

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

October 21, 1983

Green & Gold Auto Diagnostic Center, Inc.  
325 N. Merrick Ave.  
Merrick, NY 11566

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  
Melvin Frankel  
60 E. 42nd St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Green & Gold Auto Diagnostic Center, Inc. :  
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 3/1/74-10/2/80. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

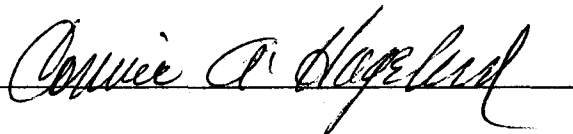
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Green & Gold Auto Diagnostic Center, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

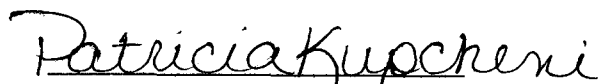
Green & Gold Auto Diagnostic Center, Inc.  
325 N. Merrick Ave.  
Merrick, NY 11566

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  
21st day of October, 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 :  
Green & Gold Auto Diagnostic Center, Inc. :  
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 3/1/74-10/2/80. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Melvin Frankel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Melvin Frankel  
60 E. 42nd St.  
New York, NY 10017

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  
21st day of October, 1983.

*Patricia Kupcheni*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

*Connie Hagelund*

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
GREEN & GOLD AUTO DIAGNOSTIC CENTER, INC. : 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 October 2, 1980.

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Petitioner, Green & Gold Auto Diagnostic Center, Inc., 325 North Merrick Avenue, Merrick, New York 11566, 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 October 2, 1980 (File No. 34407).

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 submitted by January 26, 1983. Petitioner appeared by Melvin Frankel, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioner is liable under the provisions of section 1141(c) of the Tax Law for the taxes determined due from the seller, George's County Service, Inc.

FINDINGS OF FACT

1. On September 23, 1980, petitioner, Green & Gold Auto Diagnostic Center, Inc., notified the Tax Commission of its intent to purchase the business assets of George's County Service, Inc. on October 3, 1980. Said notice was received by the Audit Division on September 29, 1980. The sales price of the business assets was designated to be \$32,000.00.

2. On September 29, 1980, the Audit Division issued a Notice of Claim to Purchaser advising Green & Gold Auto Diagnostic Center, Inc. of a possible claim for sales and use taxes from the seller. The Notice stated that no distribution of funds or property to the extent of the amount of the State's claim may be made before the seller's liability has been determined, payment of such liability has been made, and the purchaser is authorized to release the funds or property.

Said notice was addressed to the purchaser at the address as stated in its notification to the Tax Commission of the impending purchase. Normal mailing procedures were followed by the Audit Division in that a mailing record was made of all notices to purchasers mailed that day, a count was taken, and the sealing and stamping of the envelopes were witnessed by two parties. The notices were then deposited in a branch of the United States Post Office in Albany, New York and witnessed by two different parties.

A similar notice was also mailed to the escrow agent listed in petitioner's notification of the purchase; however, no mailing record was made.

3. On December 20, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Green & Gold Auto Diagnostic Center, Inc. covering the period March 1, 1974 through August 31, 1977. The Notice asserted additional tax determined due from George's County Service, Inc. in the amount of \$22,082.85 plus penalty and interest of \$18,505.94 for a total due of \$40,588.79.

In addition, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Green & Gold Diagnostic Center, Inc. [sic] covering the period September 1, 1977 through October 2, 1980. This Notice asserted additional tax determined due from George's County

Service, Inc. in the amount of \$9,068.10 plus penalty and interest of \$1,993.24 for a total due of \$11,061.34.

Both notices represented petitioner's liability as purchaser of the business assets of George's County Service, Inc. under the provisions of section 1141(c) of the Tax Law.

4. As a result of a prior hearing in the Matter of George's County Service, Inc. (State Tax Commission, February 5, 1982), the seller's additional tax liability for the period March 1, 1974 through November 30, 1977 has been reduced to \$10,729.06 and penalty and interest reduced to the minimum statutory rate.

5. Petitioner denied having received the Notice of Claim to Purchaser mailed by the Audit Division on September 29, 1980. Further, petitioner contended that the escrow agent did not receive any notice. A title search and affidavit of creditors was sought and secured before the consummation of the sale which did not list the Tax Department as a creditor. Petitioner proceeded with the purchase of the business on or about October 3, 1980, holding \$10,000.00 in escrow.

6. Petitioner argued that the Notice issued for the period March 1, 1974 through August 31, 1977 was arbitrary since it was based upon an estimated assessment against the seller. This Notice was reduced pursuant to Finding of Fact "4". Petitioner further argued that the actual tax due on the Notice covering the period September 1, 1977 through October 2, 1980 is still unknown and that the intent of the statute was not to claim an arbitrary amount due. Both notices issued were a result of a field audit performed on the books and records of the seller, George's County Service, Inc.

7. Finally, petitioner argued that the State should be estopped from proceeding against the purchaser if it failed to promptly attempt to collect tax from the seller.

8. A hearing in the Matter of George's County Service, Inc. covering the period December 1, 1977 through October 2, 1980 has been held, a decision having been rendered on July 15, 1983. The audit findings were reduced by \$1,499.85 in nontaxable sales made to exempt organizations during this period.

#### CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides in pertinent part that whenever the purchaser shall fail to give notice to the Tax Commission of a proposed bulk sale or whenever the Tax Commission shall inform the purchaser that a possible claim for tax exists, any sums of money, or other consideration, which the purchaser is required to transfer over to the seller shall be subject to a first priority right and lien for any taxes theretofore or thereafter determined to be due from the seller to the state and the purchaser is forbidden to transfer to the seller any such sums of money to the extent of the amount of the State's claim. Within ninety days of receipt of the notice of the sale from the purchaser, the Tax Commission shall give notice to the purchaser and to the seller of the total amount of any tax which the state claims to be due from the seller to the state, and whenever the Tax Commission shall fail to give such notice to the purchaser within ninety days from receipt of the notice of the sale, such failure will release the purchaser from any further obligation to withhold any sums of money which the purchaser is required to transfer over to the seller.

B. That petitioner properly notified the Tax Commission of the pending purchase of the business assets of George's County Service, Inc. That the

Audit Division properly notified petitioner of a possible existing claim on September 29, 1980 as evidenced by the signed mailing record used in the normal office procedure in mailing such notices. A presumption arises that such notice was received by the addressee notified. The mere denial of receipt by petitioner is insufficient to rebut the presumption. (Russell v. State Tax Commission, Albany County, Special Term, Cerrito, J., November 6, 1981.)

That the Audit Division further met the requirements of section 1141(c) of the Tax Law in that the purchaser was notified of the amount of the state's claim within 90 days.

C. That section 1138(a) of the Tax Law provides for a hearing when the person against whom tax is assessed makes application within ninety days. Petitioner's argument therefore relative to prompt collection of tax from the seller is without merit in that the seller had a right to a hearing for redetermination of taxes due. Moreover, the State may not be estopped "from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority". (McMahon v. State Tax Commission, 45 A.D.2d 625, 627.)

D. That in order to conform with adjustments previously made to the seller's liability (Finding of Fact "4"), the Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period March 1, 1974 through August 31, 1977 is reduced to \$10,074.67 plus minimum interest. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period September 1, 1977 through October 2, 1980 is reduced by \$780.10 to reflect the adjustment of tax due for the period September 1 through November 30, 1977 to \$654.39. The penalty is cancelled and the interest reduced to the minimum by statute.




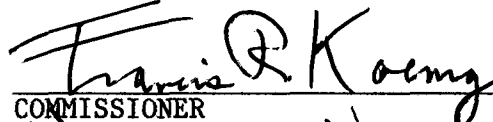
E. That the petition of Green & Gold Auto Diagnostic Center, Inc. is granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1980 along with the adjustments made in the Matter of George's County Service, Inc., State Tax Commission, July 15, 1983; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

OCT 21 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 208 432

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>DIAGNOSTIC CTR, INC.</b>	
<b>GREEN &amp; GOLD AUTO</b>	
Street and No. <b>325 N. MERRICK AVE.</b>	
P.O., State and ZIP Code <b>MERRICK, NY 11566</b>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 208 433

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>MELVIN FRANKEL</b>	
Street and No. <b>60 E. 42ND ST.</b>	
P.O., State and ZIP Code <b>NEW YORK, NY 10017</b>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982