

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

October 22, 1982

Toysun Restaurant Corp.  
1621 Unionport Rd.  
Bronx, NY 10462

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) 1139 & 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  
Lawrence Metzger  
Beck & Metzger  
11 E. 44th St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
TOYSUN RESTAURANT CORP.	:	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 September 1, 1974 through	:	
February 28, 1978.	:	

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Petitioner, Toysun Restaurant Corp., 1621 Unionport Road, Bronx, New York 10462, 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 February 28, 1978 (File No. 25248).

A formal hearing was held before Stanley Buchsbaum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 27, 1980 at 11:00 A.M. Petitioner appeared by Beck & Metzger Certified Public Accountants (Lawrence Metzger, CPA). The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the signing of a Consent to Fixing of Tax Not Previously Determined and Assessed precluded petitioner from subsequently applying for a refund of sales tax paid pursuant to the consent.

II. Whether the use of a markup test was a proper audit method to determine petitioner's additional sales tax liability.

FINDINGS OF FACT

1. During the period in issue petitioner owned and operated a Chinese restaurant which served beer, wine and liquor as well as food.

2. On September 13, 1978, following a field audit, petitioner, by Gong King Ngee, treasurer, signed a Consent to Fixing of Tax Not Previously Determined and Assessed for the period September 1, 1974 through February 28, 1978 in the amount of \$31,728.32 plus interest of \$5,872.46. Petitioner paid this amount by money order for \$37,600.78.

3. A statement on the consent form signed by petitioner specifically provides that signing the consent does not waive the right to apply for a credit or refund within the required time limit. The Audit Division argued that signing the consent constituted a waiver of the right to subsequently apply for a refund.

4. In December, 1978 petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax in the amount of \$31,728.32 on the ground that the Audit Division had arbitrarily increased petitioner's sales income without regard to its records. The Audit Division took no action on the refund claim and thus the claim was deemed denied.

5. During the audit, all records requested by the auditor were made available by the petitioner. From an examination of petitioner's records, the auditor found that the books reflected a food markup of 58 percent. Since this figure appeared to be low for a restaurant of this type, the auditor conducted markup tests on both food and liquor sales. The liquor markup test used one month's purchase invoices and current menu prices. The auditor computed a 331 percent markup on beer and liquor. This figure was not contested. The food markup test used information supplied by the petitioner, prior audits and personal observations by the auditor. The test results indicated a 112 percent markup on the luncheon menu and a 133 percent markup on the dinner menu.

Petitioner disagreed with these percentages but presented no evidence to account for the discrepancy between the test results and the reported sales.

6. After conferences with the audit team, petitioner signed the consent fixing the tax based on a food markup of 103 percent. The auditors assumed petitioner was agreeing to this figure, however, petitioner maintained that the consent was only signed to prevent interest and penalties from running but that the percentage was not agreed to.

7. The 103 percent food markup was applied to audited food purchases of \$679,642.00 to arrive at audited food sales of \$1,379,673.00. This represented a 30.52 percent increase over reported taxable sales. The 30.52 percent increase was applied to reported taxable sales for the audit period resulting in additional tax due of \$31,728.32.

#### CONCLUSIONS OF LAW

A. That section 1139(c) of the Tax Law provides, in part, that a person filing a signed consent to fixing of sales tax due, "shall, nevertheless, be entitled to apply for a refund or credit... as long as such application is made within" the appropriate time limitation. Petitioner complied with this section and, therefore, did not waive its right to claim a refund.

B. That the markup test performed by the Audit Division is a generally accepted audit procedure used to verify the accuracy of books and records. The test disclosed a significant discrepancy between sales as tested and sales reported thus establishing that petitioner's records were insufficient or incorrect.

C. That in view of the insufficiency of the books and records, the Audit Division properly determined petitioner's taxable sales and sales taxes due in

accordance with the provisions of section 1138(a) of the Tax Law (Chartair Inc. v. State Tax Commission, 65 A.D.2d 44) and that petitioner has failed to sustain the burden of showing that the audit was in error.

D. That the petition of Toysun Restaurant Corp. is denied.

DATED: Albany, New York

OCT 22 1982

STATE TAX COMMISSION

*ACTING*

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Toysun Restaurant Corp. :  
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 9/1/74-2/28/78. :  
\_\_\_\_\_:

AFFIDAVIT OF MAILING

State of New York  
County of Albany

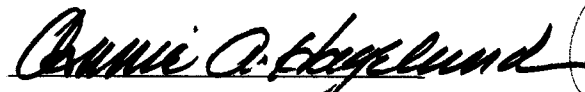
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Toysun Restaurant Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Toysun Restaurant Corp.  
1621 Unionport Rd.  
Bronx, NY 10462

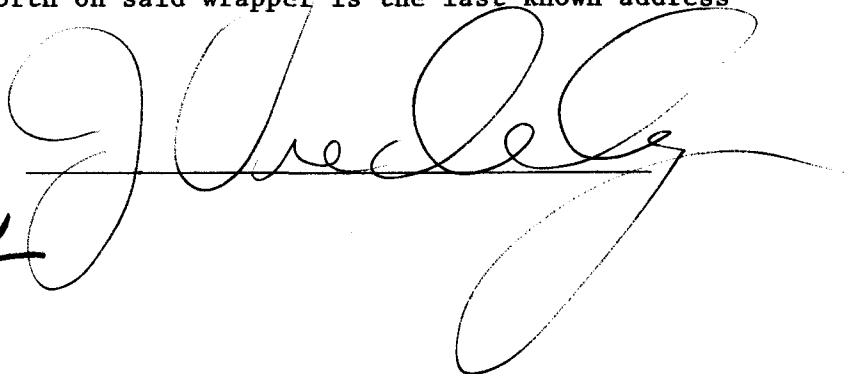
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
22nd day of October, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Toysun Restaurant Corp. :

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 9/1/74-2/28/78. :

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 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Lawrence Metzger the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence Metzger  
Beck & Metzger  
11 E. 44th St.  
New York, NY 10017

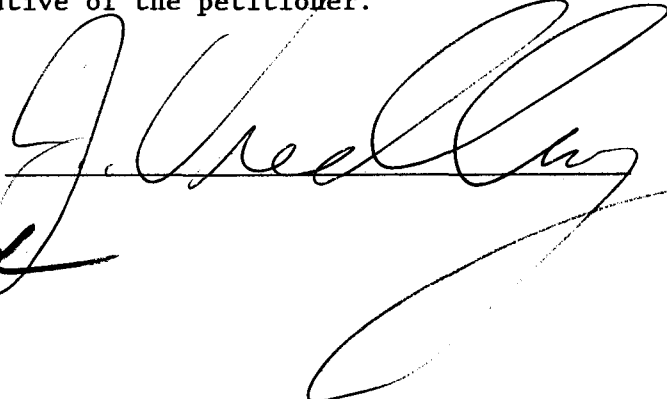
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
22nd day of October, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



**P 230 844 128**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO				
<i>Laurence Metzger</i>				
STREET AND NO.				
<i>11 E 44 St Bklyn Metzger</i>				
P.O., STATE AND ZIP CODE				
<i>New York, N.Y. 10017</i>				
POSTAGE	\$			
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	€		
	OPTIONAL SERVICES	SPECIAL DELIVERY	€	
		RESTRICTED DELIVERY	€	
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	€
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY		€	
TOTAL POSTAGE AND FEES	\$			
POSTMARK OR DATE				

**P 230 844 127**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO				
<i>Raymond Best, Corp.</i>				
STREET AND NO.				
<i>1621-22nd Street Rd.</i>				
P.O., STATE AND ZIP CODE				
<i>Brooklyn, N.Y. 10462</i>				
POSTAGE	\$			
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	€		
	OPTIONAL SERVICES	SPECIAL DELIVERY	€	
		RESTRICTED DELIVERY	€	
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	€
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY		€	
TOTAL POSTAGE AND FEES	\$			
POSTMARK OR DATE				