

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

July 15, 1983

George's County Service, Inc.  
c/o George Fernandez  
118 Soifer Avenue  
North Bellmore, NY 11710

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 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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

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

George's County Service, Inc.

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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 12/1/77-10/2/80. :

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon George's County Service, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George's County Service, Inc.  
c/o George Fernandez  
118 Soifer Avenue  
North 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  
15th day of July, 1983.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition  
of  
GEORGE'S COUNTY SERVICE, 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 December 1,  
1977 through October 2, 1980.

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DECISION

Petitioner, George's County Service, Inc., c/o George Fernandez, 118 Soifer Avenue, North Bellmore, New York, 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 December 1, 1977 through October 2, 1980 (File No. 33432).

A 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 January 20, 1983, at 1:15 P.M. with all evidence to be submitted by February 28, 1983. Petitioner appeared by George Fernandez, president. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the result of a field audit performed by the Audit Division whereby markups, based on a prior audit finding, were applied to petitioner's purchases properly reflected the taxable sales made during the current audit period.

FINDINGS OF FACT

1. On December 20, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against George's County Service, Inc. covering the period December 1, 1977 through October 2, 1980, the date the business was sold. The Notice asserted additional sales tax due of

\$7,633.61 plus interest of \$1,118.20 for a total due of \$8,751.81 and was issued as a result of a field audit.

2. On audit, the Audit Division accepted gasoline sales as recorded by petitioner. In order to reconcile gross sales with those reported on sales and use tax returns filed, the Audit Division proceeded to mark up petitioner's purchases other than gasoline. A markup analysis could not be performed since petitioner did not have all its purchase or sales invoices. The Audit Division therefore utilized markups determined on a prior audit conducted and applied those markups to the following purchases which were recorded on daily worksheets for the period March 1 through May 31, 1980:

	<u>PURCHASES</u>	<u>MARKUP</u>
Oil	\$ 444.30	100%
TBA	897.02	30%
Parts	3,435.52	175%
Outside Labor	85.00	25%

Based on the above, the Audit Division determined taxable sales other than gasoline to be \$11,608.66 for that period. Petitioner recorded sales other than gasoline of \$6,751.70; the Audit Division therefore determined an error in reporting such sales of 71.94 percent. This percentage was applied to sales of \$151,586.68 as recorded by petitioner, and additional taxable sales other than gasoline were determined to be \$109,051.46 for the audit period. The Audit Division thereby determined the additional sales tax due of \$7,633.61.

3. Petitioner is in agreement with the markups as applied by the Audit Division on its purchases of tires, batteries, and accessories (TBA) and outside labor. Petitioner is not in agreement with the markups applied to its purchases of oil and parts. In support of its petition, petitioner submitted some purchase invoices and sales invoices to show the actual markups on those purchases during the audit period.

4. The purchase invoices submitted did not readily identify the type of parts being purchased and consequently could not be matched to a corresponding sales invoice. Additionally, some of the purchase invoices were outside the audit period. In regard to oil, petitioner paid approximately 65¢ to 67¢ per quart for oil during 1977. Petitioner recorded oil sales of \$1.50 and \$1.75 during the period March through May, 1980.

The sampling of sales invoices submitted throughout the audit period disclosed that more oftentimes than not, along with the sales of parts were charges for installation labor. Conversely, labor charges were billed without sales of any parts. The Audit Division made no computations for labor charges to determine such sales separate and apart from the markup determination on parts.

5. Petitioner also submitted sales invoices to Nassau County Police Department and School District No. 3. Nontaxable sales were made to these exempt organizations in the amount of \$1,499.85 during the audit period.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of purchases to verify sales when sales records are not available for the determination of an exact amount of tax. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

That the application of the markups used by the Audit Division based on a prior audit was a reasonable calculation to reflect any additional taxes due. (Matter of Grant Co. v. Joseph, 2 N.Y.2d 196; Matter of Meyer v. State Tax Commission, 61 A.D.2d 233.)

B. That once it is established that the Audit Division's independent determination was permissible, the burden of proof is upon petitioner to show that the Audit Division's determination should be overturned. (People ex rel.

Kohlman & Co. v. Law, 239 N.Y. 346.) Petitioner has failed to meet that burden with respect to the markups on purchases applied on audit.


C. That petitioner has sustained the burden of showing that some sales made during the audit period were sales to organizations exempt from tax under section 1116 of the Tax Law (Finding of Fact "5"). That the audit findings are hereby adjusted to reflect those sales made.

D. That the petition of George's County Service, Inc. is granted to the extent indicated in Conclusion of Law "C" 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 December 20, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 208 089

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Shirley's County Service Co.</i>	
Street and No. <i>401 Shady Avenue</i>	
P.O., State and ZIP Code <i>118 Shady Ave</i>	
Postage <i>Post Office</i>	
Certified Fee	<i>1.75</i>
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982