

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Fred Clemett & Co., 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 - 11/30/75. :

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 28th day of November, 1980, he served the within notice of Decision by mail upon Fred Clemett & Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Clemett & Co., Inc.  
2020 Lemoyne Ave.  
Mattydale, NY 13211

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  
28th day of November, 1980.

Debra A Bank

Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Fred Clemett & Co., 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 - 11/30/75. :

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 28th day of November, 1980, he served the within notice of Decision by mail upon John G. Miller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

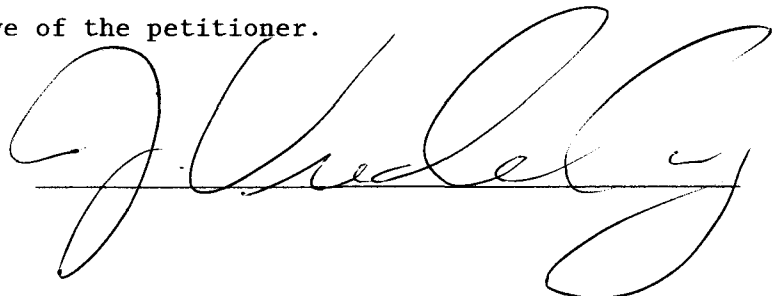
Mr. John G. Miller  
Walquist & Renodin  
Eleven N. Pearl St.  
Albany, NY 12207

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  
28th day of November, 1980.

Detrola Bank



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

November 28, 1980

Fred Clemett & Co., Inc.  
2020 Lemoyne Ave.  
Mattydale, NY 13211

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  
John G. Miller  
Walquist & Renodin  
Eleven N. Pearl St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
FRED CLEMETT AND CO., 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	:	
November 30, 1975.	:	

---

Petitioner, Fred Clemett and Co., Inc., 2020 Lemoyne Avenue, Mattydale, New York 13211, 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 November 30, 1975 (File No. 16401).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on May 15, 1980 at 2:45 P.M. Petitioner appeared by John G. Miller, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales and use tax liability for the period December 1, 1972 through November 30, 1975 based on its findings from certain test periods.

FINDINGS OF FACT

1. Petitioner, Fred Clemett and Co., Inc., is engaged in the sales, installation and service of petroleum marketing and liquid handling equipment. Such equipment includes gasoline pumps, storage tanks and service station islands.

2. On May 27, 1976, 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 November 30, 1975 for taxes due of \$5,750.54, plus penalty and interest of \$2,240.69, for a total of \$7,991.23.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the period December 1, 1972 thorough February 28, 1973, to June 20, 1976.

4. On audit, the Audit Division examined charge sales invoices for the period December 1, 1974 through November 30, 1975 and found additional taxable sales of \$7,792.00 or .7 percent of taxable sales reported for said period. This percentage was applied to taxable sales reported for the audit period, resulting in additional taxable charge sales of \$24,196.00. Cash sales invoices were also examined; however, the test was for the three-month period of September 1, 1975 through November 30, 1975 because of the numerous transactions. The test revealed additional taxable sales of \$1,776.00 or 8 percent of cash sales made during the test period. This percentage was applied to total cash sales of \$200,258.00 to arrive at additional taxable cash sales for the audit period of \$16,020.00.

The Audit Division also reviewed expense purchase invoices for the period November 1, 1974 through October 31, 1975 which disclosed that petitioner failed to pay a sales or use tax on expense purchases totaling \$5,739.00. The majority of said purchases were charged to a supply and expense account (#8-500) in petitioner's general ledger and represented 25.4 percent of the total posted to that account for the test period. The Audit Division concluded that such purchases were of a recurring nature and, therefore, applied 25.4 percent to total purchases charged to the 8-500 account during the audit period to

determine taxable purchases of \$13,088.00. Additionally, there was a taxable purchase for \$2,639.72 which was not considered to be a recurring item.

The Division also determined that petitioner failed to pay a sales or use tax on materials purchased and consumed in the performance of capital improvement work. Petitioner established that the cost of such materials for the period November 1, 1974 through October 31, 1975 was \$10,703.00 which was .75 percent of the petitioner's cost of goods sold for the same period. Based on the test period findings, the Audit Division determined taxable material purchases for the audit period of \$31,880.00.

5. At the hearing, counsel for the Audit Division conceded that the amount of tax due determined on audit should be reduced to \$4,835.02. Counsel submitted a schedule indicating that additional taxable charge sales were adjusted to \$13,307.00 based on the deletion of one sale which the Audit Division considered extraordinary and not representative of petitioner's sales activity in the test period. The additional taxable cash sales were adjusted to \$9,212.00 to reflect that the Audit Division's test period was actually a six-month period and consequently, its computations based on a three-month test period were erroneous.

6. Petitioner did not contest the accuracy of the Audit Division's findings for those periods where books and records were examined; however, it argued that the Division's use of the test period results to estimate taxes for other periods was not proper since adequate books and records had been maintained.

7. The Audit Division's auditor found that petitioner maintained complete and adequate books and records. Petitioner maintained a general ledger, purchase journal, sales journal, purchase invoices and sales invoices.

8. Petitioner, at all times, acted in good faith.

CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

B. That petitioner maintained complete and adequate books and records from which the Audit Division could have determined the exact amount of tax due on nontaxable sales, expense purchases, and materials used in capital improvement work. Accordingly, the tax due is reduced to the actual amounts found due for the periods examined as follows:

charge sales	\$ 490.11
cash sales	124.32
expense purchases	586.51
materials	682.35
	<u>\$1,883.29</u>

C. That the penalty is abated and the interest shall be computed at the minimum statutory rate.

D. That the petition of Fred Clemett and Co., Inc. is granted to the extent indicated in Conclusion of Law "B" and "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 May 27, 1976; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION

*James C. Smith*  
PRESIDENT

*Thomas A. Hagan*  
COMMISSIONER

*Francis R. Koenig*  
COMMISSIONER