

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
121 Lexington Restaurant Corp. : AFFIDAVIT OF MAILING

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 December 1, 1979 :
through May 31, 1983. :
_____:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of August, 1986, he/she served the within notice of Decision by certified mail upon 121 Lexington Restaurant Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

121 Lexington Restaurant Corp.
2 Grace Court, Apt. 30
Brooklyn, NY 11201

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
20th day of August, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Aykut (a/k/a John) Gorkey : AFFIDAVIT OF MAILING
Officer of 121 Lexington Restaurant Corp. :
:
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 December 1, 1979 :
through May 31, 1983. :

State of New York :

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David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of August, 1986, he/she served the within notice of Decision by certified mail upon Aykut (a/k/a John) Gorkey, Officer of 121 Lexington Restaurant Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Aykut (a/k/a John) Gorkey
Officer of 121 Lexington Restaurant Corp.
2 Grace Court, Apt. 30
Brooklyn, NY 11201

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

August 20, 1986

Aykut (a/k/a John) Gorkey
Officer of 121 Lexington Restaurant Corp.
2 Grace Court, Apt. 30
Brooklyn, NY 11201

Dear Mr. Gorkey:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

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

August 20, 1986

121 Lexington Restaurant Corp.
2 Grace Court, Apt. 30
Brooklyn, NY 11201

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DECISION

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 AYKUT (A/K/A JOHN) GORKEY, :
 OFFICER OF 121 LEXINGTON RESTAURANT CORP. :
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 of the Tax Law for the Period December 1, 1979 :
 through May 31, 1983. :
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Petitioners, 121 Lexington Restaurant Corp. and Aykut (a/k/a John) Gorkey, officer of 121 Lexington Restaurant Corp., 2 Grace Court, Apt. 30, Brooklyn, New York 11201, each 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 December 1, 1979 through May 31, 1983 (File Nos. 48753 and 48754).

A consolidated hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 1, 1986 at 9:15 A.M. Petitioners appeared by Aykut Gorkey pro se. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the State Tax Commission has jurisdiction to proceed administratively against petitioners for unpaid sales taxes of 121 Lexington Restaurant Corp.

II. Whether the Audit Division properly determined the additional sales taxes due from petitioner 121 Lexington Restaurant Corp. for the period at issue.

FINDINGS OF FACT

1. During the period at issue, petitioner 121 Lexington Restaurant Corp. ("the corporation") filed eleven New York State and local sales and use tax returns reflecting taxes due, but enclosed no remittance therewith. The returns showed taxes due in the following amounts:

<u>Period Ended</u>	<u>Tax</u>
5/31/80	\$ 2,012.72
8/31/80	1,569.68
11/30/80	1,569.84
2/28/81	1,474.80
5/31/81	1,902.16
8/31/81	1,636.64
11/30/81	1,849.16
2/28/82	1,381.71
5/31/82	1,185.03
8/31/82	982.99
11/30/82	<u>1,369.42</u>
Total Tax Due	\$16,934.15

The corporation's return for the period ended February 29, 1980 was accompanied by a check in the amount of the taxes shown due. The corporation did not file a return for the periods ended February 28, 1983 and May 31, 1983.

2. On September 14, 1983, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against the corporation and petitioner John Gorkey, as an officer of the corporation, for the period December 1, 1979

through May 31, 1983, asserting taxes, penalty and interest due in the amount of \$67,672.30 scheduled as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
2/29/80	\$ 1,727.12	\$ 431.78	\$ 771.18
5/31/80	3,600.00	900.00	1,498.04
8/31/80	3,600.00	900.00	1,388.67
11/30/80	3,600.00	900.00	1,280.47
2/28/81	3,600.00	900.00	1,173.45
5/31/81	3,600.00	900.00	1,064.04
8/31/81	3,600.00	900.00	946.94
11/30/81	3,712.51	928.13	846.37
2/28/82	3,382.50	744.15	654.76
5/31/82	3,217.50	611.33	512.82
8/31/82	3,217.51	514.80	402.85
11/30/82	3,217.51	418.28	294.05
2/28/83	3,217.50	321.75	189.13
5/31/83	3,630.00	254.10	103.06
	<u>\$46,922.15</u>	<u>\$9,624.32</u>	<u>\$11,125.83</u>

The notices contained the following statement:

"THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARINGS PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS."

3. The assessments represent additional taxes in the amount of \$29,575.50¹ found due by the Audit Division as the result of an audit of the corporation's books and records, unpaid sales tax in the amount of \$16,934.15 (see Finding of Fact "1") and bulk sales tax determined to be due of \$412.50, for a total of \$46,922.15. Each of the petitioners timely filed a petition to review the notices.

4. During the period at issue, the corporation operated a restaurant doing business as the Bosphorous East Restaurant at 121 Lexington Avenue in New

1 The assessment of additional taxes should, properly, have been issued by a Notice of Determination and Demand for Payment of Sales and Use Taxes Due rather than a Notice and Demand; however, the statement on the notice meets all the notice requirements of section 1138(a)(1) of the Tax Law.

York City, specializing in Turkish food. Aykut Gorkey, also known as John Gorkey, was the president of the corporation. In the spring of 1983, Mr. Gorkey proposed to sell the corporation's business assets to Recept Yuksel. On or about June 10, 1983, Mr. Yuksel submitted to the Audit Division a Notification of Sale, Transfer or Assignment in Bulk which indicated a "scheduled date of sale" of May 19, 1983 and a total sales price of \$45,000.00, \$5,000.00 of which was for furniture and fixtures. Subsequently, however, Mr. Yuksel learned of Mr. Gorkey's poor financial condition and the sale was never consummated. Mr. Gorkey continued to operate the restaurant through August 1983 when he was evicted by the landlord.

5. In or about December 1982, the Audit Division attempted to perform an audit of the corporation's books and records. The only records made available by petitioners were copies of sales tax returns, a cash receipts and cash disbursements journal for part of the audit period, and some guest checks. The auditor requested, but was never provided with, the cash receipts and cash disbursements journal for the entire audit period, cancelled checks, Federal tax returns and guest checks for the entire audit period.

6. In view of the apparent inadequacy and/or unavailability of the corporation's books and records, the Audit Division resorted to the use of external indices, i.e. the auditor's observation of the business premises and its experience in auditing similar businesses, to compute the corporation's sales tax liability. The Audit Division estimated that the corporation should have been reporting sales of \$45,000.00 for each three-month sales tax quarter for the period December 1, 1979 through December 31, 1981, and \$39,000.00 per quarter for the period January 1, 1982 through May 31, 1983 during which the corporation lost its liquor license. The Audit Division computed audited

taxable sales of \$596,000.00 which, when reduced by taxable sales reported of \$232,524.00, resulted in additional taxable sales of \$363,476.00 and additional sales tax due thereon of \$29,575.50. The Audit Division also computed a bulk sales tax of \$412.50 on the \$5,000.00 sales price of furniture and fixtures as indicated in the Notification of Sale, Transfer or Assignment in Bulk (see Finding of Fact "4").

7. At the hearing, Mr. Gorkey did not contest the computation of the taxes at issue, but rather expressed his inability to pay.

CONCLUSIONS OF LAW

A. That where timely and correct sales tax returns are submitted, lacking only the remittance of tax shown as due thereon, this Commission is not empowered to administratively determine the liability of persons required to collect tax. Parsons v. State Tax Commission, 34 NY2d 190. Notwithstanding the enactment of Tax Law section 171, paragraph twenty-first (L. 1979, Ch. 714, eff. January 1, 1980), the Tax Law does not confer administrative jurisdiction on the Tax Commission to recover unpaid taxes where correct returns have been filed. Hall v. New York State Tax Commission, 108 AD2d 488. Notwithstanding petitioners' request for a hearing and redetermination of the issue of their liability without objection to the forum, jurisdiction may not be conferred when none exists.

B. That with respect to that part of the assessment in the amount of \$16,934.15 representing unpaid sales taxes where returns were filed lacking the remittance of tax shown as due, this Commission does not have the authority to administratively determine petitioners' liability. With respect to that part of the assessment representing additional taxes due, the Tax Commission is

authorized under section 1138(a) of the Tax Law to administratively determine the tax liability.

C. That in light of petitioners' inability to produce complete and adequate books and records, the Audit Division was justified in employing external indices, in this instance the Audit Division's experience and the auditor's observations, to determine petitioners' sales tax liability. Tax Law §§1135 and 1138.

D. That under the circumstances herein, the audit method selected was reasonable. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223, 228). Petitioners failed to sustain the burden of showing that the method of audit or the amount of tax assessed was erroneous.

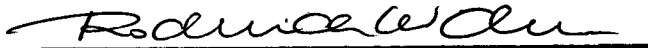
E. That the business assets of 121 Lexington Restaurant Corp. were never sold; therefore, the bulk sales tax of \$412.50 is hereby cancelled.

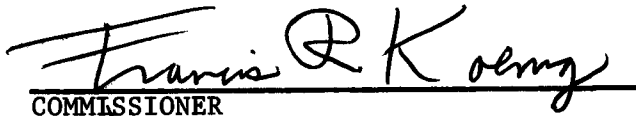
F. That the petitions of 121 Lexington Restaurant Corp. and Aykut (a/k/a John) Gorkey are granted to the extent indicated in Conclusions of Law "B" and "E" and that, except as so granted, are otherwise denied.

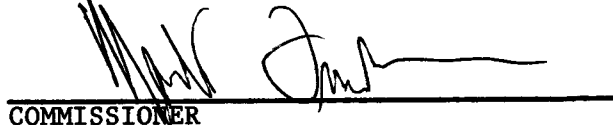
DATED: Albany, New York

STATE TAX COMMISSION

AUG 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

S.T.

REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 9/19/86
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition Dec. - 8/20/86
Name	
121 Lexington Restaurant Corp.	
Address	
2 Grace Court, Apt. 30 Brooklyn, N. Y. 11201	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	unclaimed

Searched by DP	Section	Date of Search 9/19/86
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

P 319 372 937

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

* U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
121 Lexington Restaurant	
Street and No.	
2 Grace Court, Apt. 30	
P.O., State and ZIP Code	
Brooklyn, N.Y. 11201	
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	

P 319 372 936

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

* U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
Aykut (AKA John) Gorkey	
Officer of 121 Lexington Restaurant	
2 Grace Court, Apt. 30	
P.O., State and ZIP Code	
Brooklyn, N.Y. 11201	
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	

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

W. A. Harriman Campus

ALBANY, N.Y. 12227

* 107



RETURNED
TO
SENDER

REASON CHECKED

Unclaimed ☐ Refused ☐

Address unknown ☐

Insufficient Address ☐

No such street number ☐

No such office in state ☐

Do not re-mail in this envelope ☐

1986

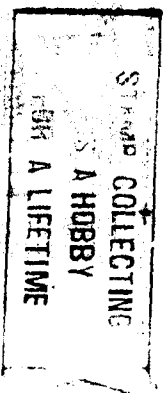
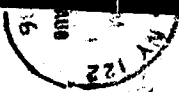
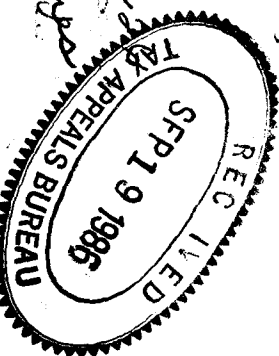
For a more complete explanation of the rules
governing return addresses

CERTIFIED

P 319 372 937

MAIL

121 Lexington Restaurant Corp.
2 Grace Court, Apt. 30
Brooklyn, NY 11201



NAME
103



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

August 20, 1986

121 Lexington Restaurant Corp.
2 Grace Court, Apt. 30
Brooklyn, NY 11201

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6. In view of the apparent inadequacy and/or unavailability of the corporation's books and records, the Audit Division resorted to the use of external indices, i.e. the auditor's observation of the business premises and its experience in auditing similar businesses, to compute the corporation's sales tax liability. The Audit Division estimated that the corporation should have been reporting sales of \$45,000.00 for each three-month sales tax quarter for the period December 1, 1979 through December 31, 1981, and \$39,000.00 per quarter for the period January 1, 1982 through May 31, 1983 during which the corporation lost its liquor license. The Audit Division computed audited

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7. At the hearing, Mr. Gorkey did not contest the computation of the taxes at issue, but rather expressed his inability to pay.

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C. That in light of petitioners' inability to produce complete and adequate books and records, the Audit Division was justified in employing external indices, in this instance the Audit Division's experience and the auditor's observations, to determine petitioners' sales tax liability. Tax Law §§1135 and 1138.

D. That under the circumstances herein, the audit method selected was reasonable. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223, 228). Petitioners failed to sustain the burden of showing that the method of audit or the amount of tax assessed was erroneous.

E. That the business assets of 121 Lexington Restaurant Corp. were never sold; therefore, the bulk sales tax of \$412.50 is hereby cancelled.

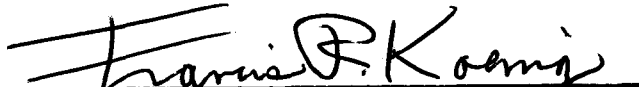
F. That the petitions of 121 Lexington Restaurant Corp. and Aykut (a/k/a John) Gorkey are granted to the extent indicated in Conclusions of Law "B" and "E" and that, except as so granted, are otherwise denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER