

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Luch 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 9/1/74-8/31/78.		

State of New York  
County of Albany

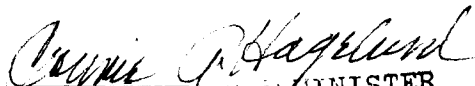
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of September, 1982, he served the within notice of Decision by certified mail upon Luch Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

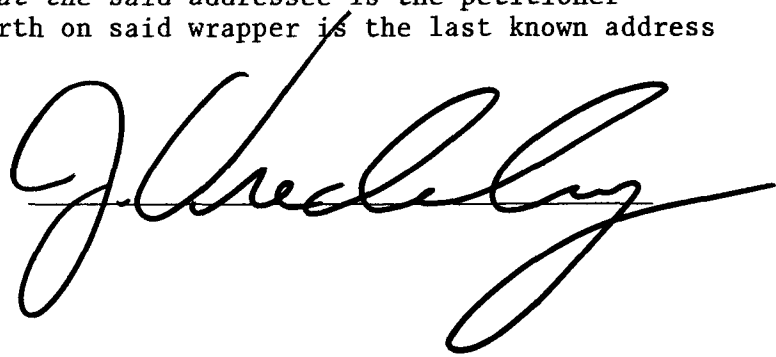
Luch Restaurant, Inc.  
591 Third Ave.  
New York, NY 10016

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  
8th day of September, 1982.

  
COMMISSIONER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Luch Restaurant, Inc. :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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State of New York  
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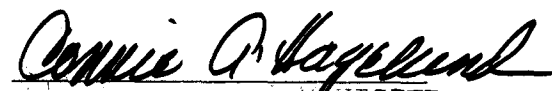
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of September, 1982, he served the within notice of Decision by certified mail upon George Ziefert the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

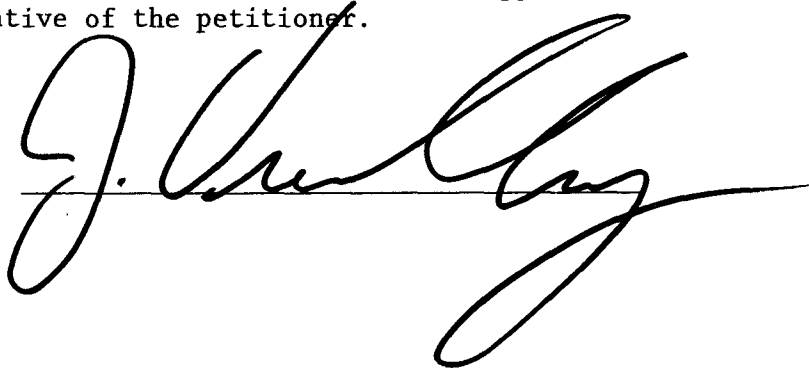
George Ziefert  
Moskowitz, Ziefert & Co.  
1987 Flatbush Ave.  
Brooklyn, NY 11234

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  
8th day of September, 1982.

  
\_\_\_\_\_  
CONNEE A. HAGELUND  
CLERK OF THE COMMISSIONER  
OFFICE OF THE COMMISSIONER OF TAX LAW  
SECTION 114



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

September 8, 1982

Luch Restaurant, Inc.  
591 Third Ave.  
New York, NY 10016

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
George Ziefert  
Moskowitz, Ziefert & Co.  
1987 Flatbush Ave.  
Brooklyn, NY 11234  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
LUCH RESTAURANT, INC.  
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,  
1974 through August 31, 1978.

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DECISION

Petitioner, Luch Restaurant, Inc., 591 Third Avenue, New York, New York 10016, 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 September 1, 1974 through August 31, 1978 (File No. 26258).

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 August 4, 1981, at 2:45 P.M. Petitioner appeared by George Ziefert, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the result of a field audit performed by the Audit Division properly reflected petitioner's additional sales and use tax liability.

II. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period September 1, 1974 through February 28, 1978 was timely issued within the statute of limitations.

FINDINGS OF FACT

1. Under date of December 20, 1978, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against Luch

Restaurant, Inc. The first Notice covered the period September 1, 1974 through February 28, 1978 and asserted tax due of \$8,989.82, plus penalties and interest of \$4,645.01, for a total of \$13,634.83. The second Notice covered the period March 1, 1978 through August 31, 1978 and asserted tax due of \$1,512.90, plus penalties and interest of \$199.89, for a total of \$1,712.79. The notices were issued as a result of an examination of the books and records of the petitioner.

2. Petitioner, by signature of its president, Emilio Alonso, executed a consent to extend the period of limitation for assessment to December 19, 1978.

3. On audit, the Audit Division performed a mark-up test on petitioner's beer and liquor purchases. It applied the results of the mark-up test to beer and liquor purchases in the audit period to determine petitioner's beer and liquor sales. The Audit Division accepted beer and liquor sales as reported by petitioner.

The Audit Division was suspicious of food sales made due to the low volume of food purchases made from September, 1974 through August, 1977 in comparison to the volume of food sales made at the time of the audit in January, 1978. Also, the salaries of the two officers of \$5,200.00 each was considered unusually low. Therefore, the Audit Division increased the officers' and a cook's salaries to \$15,600.00 per year and thereby computed additional taxable food sales of \$84,067.00 for the period September 1, 1974 through August 31, 1977. The Audit Division determined an error rate of 55.23 percent of taxable sales reported for that period and applied the error rate to the sales reported in the audit period to determine additional tax due of \$9,541.83.

The Audit Division conducted an overcollection test using the guest checks of August 18, 1977 which disclosed a margin of error of .6 percent of sales tax reported. Petitioner did not maintain guest checks for the entire audit

period. The Audit Division applied the error rate to the adjusted tax due of \$26,818.39 in the audit period and determined that overcollections were made of \$160.89.

Petitioner sustained a fire in February, 1977. The Audit Division estimated that petitioner purchased \$10,000.00 in fixed assets as the result of needed renovations and also determined that no sales tax was paid on such purchases. It held additional tax due on fixed assets of \$800.00. The Audit Division did not review expense purchases as they were negligible. The Audit Division thereby determined the total additional tax due of \$10,502.72.

4. Prior to the issuance of the notices, the Audit Division canvassed petitioner's food suppliers. The responses revealed that the suppliers only recently began doing business with petitioner and verified the small amount of cash purchases recorded. The Audit Division then reviewed petitioner's file with the State Liquor Authority for the months of May, June and July of 1977. It showed liquor sales reported to the State Liquor Authority of \$12,809.00. The Audit Division compared these sales to the liquor sales reported on sales and use tax returns filed of \$9,609.00 and determined an error rate of 34.34 percent. The error rate was applied to gross sales reported by petitioner, which the Audit Division felt confirmed unreported sales of \$52,274.21. The notices, however, were issued as originally computed in Finding of Fact "3".

5. Emilio Alonso, president of petitioner corporation, acquired full interest in the corporation on September 15, 1977. From that time, petitioner changed its operation in that it expanded its food sales to include a wider variety of meals. Prior to that time, petitioner's food menu was limited to smaller items such as hamburgers.

6. Petitioner argued that the low salaries paid to officers were justified in that the officers shared an apartment and personal expenses. Additionally, they each spent approximately 100 hours a week at the business, taking most of their meals there.

7. Petitioner sustained a loss of \$1,700.00 in the fire which occurred on February 1, 1977. Insurance reimbursement covered the cleaning and repairing of most of the kitchen equipment. Petitioner made equipment acquisitions of \$1,633.00 in 1977 and 1978. Petitioner, however, submitted no documentation that tax was paid on such purchases.

8. Petitioner argued that the sales figures given the State Liquor Authority were estimates in response to a phone inquiry made by petitioner's representative. The information was needed at the time of change in petitioner's liquor license and its books and records were not immediately available to obtain such information.

9. Petitioner argued that the period September 1, 1974 through November 30, 1975 was not timely assessed within the statute of limitations because the consent extending the period for assessment held the periods open to December 19, 1978, whereas the notices were dated December 20, 1978. The Audit Division introduced certification that the notices were mailed on December 6, 1978 and received by petitioner on December 7, 1978. The December 20 date was used by the Audit Division as a basis for the computation of penalty and interest.

10. Petitioner did not raise the issue of penalty or interest.

11. Petitioner did not maintain adequate books and records from which the Audit Division could determine the exact amount of sales and use taxes.

CONCLUSIONS OF LAW

A. That pursuant to section 1138(a) of the Tax Law there is statutory authority for the use of external indices when necessary for the determination of tax due when a return filed is incorrect or insufficient. That the Audit Division properly used purchases as a basis for determining petitioners beer and liquor sales and accepted those sales as reported by petitioner.

B. That petitioner's small amount of food purchases were verified through petitioner's suppliers and no additional food purchases were found. That the increase in the officers' and cook's salaries for the audit period was totally arbitrary and lacked any foundation whatsoever. That the increase made to petitioner's taxable sales is hereby cancelled.

C. That resort to a test period to determine the amount of tax due was founded upon an insufficiency of recordkeeping (Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44, 411 N.Y.S. 2d 41). That petitioner did make errors in the overcollection of sales tax at the rate of .6 percent as found in Finding of Fact "3". The additional tax due resulting from such errors is reduced to \$103.65 based on sales tax reported by petitioner.

D. That the additional tax due estimated by the Audit Division on fixed assets is reduced to \$130.64 pursuant to Finding of Fact "7".

E. That section 1147(a)(1) provides that any period of time which is determined according to the provisions of Articles 28 and 29 of the Tax Law by the giving of notice shall commence to run from the date of mailing of such notice. That the notices issued by the Audit Division were mailed by certified mail on December 6, 1978, and were therefore timely issued.

F. That the petition of Luch Restaurant, Inc. is granted to the extent indicated in Conclusions "B", "C" and "D" above; that the Audit Division is



directed to accordingly modify the Notices of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1978 with applicable penalties and interest thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 08 1982

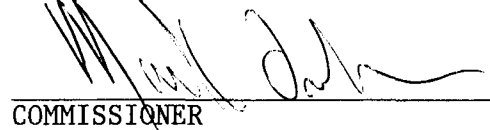
STATE TAX COMMISSION



ACTING PRESIDENT



COMMISSIONER



COMMISSIONER