

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

SRV, INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 and 29 of the :
Tax Law for the Year(s) ~~xxxx~~ Period(s) :
June 1, 1972 through May 31, 1975.

State of New York
County of Albany

John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 14th day of February , 1979, she served the within
Notice of Determination by ~~(certified)~~ mail upon SRV, Inc.

(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

SRV, Inc.
6501 Bay Parkway
Brooklyn, NY 11204

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~~
~~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

14th day of February , 1979

Marilyn J. Papineau

John Huhn



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

February 14, 1979

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

SRV, Inc.
6501 Bay Parkway
Brooklyn, NY 11204

Gentlemen:

Please take notice of the **determination**
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1132 & 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Joseph Chyrywat
Hearing Examiner

cc: ~~Rebillion to Representative~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
SRV, INC. : DETERMINATION
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 June 1, 1972 through May 31, :
1975. :

Applicant, SRV, Inc., 6501 Bay Parkway, Brooklyn, New York 11204, filed an application 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 June 1, 1972 through May 31, 1975 (File No. 14531).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 8, 1978 at 10:45 A.M. Applicant appeared by its vice-president, Russell Awad. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau's determination of additional sales tax, based on an audit of applicant's records, was correct.

FINDINGS OF FACT

1. Applicant, SRV, Inc., filed New York state and local sales and use tax returns for the period June 1, 1972 through May 31, 1975.

2. During the period at issue, applicant operated a gasoline service station and auto repair shop.

3. On March 1, 1976 as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for taxes due of \$15,016.87, plus penalty and interest, for the period June 1, 1972 through May 31, 1975.

4. Applicant timely applied for a hearing to review the determination of the deficiencies in sales tax.

5. On audit, the Sales Tax Bureau's auditor observed that the sales tax per gallon of gasoline stated on a placard affixed to applicant's gasoline pumps was overstated by six mills-per-gallon. The auditor concluded that applicant overcollected sales tax by six mills-per-gallon on its gasoline sales for the entire audit period; therefore, he determined additional sales tax due of \$7,751.50.

6. In addition, the auditor estimated a markup of 200% on sales of tires, batteries, accessories and repair parts, based on past experience. The 200% markup represented labor charges and

profit added to the cost of said items. Using the year 1974 as a test period, the auditor determined that applicant under-reported sales tax due on said items by \$7,265.37 for this period. The auditor testified that applicant's records were incomplete and that an actual markup test was not attempted.

7. Applicant contended that the determination regarding the overcollection of sales tax was based on one day's observation, and that there was no evidence to show that it occurred at any other time within the audit period. The day on which the observation was made was outside the audit period.

8. Applicant also contended that between 1972 and 1973, the station hours were shortened due to the gasoline shortage and that, since his livelihood came mainly from the sale of gasoline, he didn't have time to work in the repair bays. Therefore, he contended, the 200% markup of sales of tires, batteries, accessories and repair parts is unjustified.

9. Applicant did not present any documentary or other substantial evidence to disprove the 200% markup used by the Sales Tax Bureau.

CONCLUSIONS OF LAW

A. That when applicant's records are incomplete, the Sales Tax Bureau may use indices external to applicant's records; however, the method used by the Bureau must be reasonably calculated to reflect the taxes due. (Matter of Grant v. Joseph (1957) 2 NY 2d 196, 206; recently cited in Matter of Norman H. Meyer et al. v. State

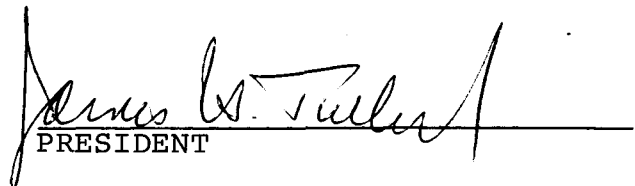
Tax Commission, et al. (3rd Dept., (1978) 61 App. Div. 2d 223). That the Sales Tax Bureau's determination of a 200% markup of tires, batteries, accessories and repair parts is correct in accordance with the provisions of section 1138(a) of the Tax Law, and was a reasonable basis for determining the tax in the absence of complete and accurate records.

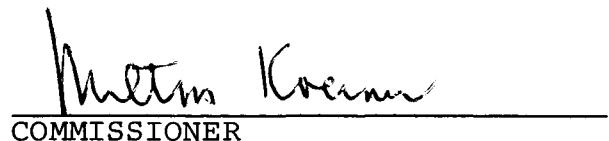
B. That in determining that applicant had over-collected sales tax on gasoline, based on its observation of one particular day which was not within the audit period, the Sales Tax Bureau did not reasonably calculate the additional tax due on gasoline sales; therefore, the projected tax due on such sales is cancelled.

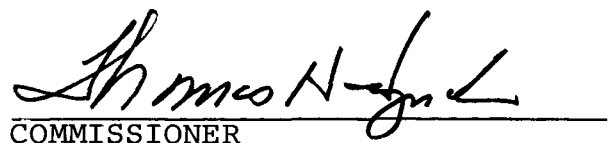
C. That the application of SRV, Inc. is granted to the extent indicated in Conclusion of Law "B", above; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 1, 1976 and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
February 14, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER