

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

September 27, 1982

Tomfor Transportation Corp.
& Jay-Dee Transportation, Inc.
P.O. Box E
43 DeBevoise Ave.
Roosevelt, NY 11575

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
Robert Samarel
19 Sandra Dr.
Smithtown, NY 11787
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
TOMFOR TRANSPORTATION CORP.	:	DECISION
and	:	
JAY DEE TRANSPORTATION, 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, 1974	:	
through May 31, 1977.	:	

Petitioners, Tomfor Transportation Corp. and Jay Dee Transportation, Inc., 43 Debevoise Avenue, Roosevelt, New York 11575, filed petitions 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 May 31, 1977 (File Nos. 21719 and 21585).

A combined small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 1, 1981 at 1:15 P.M. Petitioners appeared by Robert Samarel, Controller. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether petitioners are liable for use tax on purchases where the invoices did not separately state sales tax.

FINDINGS OF FACT

1. On March 20, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Tomfor Transportation Corp. for the period March 1, 1974 through May 31, 1977 in the amount of

\$16,156.75 tax, plus penalties and interest of \$7,795.15, for a total of \$23,951.90.

On March 20, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Jay Dee Transportation, Inc. for the period March 1, 1974 through May 31, 1977 in the amount of \$19,357.80 tax, plus penalties and interest of \$9,864.05, for a total of \$29,221.85. The Notices were issued as a result of a field audit.

2. Petitioners had executed consents to extend the period of limitation for assessment through March 20, 1978.

3. As a result of a conference, petitioner Tomfor Transportation Corp. agreed to pay tax due of \$4,194.75, and the Audit Division canceled tax due of \$9,256.02 leaving the tax due at issue of \$2,705.98. Petitioner Jay Dee Transportation agreed to pay tax due of \$7,723.30, and the Audit Division canceled tax due of \$8,533.10 leaving the tax due at issue of \$3,101.40. The Audit Division canceled the penalties and interest in excess of the minimum statutory rate on the agreed portion of tax due.

4. The Audit Division based its determination (disagreed portion) of additional tax due on purchases of repairs made to petitioners' vehicles by H & H East Hempstead Auto Body, Inc. (H & H). No sales tax was stated on the invoices received from H & H. Petitioners did not report the tax on these purchases on the sales and use tax returns it filed; therefore, the Audit Division held use tax due of \$2,705.98 from Tomfor Transportation Corp. and \$3,101.40 from Jay Dee Transportation, Inc.

5. Damage reports issued by H & H served as its sales invoices. These reports contained a description of vehicle damage and a damage report total. The tax was not separately stated on the invoice issued.

6. Mr. Richard Moore, secretary-treasurer of H & H contended that the sales tax was separately stated on original estimates for insurance purposes. He further contended that H & H reported sales tax based on quarterly totals of bank deposits multiplied by the appropriate tax rate. No documentary evidence was submitted to show that the tax was in fact separately stated or that H & H collected or paid the sales tax.

7. Petitioners contended that the sales tax was included in the purchase price of repair parts and services and remitted by H & H on bank deposits; therefore, petitioners reasoned that it would be grossly unfair for them to pay the tax again. Petitioners introduced cancelled checks in payment of sales and services as rendered by H & H. The cancelled checks were not conclusive as to the payment of sales tax. Moreover, not all amounts paid would have required an insurance estimate if in fact the tax was segregated thereon as contended in Finding of Fact "5".

8. Petitioners failed to show reasonable cause for not paying over any use taxes due.

CONCLUSIONS OF LAW

A. That section 1132(a) of the Tax Law provides that every person required to collect the tax shall collect the tax from the customer when collecting the price to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him.

B. That section 1137(a) of the Tax Law provides that every person required to file a return...shall, at the time of filing such return, pay to the Tax Commission...all taxes imposed by section eleven hundred ten or pursuant to Article twenty-nine of this chapter upon such person's use of property or services.

C. That petitioners offered no evidence to show that any tax was paid to H & H East Hempstead Auto Body, Inc., and petitioners did not remit the tax on its sales and use tax returns filed as required by section 1137(a) of the Tax Law.

D. That the additional tax due asserted against Tomfor Transportation Corp. in the amount of \$9,256.02 is canceled pursuant to Finding of Fact "3". That the agreed amount of tax due of \$4,194.75 is payable with interest at the minimum statutory rate. That the additional tax due at issue of \$2,705.98 is sustained with applicable penalties and interest thereon.

That the additional tax due asserted against Jay Dee Transportation, Inc. in the amount of \$8,533.10 is canceled pursuant to Finding of Fact "3". That the agreed amount of tax due of \$7,723.30 is payable with interest at the minimum statutory rate. That the additional tax due at issue of \$3,101.40 is sustained with applicable penalties and interest thereon.

E. That the petitions of Tomfor Transportation Corp. and Jay Dee Transportation, Inc. are granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued March 20, 1978; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

SEP 27 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Tomfor Transportation Corp.
& Jay-Dee Transportation, 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
3/1/74-5/31/77.

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 27th day of September, 1982, he served the within notice of Decision by certified mail upon Tomfor Transportation Corp., & Jay-Dee Transportation, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tomfor Transportation Corp.
& Jay-Dee Transportation, Inc.
P.O. Box E
43 DeBevoise Ave.
Roosevelt, NY 11575

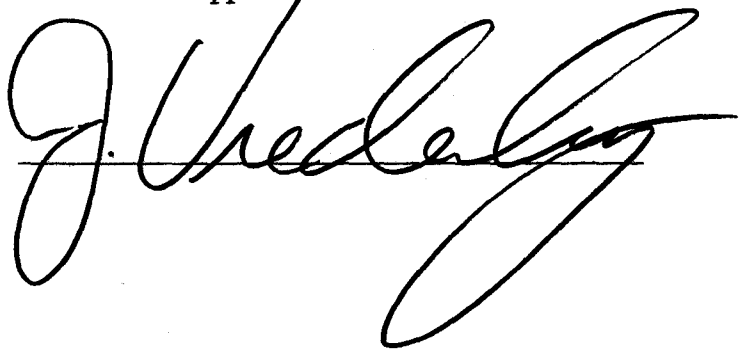
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
27th day of September, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Tomfor Transportation Corp.
& Jay-Dee Transportation, 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 3/1/74-5/31/77.

State of New York
County of Albany

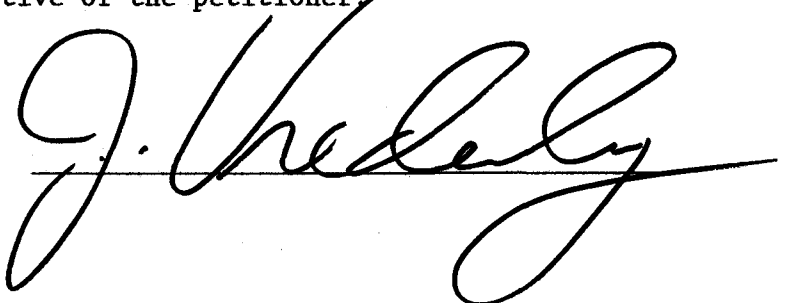
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of September, 1982, he served the within notice of Decision by certified mail upon Robert Samarel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Samarel
19 Sandra Dr.
Smithtown, NY 11787

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
27th day of September, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 230 842 931
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Tomber Transportation Corp.</i>	
STREET AND NO.		<i>1900 E.</i>	
P.O., STATE AND ZIP CODE		<i>4300 E. Riverside Ave.</i>	
POSTAGE		<i>Smithtown NY 11787</i>	
CERTIFIED FEE		€	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	€
		RESTRICTED DELIVERY	€
		RETURN RECEIPT SERVICE	€
		SHOW TO WHOM AND DATE DELIVERED	€
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 842 932
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Robert Samarel</i>	
STREET AND NO.		<i>19 Sandra Dr.</i>	
P.O., STATE AND ZIP CODE		<i>Smithtown NY 11787</i>	
POSTAGE		\$	
CERTIFIED FEE		€	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	€
		RESTRICTED DELIVERY	€
		RETURN RECEIPT SERVICE	€
		SHOW TO WHOM AND DATE DELIVERED	€
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976