

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Arc Welding Supply 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 3/1/72 - 2/28/75. :

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Arc Welding Supply Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arc Welding Supply Co., Inc.  
467 Bruckner Blvd.  
Bronx, NY 10455

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  
11th day of June, 1982.

*Carrie R. Wajsbort*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Arc Welding Supply 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 3/1/72 - 2/28/75 :

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon William Scarnati the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Scarnati  
Ridge Rd.  
Syosset, NY

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  
11th day of June, 1982.

*Annice G. Haylund*

*J. Vredenburg*

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

June 11, 1982

Arc Welding Supply Co., Inc.  
467 Bruckner Blvd.  
Bronx, NY 10455

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
William Scarnati  
Ridge Rd.  
Syosset, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
ARC WELDING SUPPLY CO., INC.  
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 March 1, 1972  
through February 28, 1975.

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DECISION

Petitioner, Arc Welding Supply Co., Inc., 467 Bruckner Boulevard, Bronx, New York 10455, 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 March 1, 1972 through February 28, 1975 (File No. 14885).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 16, 1978 at 2:50 P.M. Petitioner appeared by William Scarnati, its president. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

- I. Whether the use of a test period resulting in a margin of error percentage should be applied to the entire tax period in question.
- II. Whether the Audit Division should have disallowed exempt sales claimed by petitioner for the entire taxable period.

FINDINGS OF FACT

1. Petitioner, Arc Welding Supply Co., Inc., timely filed New York State and local sales and use tax returns for the period March 1, 1972 through February 28, 1975.

2. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1972 through February 28, 1975 until December 20, 1976.

3. On April 5, 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 to petitioner for \$22,867.90 in additional tax, plus \$9,634.96 in penalty and interest, for a total due of \$32,502.85.

4. Petitioner subsequently filed an application for revision of said determination.

5. On audit, petitioner's tax returns, journals, ledgers and source documents were examined. The auditor found that the gross sales recorded in the general ledger exceeded the gross sales reported on the sales tax returns by \$28,674.00. The auditor considered such sales as additional taxable sales. The auditor analyzed the December 1973 exempt sales and computed disallowance percentages of 25.5213 percent for New York City, 2.5665 percent for Nassau County, .1567 percent for the City of Mount Vernon, .2501 percent for the City of White Plains and 90.6106 for New York State. These percentages of disallowance were projected over the audit period to determine disallowed exempt sales of \$351,119.00. The auditor analyzed the recurring expense purchases for December 1973, January 1974 and February 1974 and computed an error rate of 35.68 percent for vehicle maintenance expense purchases. He projected this over the audit period to arrive at vehicle maintenance purchases subject to use tax of \$2,617.00. The auditor analyzed all fixed asset purchases in the audit period and found that use tax was due on \$1,818.00 of the fixed assets purchased.

6. After a conference held on January 25, 1977, the Audit Division's claim for sales and use taxes was reduced from \$22,867.90 to \$7,819.59. Said reduction was due to petitioner's presentation of additional documentation in support of its exempt sales. The disallowance percentages computed on audit were accordingly revised to 3.8578 percent for New York City and 10.0210 percent for New York State.

7. At the hearing, petitioner argued that its exempt sales were supported by exemption forms. Properly executed "Resale Certificates" received from Hudson Harbor-79th Street Boat Basin, Inc., 79th Street & Hudson River, New York, New York and Bronx Psychiatric Center, 1500 Waters Place, Bronx, New York were introduced into evidence. The other forms petitioner introduced were inappropriate to the transactions for which issued or for transactions not within the test period.

8. Petitioner maintained adequate books and records from which the Audit Division could have determined petitioner's actual sales and use tax liability.

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

#### 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 recordkeeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

B. That petitioner maintained adequate records. The estimated procedures used to determine the sales and use taxes due from petitioner are arbitrary

and capricious. Petitioner's liability is limited to the actual amount found due in the test periods.

C. That section 1132(c) of the Tax Law provides, in part, that a vendor shall not be required to collect tax from purchasers who furnish a certificate of resale in proper form.

D. That petitioner received properly completed "Resale Certificates" to substantiate exempt sales to (i) Hudson Harbor-79th Street Boat Basin, Inc. and (ii) the Bronx Psychiatric Center. That, therefore, sales to said organizations are exempt from tax.

E. That penalties and interest in excess of the minimum statutory rate are cancelled.

F. That the petition of Arc Welding Supply Co., Inc. is granted to the extent indicated in Finding of Fact "6" and Conclusions of Law "B", "D" and "E" above. The Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 5, 1976. Except as so granted, the petition is in all other respects denied.

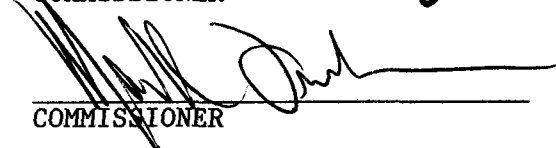
DATED: Albany, New York

JUN 11 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER