

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Industrial Refining Corp.

:

:

: 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 6/1/71 - 5/31/75.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Industrial Refining Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Industrial Refining Corp.
c/o Harold Schectman, President
1495 Fillmore Ave., P.O. Box 1011
Buffalo, NY 14211

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
5th day of June, 1981.

Carmie A. Haglund

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Industrial Refining Corp. :

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for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 6/1/71 - 5/31/75.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Malcolm Brutman 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. Malcolm Brutman
2495 Kensington Ave.
Buffalo, NY 14226

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
5th day of June, 1981.

Annice A. Hagelund

J. Vredenburg

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

June 5, 1981

Industrial Refining Corp.
c/o Harold Schectman, President
1495 Fillmore Ave., P.O. Box 1011
Buffalo, NY 14211

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
Malcolm Brutman
2495 Kensington Ave.
Buffalo, NY 14226
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
INDUSTRIAL REFINING CORP. : 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 June 1, 1971 :
through May 31, 1975.

Petitioner, Industrial Refining Corp., 1495 Fillmore Avenue, P.O. Box 1011, Buffalo, New York 14211, 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 June 1, 1971 through May 31, 1975 (File No. 14903).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on November 18, 1980 at 2:45 P.M. Petitioner appeared by Malcolm Brutman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales and use tax liability for the period June 1, 1971 through May 31, 1975.

FINDINGS OF FACT

1. Petitioner, Industrial Refining Corp., was engaged in the processing of scrap iron and metal.
2. On February 25, 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 June 1, 1971 through May 31, 1975 for

taxes due of \$6,371.61, plus penalty and interest of \$2,744.48, for a total of \$9,116.09.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1971 through May 31, 1975, to December 20, 1976.

4. On audit, the Audit Division examined petitioner's operating expense purchases for the period December 1, 1972 through May 31, 1973 which disclosed that sales or use tax was not paid on purchases totaling \$4,135.00 or 42 percent of total operating expense purchases for said period. This percentage was applied to total operating expense purchases for the audit period to determine taxable purchases of \$41,917.00. The Audit Division also determined that petitioner failed to pay sales or use taxes on fixed assets of \$49,106.00 acquired during the audit period. The Audit Division's determination as to whether the expense purchases were subject to tax was based on the nature of their use as described by petitioner's president and accountant.

5. The Audit Division failed to establish that petitioner's books and records were inadequate to conduct a complete audit of expense purchases and determine the exact amount of tax due on such purchases for the audit period.

6. Petitioner contended that certain operating expense purchases during the test period were actually purchases made as a convenience for third parties and thus, not used in its business operations.

7. The Audit Division conceded that petitioner paid sales tax on a crane part purchased for \$900.00 which was included in the test period.

8. The fixed assets acquired during the audit period consisted of three automobiles, three trucks, truck repairs and a loader. One of the automobiles was purchased in March 1971 which is not within the period under audit.

Petitioner argued that the automobiles and trucks could not be registered with the Department of Motor Vehicles without paying sales tax at such time or showing proof that sales tax was paid. The loader at issue was purchased in March 1974 and is used by petitioner in its processing operation to handle scrap metal. Said loader, however, was also used subsequent to production in loading trucks for distribution.

9. Petitioner acted in good faith at all times and did not willfully attempt to evade the taxes at issue.

CONCLUSIONS OF LAW

A. That although there is statutory authority for the 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. That since the Audit Division failed to establish such a foundation, the use of a test period becomes arbitrary and capricious. Accordingly, petitioner's tax liability on expense purchases is limited to the actual amount found due for the period December 1, 1972 through May 31, 1973.

B. That petitioner failed to show that the expense purchases referred to in Finding of Fact "6" were for resale within the meaning and intent of section 1101(b)(4)(i) of the Tax Law or that such purchases are exempt by virtue of sections 1115(a)(12) and 1210(a)(1) of the Tax Law. However, in accordance with Finding of Fact "7" and Conclusion of Law "A", the tax due on expense purchases is reduced to \$226.45.

C. That the tax assessed of \$359.52 on the automobile purchased in March 1971 was not timely in accordance with the provisions of section 1147(b) of the

Tax Law and, therefore, is cancelled. That petitioner failed to establish that tax was paid on the remaining automobiles and trucks at issue either at the time of purchase or registration and, therefore, is liable for said taxes pursuant to section 1133(b) of the Tax Law.

D. That section 1115(a)(12) of the Tax Law, as amended by Ch. 851, Laws 1974, effective September 1, 1974, provides an exemption for "machinery or equipment for use or consumption directly and predominantly (directly and exclusively prior to September 1, 1974) in the production of tangible personal property ... for sale, by manufacturing, processing ...". That the loader referred to in Finding of Fact "8" purchased in March 1974 was not used directly and exclusively in the production of tangible personal property within the meaning and intent of former section 1115(a)(12) of the Tax Law.

E. That the penalty and interest in excess of the minimum statutory rate imposed pursuant to section 1145(a) of the Tax Law are cancelled.

F. That the petition of Industrial Refining Corp. is granted to the extent indicated in Conclusions of Law "A", "B" "C" and "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 25, 1976; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER