

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Gottry Corp.	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 3/1/74 - 2/28/77.	:	

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 Gottry Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gottry Corp.
999 Beahan Rd., P.O. Box H
Rochester, 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 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.

Arnie P. Waples *J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gottry Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
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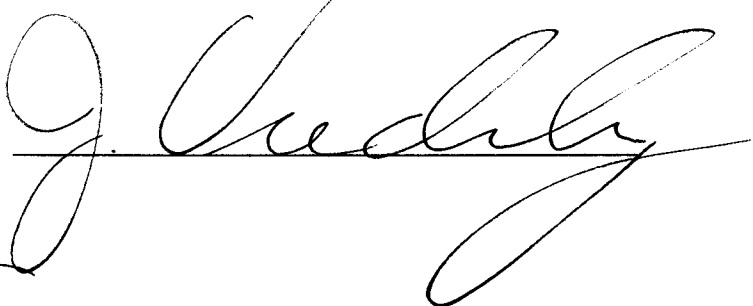
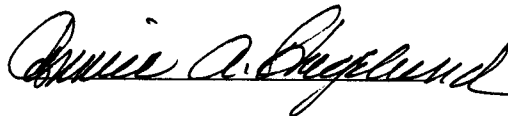
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of June, 1982, he served the within notice of Decision by certified mail upon Herbert Burstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Burstein
One World Trade Ctr., Suite 2373
New York, NY 10048

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.

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

June 11, 1982

Gottry Corp.
999 Beahan Rd., P.O. Box H
Rochester, NY

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
Herbert Burstein
One World Trade Ctr., Suite 2373
New York, NY 10048
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GOTTRY CORPORATION

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 March 1, 1974
through February 28, 1977.

Petitioner, Gottry Corporation, 99 Beahan Road, P.O. Box H, Rochester, New York 14624, 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, 1974 through February 28, 1977 (File No. 20416).

A formal hearing was scheduled before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, Building No. 9, State Campus, Albany, New York on April 26, 1979. Petitioner waived the formal hearing, provided that the parties enter into a stipulation of facts. A stipulation of facts was signed and is submitted to the State Tax Commission together with the entire record on file. The State Tax Commission renders the following decision, after due consideration of said record.

ISSUE

Whether the assessment for the period March 1, 1974 through February 28, 1977 based on the Audit Division's test periods was proper.

FINDINGS OF FACT

1. On August 25, 1977, pursuant to an audit of records, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Gottry Corporation, in the amount of \$23,833.97 plus penalty and interest of \$10,396.00 for a total of \$34,229.97.

2. The petitioner executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1974 through May 31, 1974 to September 20, 1977.

3. Petitioner, Gottry Corporation, ("Gottry"), a New York corporation, was engaged in the transportation of heavy machinery and equipment. Its services include surface transportation, loading and unloading of equipment, and at times involved storage-in-transit i.e., the receipt and temporary storage of equipment at its terminal facility. Whenever equipment remained in storage for a period beyond what is accepted in the trade, a sales tax was charged for storage and installation. No sales tax was charged for temporary storage. Upon request by Gottry's customers for delivery of the equipment, it was reloaded either on Gottry's trucks or the truck of a third party to be delivered to its destination.

4. An audit of Gottry's records indicated an error to the tax remitted with respect to handling revenue of the warehouse, the in-storage-transit of equipment.

Test Periods September 1, 1974 to November 30, 1974, June 1, 1975 to August 31, 1975 and December 1, 1975 to February 28, 1976.

<u>Total Handling Charges for Test Period</u>	<u>\$ 40,585.70</u>	
Handling Charges Exempted	\$ 13,547.41	= 33.38% Exempt Handling Charges

Total Handling Revenue for All Periods	\$151,922.89
Exempt Handling Charges (33.38%)	50,711.87
Taxable Handling Revenue	101,211.02
Tax Due 7%	7,084.78

5. Petitioner, Gottry Corporation, maintained a standard double entry accounting system. All records were computerized. The audit of Gottry's records indicated that there were some additional taxable sales. The computation of tax on these sales of services involving installation, repair and services, was as follows:

For Test Period Tax Remitted	\$ 9,248.45	= 34.714% Margin of Error
Additional Tax Due Per Audit	\$ 3,210.48	

Total Tax Remitted	\$48,229.36
Tax Due (48,229.36 x 34.714%)	\$16,749.19

The actual tax found to be due on audit is \$3,210.48.

6. Gottry relied on many customers who promised resale certificates which were not secured. Many exempt purchase certificates were incomplete and some certificates were improperly taken for taxable items.

7. Gottry relied on a letter from the Instructions and Interpretation Unit sent to a rigging company in Buffalo, New York.

8. Petitioner acted in good faith.

CONCLUSIONS OF LAW

A. That section 1105(c)(3) imposed a tax on the "installation of tangible personal property or maintaining, servicing, repairing tangible personal property...".

B. That section 1105(c)(4) imposed a tax on the "storing of all tangible personal property not held for sale in the regular course of business...".

C. That the handling charges of Gottry Corporation are a part of the fee for the transportation service and are not subject to the sales tax imposed by section 1105(c)(3) or section 1105(c)(4).

D. That Gottry Corporation was liable to collect a sales tax on the changes for the installation and servicing of tangible personal property.

E. That although there is statutory authority for use of 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 Gottry Corporation maintained adequate books and records from which the actual tax could have been determined.

F. That the actual tax found to be due per audit as per Findings of Fact "5" was \$3,210.48.

G. That the penalty and interest in excess of minimum are cancelled.

H. That the petition of Gottry Corporation is granted to the extent indicated in Conclusions of Law "C", "F" and "G" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 25, 1977. That, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 11 1982


PRESIDENT


COMMISSIONER


COMMISSIONER