

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

April 1, 1983

Kiamesha Concord, Inc.
Kiamesha Lake, NY 12751

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 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
Jack Cagan
1450 Broadway
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Kiamesha Concord, 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:
3/1/69-11/30/72.

State of New York
County of Albany

David Parchuck, 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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Kiamesha Concord, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kiamesha Concord, Inc.
Kiamesha Lake, NY 12751

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
1st day of April, 1983.

David Parchuck

James A. Hagelwood

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Kiamesha Concord, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 3/1/69-11/30/72.

State of New York
County of Albany

David Parchuck, 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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Jack Cagan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Cagan
1450 Broadway
New York, NY 10018

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
1st day of April, 1983.

David Parchuck

Annex A. H. H. H.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
KIAMESHA CONCORD, 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 March 1, 1969	:	
through November 30, 1972.	:	

Petitioner, Kiamesha Concord, Inc., Kiamesha Lake, New York 12751, 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, 1969 through November 30, 1972 (File No. 18885).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 22, 1982 at 9:50 A.M. Petitioner appeared by Jack Cagan, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Alfred Rubinstein, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to a refund based on claims of repayments to customers of sales tax erroneously charged.

II. Whether the Audit Division justifiably used a test period in determining petitioner's sales tax liability.

FINDINGS OF FACT

1. On September 11, 1973, 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 petitioner, Kiamesha Concord, Inc., in the amount of

\$333,432.18, plus penalty and interest of \$118,831.58, for a total of \$452,263.76 for the period March 1, 1969 through November 30, 1972. The petitioner timely protested the above Notice.

2. On January 23, 1974 following a pre-assessment conference held on November 16, 1973, the Audit Division revised the assessment to \$141,527.87, plus interest of \$22,556.78, for a total of \$164,084.65. Petitioner signed a Consent to Fixing of Tax Not Previously Determined and Assessed and paid the revised amount on March 4, 1974.

3. Petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax on May 19, 1975 in the amount of \$25,719.21 claiming that, in determining petitioner's tax liability, the Audit Division erroneously included taxes on complimentary rooms occupied by convention representatives in the audit classification entitled "Tax Charged Unreported".

4. The Audit Division, by letter dated December 30, 1976, denied petitioner's claim for a refund in part to the extent of \$18,908.58. Petitioner filed a perfected petition dated December 20, 1980 claiming a refund of \$18,601.74 together with statutory interest thereon.

5. Petitioner owns and operates a resort hotel in Sullivan County, New York. The hotel caters to conventions, seminars, meetings and regular guests. As part of its contracts with various groups, petitioner would provide one complimentary room for each fifty rooms rented by the group. Sales tax was charged on each of the rooms including the complimentary rooms.

6. On audit, the Audit Division, using a test period, determined a deficiency factor of 3.58 percent on tax charged on rooms but unreported. The auditor used a test period because, as explained in the field audit report, "it was impossible to verify entries in cash book because adding machine tapes and

records were not retained intact." Moreover, at the time of the audit petitioner did not insist upon a full and complete audit of every record.

7. On the revised assessment the auditor determined a deficiency factor of .35 percent on tax charged but unreported. In its claim for refund petitioner argued that the deficiency factor was in error because the auditor had included tax charged on complimentary rooms in arriving at the factor and that this tax had been refunded to its customers during the test period. Petitioner did its own computations and arrived at an "overpayment" factor of .658 percent which, petitioner claimed, when applied to tax charged on rooms for the audit period entitled it to a refund.

8. The Audit Division accepted petitioner's claim as to the erroneous inclusion in the deficiency factor of tax on complimentary rooms provided to A. D. Goode Lodge, B'nai Brith and the New York State Elks Association. These adjustments resulted in a partial refund to petitioner. The Division, however, rejected petitioner's claim of erroneous inclusion in the deficiency factor of tax on complimentary rooms provided to the New York State Academy of Family Physicians, National Association of Oil Heat Service Managers and American Pet Products Manufacturers Association.

9. At the hearing petitioner produced numerous guest checks and other bills encompassing the hotel stays of the rejected groups and conventions. None of the documents indicated that petitioner had refunded any of the erroneously charged tax to the customers. Petitioner did not produce any other evidence at the hearing, or thereafter, showing that any tax had been refunded to its customers.

10. Petitioner argued alternatively that, even if it could not prove that it had refunded erroneously collected tax, the Audit Division was only entitled

to the actual unreported tax charged determined for the test period because petitioner's books and records were adequate and a test period should not have been used.

CONCLUSIONS OF LAW

A. That section 1139(a) of the Tax Law provides, in part, that:

"No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission...that he has repaid such tax to the customer."

Petitioner failed to produce any evidence demonstrating that it had repaid any tax to its customers and, therefore, it is not entitled to a refund of such tax.

B. That, while the Audit Division may not use a test period when the petitioner's records are readily available and provide an adequate basis on which to determine the amount of tax due (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44), when the records are not so sufficient, use of a test period is permissible (Korba v. New York State Tax Commission, 84 A.D.2d 655). Inasmuch as petitioner failed to retain its adding machine tapes and records of refunds to customers making it impossible for the auditor to verify cash book entries, use of a test period was a permissible audit method and petitioner is liable for the tax for the entire audit period.

C. That the petition of Kiamesha Concord, Inc. is denied and the denial of refund dated December 30, 1976 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 01 1983

Roderick W. Allen
PRESIDENT

Francis R. Koelmig
COMMISSIONER

[Signature]
COMMISSIONER

P 389 758 758
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Kiamesha Concord, Inc</i>	
Street and No.	
P.O., State and ZIP Code <i>Kiamesha Lake, NY 12751</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 389 758 759
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Jack Cagan</i>	
Street and No. <i>1450 Broadway</i>	
P.O., State and ZIP Code <i>New York, NY 10018</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982