

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

John E. Kelly

:

:

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:
11/30/74-8/31/77.

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 February, 1982, he served the within notice of Decision by certified mail upon John E. Kelly, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

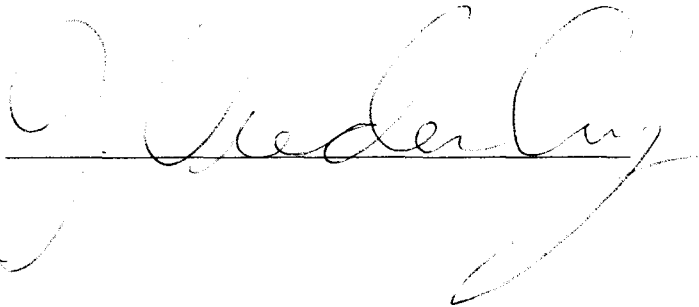
John E. Kelly
301 Nassau St.
Bellmore, NY 11710

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 February, 1982.





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

February 11, 1982

John E. Kelly
301 Nassau St.
Bellmore, NY 11710

Dear Mr. Kelly:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN E. KELLY	:	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 September 1,	:	
1974 through August 31, 1977.	:	

Petitioner, John E. Kelly, 301 Nassau Street, Bellmore, New York 11710, 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 September 1, 1974 through August 31, 1977 (File No. 25454).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 23, 1981, at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether petitioner is liable for tax on certain nontaxable sales disallowed by the Audit Division.

FINDINGS OF FACT

1. Petitioner, John E. Kelly, was engaged in the installation and repair of service station lifts.

2. On December 9, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1974 through August 31, 1977 for taxes due of \$1,562.20 plus penalty and interest of \$558.00, for a total of

\$2,150.20. Said notice was issued as a result of the Audit Division's examination of petitioner's available books and records.

3. On audit, the Audit Division disallowed petitioner's reported nontaxable sales of \$20,016.00 for the audit period and asserted tax thereon of \$1,562.20.

4. Petitioner submitted certificates covering the following sales at issue:

<u>DATE</u>	<u>CUSTOMER</u>	<u>SALES AMOUNT</u>	<u>CERTIFICATE</u>
12-11-74	Astas Tire Service	\$ 1,350.00	Capital Improvement
02-23-75	Wakefield Auto	550.00	Capital Improvement
09-14-74	Penfield Petroleum	150.00	Resale
05-16-75	Aamco Transmissions	1,575.00	Capital Improvement
07-25-75	Great Bear	2,100.00	Capital Improvement
12-25-75	Volple Service Station	600.00	Capital Improvement
03-15-76	Steven Lincoln Mercury	525.00	Capital Improvement
08-06-76	Ridge Auto Transmissions	795.90	Capital Improvement
09-22-76	Great Bear	161.60	Resale
09-05-75	Huntington Firestone	1,600.00	Capital Improvement
12-02-76	Steven Lincoln Mercury	1,200.00	Capital Improvement
01-24-77	Wakefield Battery	450.00	Capital Improvement
06-17-77	Brooklyn Union Gas	260.00	DP
06-08-77	Aldan Volkswagon	650.00	Resale
06-01-77	Pepper & Potter, Inc.	1,200.00	Capital Improvement
		<u>\$13,167.50</u>	

5. Petitioner did not willfully attempt to evade the sales taxes at issue.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that it shall be presumed that all receipts for property or services...are subject to tax until the contrary is established and the burden of proving that any receipt...is not taxable shall be upon the person required to collect tax. Unless a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is

exempt from tax under section 1115 of the Tax Law. Where such a certificate has been furnished to the vendor, the burden of proving that the receipt...is not taxable shall be solely upon the customer.

That petitioner was furnished with and accepted in good faith the certificates referred to in Finding of Fact "4"; that all of such certificates are exemption certificates within the meaning and intent of section 1132(c) of the Tax Law (Saf-Tee Plumbing Corporation v. State Tax Commission, 77 A.D.2d 1). Accordingly, since liability for the misuse of an exemption certificate rests with the purchaser, petitioner is not liable for tax on sales of \$13,167.50 disallowed by the Audit Division.

B. That petitioner failed to sustain its burden of proof required by section 1132(c) of the Tax Law with respect to the remaining sales at issue, totaling \$6,848.50; therefore, petitioner is liable for the sales tax imposed on said sales pursuant to section 1133(a) of the Tax Law.

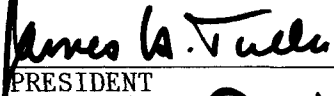
C. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

D. That the petition of John E. Kelly is granted to the extent indicated in Conclusions of Law "A" and "C" above. That the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 9, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

 FEB 11 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER