

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Lectronostic Servicenter, 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 12/1/72-5/31/77. :

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 13th day of March, 1981, he served the within notice of Decision by mail upon Lectronostic Servicenter, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lectronostic Servicenter, Inc.
2940 Avenue U
Brooklyn, NY 11229

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
13th day of March, 1981.

Connie A. Hugell

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Lectronostic Servicenter, 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 12/1/72-5/31/77. :

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 13th day of March, 1981, he served the within notice of Decision by mail upon George Weaver the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. George Weaver
Marcoin of N.Y.
92 E. Main St.
Elmsford, NY 10523

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
13th day of March, 1981.

Conrad A. Hagedorn

J. Vredenburg

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

March 13, 1981

Lectronostic Servicenter, Inc.
2940 Avenue U
Brooklyn, NY 11229

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
George Weaver
Marcoin of N.Y.
92 E. Main St.
Elmsford, NY 10523
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ELECTRONOSTIC SERVICENTER, 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 December 1, 1972	:	
through May 31, 1977.	:	

Petitioner, Lectronostic Servicenter, Inc., 2940 Avenue U, Brooklyn, New York 11229, 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, 1972 through May 31, 1977 (File No. 22195).

A small claims 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 March 20, 1980 at 1:15 P.M. Petitioner appeared by George Weaver. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period December 1, 1972 through May 31, 1977.

FINDINGS OF FACT

1. Petitioner, Lectronostic Servicenter, Inc., operated a Shell gasoline service station, which in addition to gasoline, sold automobile accessories and performed repair work.

2. On January 19, 1978, 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 for the period December 1, 1972 through May 31, 1977

for taxes due of \$12,181.00, plus penalty and interest of \$5,938.22, for a total of \$18,119.22.

3. Petitioner executed consents extending the time within which to issue an assessment of sales and use taxes for the period at issue to March 20, 1978.

4. On audit, the Audit Division accepted the accuracy of petitioner's reported gasoline sales based on the results of a markup test. It also tested nontaxable sales reported for the period ending May 31, 1977 and found that petitioner had properly completed exemption certificates on file. The Audit Division examined repair sales invoices for August 25, 1977 and August 26, 1977 and determined that petitioner's markup on accessories and repair parts including labor was 186.4 percent. Markup percentages were estimated for other sales categories as follows: oil and ATF - 100 percent, tires and tubes - 35 percent, batteries - 35 percent and vending - 50 percent. These markup's were applied to applicable purchases for the audit period after adjusting for inventory increases which resulted in additional taxable sales of \$153,518.46.

The Audit Division found use tax due of \$313.24 on the acquisition of fixed assets, however, this amount is not at issue.

5. At the hearing, the Audit Division conceded that the markup test for accessories and parts erroneously included oil and thereby the markup of 186.4 percent is adjusted to 148.6 percent.

6. Markup percentages experienced by the service station industry for the aforementioned sales categories are the following: oil and ATF - 72 percent, tires and tubes - 25 percent, batteries - 35 percent, accessories and parts (including labor) - 132.3 percent and vending - 25 percent. The application

of said markups to applicable purchases for the audit period result in taxable sales that are in substantial agreement with petitioner's books and records.

7. Petitioner maintained a daily business record book system with computerized worksheets designed for Shell dealers by the accounting firm of Management System Co. These records, as well as sales tax returns, sales and purchase invoices, Federal income tax returns, bank statements and exemption certificates, were available to the Audit Division for examination.

8. Petitioner acted in good faith at all times.

CONCLUSION OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if necessary, the tax may be estimated on the basis of external indices. However, petitioner maintained sufficient books and records for the Audit Division to perform markup tests for the categories of oil and ATF, tires and tubes, batteries and vending to verify the accuracy of such sales recorded in petitioner's books and records; therefore, the estimated markups adopted by the Audit Division were arbitrary and capricious.

B. That the markup test performed by the Audit Division for repair sales was limited to a partial sampling of two days invoices not within the period under audit and did not give consideration to seasonal variations in petitioner's business operations. Accordingly, the resultant markup of 148.6 percent, as revised in accordance with Finding of Fact "5", did not accurately determine petitioner's repair sales; therefore, petitioner's repair sales recorded in its books and records are correct.

C. That based on Conclusions of Law "A" and "B", the additional sales taxes due determined by the Audit Division of \$11,867.76 are cancelled.

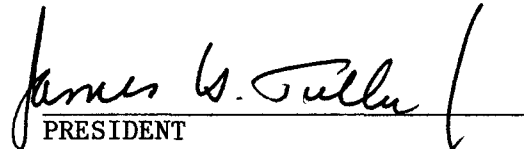
D. That the petition of Lectronostic Servicenter, Inc. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby

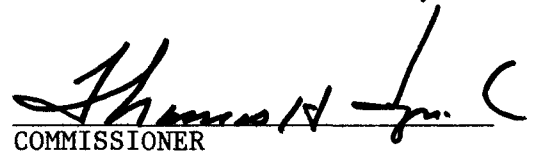
directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 19, 1978, with interest computed at the minimum statutory rate and, that except as so granted, the petition is in all other respects denied.

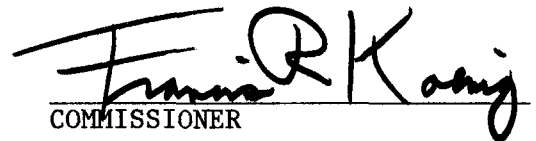
DATED: Albany, New York

MAR 13 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER