

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman Heimiller :
d/b/a Lee's Auto Body Repairs : 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 9/1/72 - 12/31/75. :

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 7th day of August, 1980, he served the within notice of Determination by mail upon Herman Heimiller, d/b/a Lee's Auto Body Repairs, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herman Heimiller
d/b/a Lee's Auto Body Repairs
Box 58 Lorraine
Jefferson Co., NY 13659

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
7th day of August, 1980.

Dorothy A. Bank

J. Vredenburg

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

July 7, 1980

Herman Heimiller
d/b/a Lee's Auto Body Repairs
Box 58 Lorraine
Jefferson Co., NY 13659

Dear Mr. Heimiller:

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) 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
Taxing Bureau's Representative

2. During the period at issue, applicant operated an auto body repair shop. The applicant sold his business interest in December of 1975.

3. On December 9, 1976, as a result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for taxes due of \$11,696.84, plus penalty and interest of \$5,419.36, for a total due of \$17,116.20 for the period September 1, 1972 through December 31, 1975.

4. Applicant executed a consent extending the period for assessment of sales and use taxes for the period September 1, 1972 through August 31, 1975 to December 20, 1976.

5. On audit, the Audit Division analyzed sales for May, 1975 and found that 57 percent of these sales represented labor and 43 percent represented materials and parts. The Audit Division then determined that the average markup on materials and parts was 34 percent. Since applicant failed to retain a record of purchases for the period under examination, the Audit Division accepted purchases as reported on applicant's Federal income tax returns and applied thereto the average markup for the period under examination. The marked-up purchases were combined with labor sales less the exempt sales allowed, which resulted in audited taxable sales of \$628,743.63. The audited taxable sales as compared to sales reported by applicant of \$474,856.00 reflected a margin of error percentage of 32.4072 percent. Said percentage of error was applied to the entire audit period to determine additional tax due.

6. The applicant's books and records were not adequate for the Audit Division to determine the exact amount of the applicant's taxable sales or sales tax liability. Because of the inadequate records, the Audit Division performed a markup of the applicant's purchases as reported on the Federal income tax returns.

7. Applicant disputed the results of the audit, contending that costs occurred for paint represented labor, and not materials and parts as determined by auditor. However, applicant failed to submit evidence to support his contention nor how the audit result would materially change, assuming his contention was valid. Applicant also disputed the correctness of the markup test applied for the period under examination. However, applicant failed to submit any evidence to support his contention.

CONCLUSIONS OF LAW

A. That the Audit Division correctly determined the amount of tax due from applicant in accordance with the meaning and intent of section 1138(a) of the Tax Law. That applicant's contention that cost of paint represented expenditures for labor was not substantiated by documentary or other credible evidence; nor had the applicant shown how a change in the classification of labor expenses would materially change the audit results. Further, the applicant failed to introduce evidence to show wherein the markup test employed by Audit Division was erroneous.

B. That the application of Herman Heimiller is denied and the Notice of Determination and Demand for Payment of Sales and Use Tax Due issued under date of December 9, 1976 is sustained.

DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER