

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Pacos Restaurant Corp. : AFFIDAVIT OF MAILING  
d/b/a Lenox Hill Coffee Shop :  
:   
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 3/1/80-2/28/83. :

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State of New York :

ss.:

County of Albany :

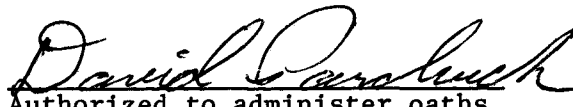
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of June, 1987, he/she served the within notice of Decision by certified mail upon Pacos Restaurant Corp., d/b/a Lenox Hill Coffee Shop the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

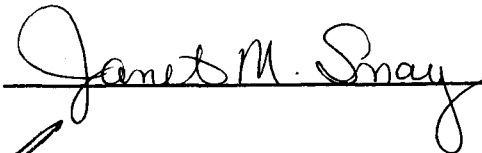
Pacos Restaurant Corp.  
d/b/a Lenox Hill Coffee Shop  
1105 Lexington Ave.  
New York, NY 10021

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  
18th day of June, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
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STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Pacos Restaurant Corp. : AFFIDAVIT OF MAILING  
d/b/a Lenox Hill Coffee Shop :  
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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 18th day of June, 1987, he served the within notice of Decision by certified mail upon Elias P. Bonaros, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

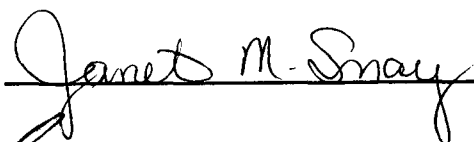
Elias P. Bonaros  
29-16 212 State St.  
Bayside, NY 11360

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 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  
18th day of June, 1987.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

June 18, 1987

Pacos Restaurant Corp.  
d/b/a Lenox Hill Coffee Shop  
1105 Lexington Ave.  
New York, NY 10021

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, 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

Petitioner's Representative:  
Elias P. Bonaros  
29-16 212 State St.  
Bayside, NY 11360

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
PACOS RESTAURANT CORP. D/B/A	:	DECISION
LENOX HILL COFFEE SHOP	:	
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, 1980	:	
through February 28, 1983.	:	

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Petitioner, Pacos Restaurant Corp. d/b/a Lenox Hill Coffee Shop, 1105 Lexington Avenue, New York, New York 10021, 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, 1980 through February 28, 1983 (File No. 53292).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 3, 1986 at 1:15 P.M. Petitioner appeared by Elias P. Bonaros, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of a three day observation test to determine petitioner's taxable sales was proper.

II. Whether the Audit Division is bound by the tax liability set forth in the Law Bureau's answer.

FINDINGS OF FACT

1. Petitioner, Pacos Restaurant Corp., operated a coffee shop and restaurant known as the "Lenox Hill Coffee Shop" located at 1105 Lexington Avenue, New York, New York. The business hours were from 6:00 A.M. to 1:00 A.M.

2. On March 20, 1984, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1980 through February 28, 1983 for taxes due of \$30,279.33, plus interest of \$8,249.57, for a total of \$38,528.90.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through February 28, 1983 to March 20, 1984.

4. Petitioner maintained inadequate and incomplete books and records. There were no guest checks, cash register tapes, general ledger or cash disbursement records. The only available record of receipts was a day book. In the absence of any verifiable records of receipts, the Audit Division performed an observation test of the business activities on three separate days, November 9, 1983, November 29, 1983 and December 2, 1983. On each occasion sales were observed from 9:00 A.M. to 4:00 P.M. One auditor observed the transactions and periodically the guest checks were given to another auditor who prepared a listing of the amount of the sale and the tax collected. The sales, excluding sales tax, for each day were as follows:

<u>Date</u>	<u>Sales</u>	<u>Hours of Observation</u>
November 9, 1983	\$ 606.15	7
November 29, 1983	658.75	7
December 2, 1983	667.45	7
	<u>\$1,932.35</u>	<u>21</u>

The average sales per hour were \$92.02. This amount was multiplied by 18 hours<sup>1</sup> per day to arrive at average daily sales of \$1,656.36. Estimated sales per quarterly filing period were \$150,729.00 (\$1,656.36 x 91 days). Since the sales were estimated for the period ending November 30, 1983, which was not within the audit period, sales were adjusted to \$142,197.00 representing sales for the period ending November 30, 1982, by considering the annual inflation rate of 6 percent based on the Consumer Price Index. Petitioner reported sales of \$111,037.00 for said period, leaving underreported sales of \$31,160.00 or an error factor of 28.06 percent. This percentage was applied to reported taxable sales for the audit period to arrive at additional taxable sales of \$372,666.00 with tax due thereon of \$30,279.33.

5. Petitioner argued that the sales referred to above in Finding of Fact "4" for the observation test were from 6:00 A.M. to 4:00 P.M. or a 10 hour period for the first two days of observation and from 9:00 A.M. to 4:00 P.M. or a 7 hour period for the last day of the test. Petitioner recomputed average daily sales based on 27 hours for the test period instead of 21 hours. This recomputation showed that the sales reported on sales tax returns were overstated and as a result petitioner claimed at the hearing that a refund is due. Petitioner's argument that the observation period on November 9, 1983 was 10 hours was based upon one of the auditors handwriting on a paper bag that stated "Lenox Hill Restaurant register readings at 4:00 P.M., 6:00 A.M. to 4:00 P.M.".

6. The handwriting on the paper bag referred to the cash register reading and was not related to the guest checks used to determine the daily sales.

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1 Petitioner was open 19 hours a day; however, the Audit Division allowed one hour for cleanup.

7. The Law Bureau, in its answer to the perfected petition issued on behalf of the Audit Division, affirmatively stated at paragraph 10 that the amount of tax due was reduced at conference to \$18,711.45. At the hearing, counsel for the Audit Division indicated that such statement was in error and the entire amount assessed on the notice of \$30,279.33 was at issue. Counsel explained that a settlement offer in the amount of \$18,711.45 was proposed by a conferee at a pre-hearing conference but was rejected by petitioner. Petitioner took the position that the Audit Division was bound to the reduced liability by virtue of the answer of the Law Bureau.

#### CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That petitioner did not have cash register tapes, guest checks, or any other records that would serve as verifiable records of taxable sales. Because of petitioner's inadequate recordkeeping, the audit procedures used by the Audit Division as a basis for determining petitioner's liability were proper in accordance with section 1138(a) of the Tax Law (see Matter of Licata v. Chu, 64 NY2d 873).

C. That the Audit Division reasonably calculated petitioner's tax liability based on the books and records available for audit. When a taxpayer's record-keeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223, lv denied 44 NY2d 645). Petitioner

failed in its burden of establishing that the amount of tax assessed was erroneous (see Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576).

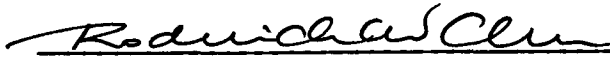
D. That the Audit Division was not bound by an erroneous statement contained in the answer of the Law Bureau. At the hearing the Law Bureau was entitled to amend the pleading to conform to the proof in accordance with 20 NYCRR 601.6(c) and such amendment did not work to the prejudice of petitioner nor in any way hinder petitioner's presentation of its case.


E. That the petition of Pacos Restaurant Corp., d/b/a Lenox Hill Coffee Shop is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1984 is sustained.



DATED: Albany, New York

STATE TAX COMMISSION

JUN 18 1987

  
PRESIDENT

  
COMMISSIONER

   
COMMISSIONER