permitted Berkman to enter the restaurant office and remove the records. The records were thereafter stored in a garage at Kulik's residence.

On April 27, 1981, a tax compliance agent telephoned Kulik to inform him that the auction of the corporation's assets had been completed, and that the keys to a Restaurant warehouse would be returned to him via certified mail.

24. In response to questions by members of the press before and after the auction, Berkman stated he and Kulik were in business together; and that the restaurant closing was an unfortunate situation, but they hoped to re-open soon.

25. Approximately two weeks prior to the hearing, Mr. D'Alessandro, petitioners' representative, retained Harvey B. Segal, CPA, to examine the books and records of Restaurant and to ascertain the sales tax liability of Restaurant for the periods ended November 30, 1980 and January 22, 1981. Mr. Segal examined the cash receipts and sales journals, prepared by Mrs. Richardson, and calculated sales taxes due for the periods ended November 30, 1980 and January 22, 1981 in the respective amounts of \$14,011.48 and \$7,818.16.

26. Included in petitioners' brief were proposed findings of fact, as to which this Commission makes the following rulings:

(a) Proposed findings 1, 2, 3, 5, 9, 10 and 14 through 20 are adopted and have been incorporated into this decision.

(b) Proposed findings 4(a) through 4(u) and 6 are rejected, inasmuch as certain duties are therein characterized as solely Berkman's responsibility.

(c) Proposed findings 7, 8, 12 and 13 are rejected as not established by the evidence.

(d) Proposed findings 11(a) through 11(d) are rejected as conclusory in nature.

#### CONCLUSIONS OF LAW

A. That since petitioner Kulik Restaurant, Inc. filed sales tax returns (without remittance) and therefore self-assessed its tax liability for the periods ended May 31, 1979 through May 31, 1980 and did not request a hearing under paragraph twenty-first of section 171 of the Tax Law; and further, since said petitioner did not file a petition within 90 days of the estimated assessment for the period ended August 31, 1980; only petitioner Joseph Kulik may contest his personal liability for the amounts assessed for such periods.

B. That petitioner Joseph Kulik maintains that this Commission lacks jurisdiction to proceed administratively with respect to his personal liability for sales taxes asserted against and unpaid by Kulik Restaurant, Inc. (for the period ended May 31, 1979 through the period ended May 31, 1980), relying upon the decision of the Court of Appeals in Matter of Parsons v. State Tax Commission, 34 N.Y.2d 190 (1974).

Parsons held that the State Tax Commission exceeded its statutory authority in serving officers and directors of a corporation, which had filed returns containing correct computations of tax liability, with Notices of Determination and Demands under Jeopardy for Payment of Sales and Use Taxes Due, and conducting hearings pursuant to such notices. Section 1138 of the Tax Law authorizes the Commission to determine the amount of tax due, notify the persons it deems liable and conduct hearings, upon request, only in two specified circumstances: (1) if a required return is not filed or if a return when filed is incorrect or insufficient; and (2) if the Commission believes that collection of the tax will be jeopardized by delay (provided the Commission determines and assesses the tax prior to the filing of the return and prior to the date the return is required to be filed).

First, the document issued to petitioner Joseph Kulik was not an assessment issued pursuant to section 1138, but a Notice and Demand for Payment, a bill demanding that petitioner pay the taxes due with respect to the corporation for the period March 1, 1979 through August 31, 1980.

Second, the decision in Parsons was rendered prior to the enactment of paragraph twenty-first of section 171 of the Tax Law (L. 1979, Ch. 714, eff. January 1, 1980) which provides in pertinent part:

"The state tax commission shall:

\* \* \*

"Provide a hearing, as a matter of right, to any taxpayer upon such taxpayer's request, pursuant to such rules, regulations, forms and instructions as the tax commission may prescribe, unless a right to a hearing is specifically provided for, modified or denied by another provision of this chapter. Where the request for a hearing is made by a person seeking review of any taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed unless such person, within ninety days from the time such liability is assessed, shall petition the tax commission for a hearing to review such liability." (Emphasis added.)

No provision of Article 28 specifically modifies or denies Kulik's right to a hearing. This Commission thus has jurisdiction to grant and conduct a hearing, as requested by Kulik in his petitions and letter of protest, and as mandated by the above-quoted provision of the Tax Law.

C. That Tax Law section 1138, subdivision (a), paragraph (1), empowers the State Tax Commission, in the event a return required by Article 28 is not filed, to determine the proper amount of sales tax from such information as may be available. If necessary, the tax may be estimated, based upon external indices. The method applied must be "reasonably calculated to reflect the taxes due." Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206 (1957).

Under the authority of section 1138, the Audit Division estimated the tax due from Kulik Restaurant, Inc. for the periods ended August 31, 1980, November 30, 1980 and February 28, 1981, those periods for which the corporation failed to file sales tax returns. However, at the hearing, petitioners produced satisfactory evidence of Restaurant's actual sales tax liability for said periods. Accordingly, the taxes due for the periods ended August 31, 1980, November 30, 1980 and January 22, 1981 (the last day that Kulik Restaurant, Inc. was in operation) are hereby redetermined in the respective amounts of \$18,851.83, \$14,011.48 and \$7,818.16.

D. That, finally, with respect to petitioner Joseph Kulik's personal liability for the sales tax required to be collected by the corporation for the period March 1, 1979 through August 31, 1980 and the period December 1, 1980 through January 22, 1981, section 1133, subdivision (a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by

said article. Section 1131, subdivision (1) furnishes the following definition for the term "persons required to collect tax":

"Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

To recapitulate Mr. Kulik's association with and role in the corporation, he held the office of president for over 40 years; for the years at issue, he divided the profits of the business equally with Mr. Berkman; he was an authorized signatory on the corporate accounts and in fact signed checks drawn thereon; he discharged employees; he was on the premises on a daily basis (if not engaged at a catering job); as president, he signed a contract for purchase of restaurant equipment on January 17, 1980.

The testimony concerning his awareness of the corporation's accruing tax liability is not crystal clear. However, given his knowledge that finances were "tight," his daily presence at the restaurant and the occasional business meetings conducted, it is entirely reasonable to conclude that he was, at the very least, placed on notice that a tax problem existed.

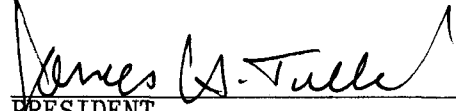
In short, Mr. Kulik was a person required to collect tax, within the intendment of sections 1131 and 1133, who was aware or should reasonably have been aware that the corporation was remiss in the payment of sales tax. See Matter of Mark Benes and George I. Hodor, as Officers of Chequers Cocktail Bar, Inc., State Tax Commission, January 11, 1980; Matter of Sheldon Farewell, State Tax Commission, October 2, 1981.

E. That the petitions of Kulik Restaurant, Inc. and Joseph Kulik are granted to the extent indicated in Conclusion of Law "C"; that the assessments issued December 10, 1980, February 9 and 21, 1981 and April 1, 1981 are to be modified accordingly; and that except as so modified, those assessments and the remaining assessments are in all other respects sustained.

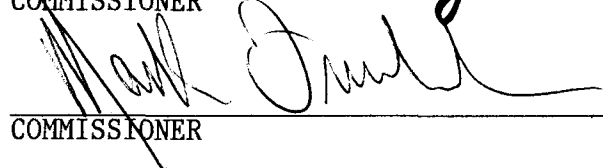
DATED: Albany, New York

MAY 24 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER