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

February 11, 1983

Green Valley Ice Cream Corp.
c/o Binder, Mishkin, Stangler & Strear
One Old Country Rd.
Carle Place, NY 11514

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 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
Harvey Fox
Binder, Mishkin, Stangler & Strear
One Old Country Rd.
Carle Place, NY 11514
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Green Valley Ice Cream Corp.	:	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 - 2/28/77.	:	

State of New York
County of Albany

David Parchuck, 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, 1983, he served the within notice of Decision by certified mail upon Green Valley Ice Cream Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Green Valley Ice Cream Corp.
c/o Binder, Mishkin, Stangler & Strear
One Old Country Rd.
Carle Place, NY 11514

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, 1983.

David Parchuck

Janice A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Green Valley Ice Cream Corp.	:	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 - 2/28/77.	:	

State of New York
County of Albany

David Parchuck, 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, 1983, he served the within notice of Decision by certified mail upon Harvey Fox the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey Fox
Binder, Mishkin, Stangler & Strear
One Old Country Rd.
Carle Place, NY 11514

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 February, 1983.

David Parchuck

Janice A. Hagelund

AUTHORIZED TO ADMINISTER OATHS PURSUANT TO TAX LAW SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of GREEN VALLEY ICE CREAM CORP. 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.	DECISION

Petitioner, Green Valley Ice Cream Corp., 391 Atlantic Avenue, Oceanside, New York 11572, 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. 23181).

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 September 25, 1981 at 9:00 A.M. Petitioner appeared by Binder, Mishkin, Stangler & Strear (Harvey Fox, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether charges made and retained by petitioner as security for the faithful performance of and compliance with all terms of a lease agreement are subject to sales tax as an additional rental charge.

FINDINGS OF FACT

1. On June 20, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Green Valley Ice Cream Corp. for the period March 1, 1974 through February 28, 1977. The Notice was issued as the result of a field audit and asserted additional tax due of

$6,506.18, plus penalties and interest of $3,797.11, for a total of $10,303.29. The Notice was timely issued pursuant to a signed consent extending the period of limitation for assessment to June 20, 1978.

2. Petitioner, Green Valley Ice Cream Corp., was in the business of leasing ice cream trucks and providing the products to be sold therefrom. In addition to a rental fee, the lease agreements provided for an "up charge" of 10 percent on the purchase price of all products purchased for resale from the petitioner. The lessee was required to purchase all items sold or given away from the petitioner unless petitioner consented otherwise. Petitioner did not charge sales tax on the "up charges".

3. The lease agreement with petitioner contained the following pertinent provisions:

> 9. "Lessee has this day deposited and shall hereafter deposit with the Lessor the sum of "up charge" (as defined in Paragraph 10 hereof) as security for the faithful performance of and compliance with all the terms, covenants and conditions contained in the within lease. If the Lessee fails to comply with each and every one of the terms, covenants and conditions of the lease, the Lessor may terminate the lease herein and/or apply all or a portion of said sum towards any damage, cost disbursements or expenses it shall sustain as a result of any breach or violation hereunder by the Lessee. If, however, all terms, covenants and conditions are fully complied with by the Lessee, then and in that event, the security shall be returned to the Lessee at the termination of this lease on surrender of the vehicle in good condition and repair.
>
> 10. Lessee agrees that there shall be added to the purchase price for all products purchased by the Lessee from the Lessor an amount equal to 10% of such purchase price. This additional amount is hereinafter referred to as the up charge. In the event that this lease is terminated for any reason prior to the termination date provided for in paragraph 2 herein, the Lessor may retain the up charge as liquidated damages for such termination.
>
> 11. The Lessee agrees to purchase all items either sold or given away from the truck, from the Lessor, and from no other without Lessor's consent.

12. The sale or other disposition of any items other than those sold and/or furnished by the Lessor, and/or consented to be sold by the lessor, shall constitute a breach hereof by the lessee, by reason of which lessor may terminate this agreement forthwith and without notice. Lessor shall thereupon retain up charges, ice cream stock and accrued rentals as liquidated damages resulting from termination as provided herein."

4. On audit, it was the Audit Division's position that the net[1] "up charges" retained by petitioner resulting from a breach of the lease agreement constituted an additional rental charge and were therefore taxable under section 1105(a) of the Tax Law. The Audit Division determined retained "up charges" from worksheets used in preparation of Federal tax returns filed for the fiscal years ended January 1976 and 1977 totaling $61,546.00. The Audit Division found the retained "up charges" to be 3 percent of gross sales for those years; therefore, it determined that 3 percent of petitioner's gross sales in the fiscal year ended January, 1975 were also retained. The Audit Division determined taxable "up charges" of $88,918.98 for the audit period and tax due thereon of $6,237.76. The Audit Division also determined additional tax due of $268.42 on furniture and fixtures purchased; however, this amount is not at issue.

5. Petitioner contended that the 10 percent "up charges" were security against any breach of the terms in the lease agreement and as such an indemnification not subject to sales tax. Petitioner cited a determination in the Matter of Kincar Leasing Corp., State Tax Commission, March 29, 1978. Petitioner contended that its "up charges" were similar to the "turn-in damages" deemed to have been an indemnity in the above matter.

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[1] It was the testimony of the sales tax auditor that the monies held subject to tax were those retained after deduction for vehicle damage and did not include those amounts refunded.

6. Petitioner further argued that the Audit Division failed to provide an accurate amount of the charges actually kept and the amount returned to the lessee. The Audit Division obtained its figures from worksheets of petitioner's accountant. Petitioner offered no documentary evidence to show how the retained "up charges" were applied to the lessees' account balances.

7. Petitioner did not argue the application of penalties or interest.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax upon the receipts from every retail sale of tangible personal property except as otherwise provided; receipt being defined by section 1101(b)(3) as "(t)he amount of the sale price of any property...without any deduction for expenses..."; and sale being defined by section 1101(b)(5) "(a)s any transfer of title or possession or both...rental, lease or license to use...conditional or otherwise, in any manner or by any means whatsoever for a consideration...".

B. That 20 NYCRR 526.5(j) in discussing elements of a receipt provides that a charge made by a vendor to a customer as a deposit on tangible personal property rented, leased or loaned is not deemed to be a taxable receipt, but is collateral security for return of the property. Upon the return of the rented, leased or borrowed tangible personal property, any amount not refunded by the vendor constitutes a taxable receipt.

C. That petitioner's business activity was twofold: the lease of ice cream trucks and the sale for resale of ice cream products. That in accordance with petitioner's lease agreements, petitioner made charges of 10 percent of the purchase price of products sold, the purchase of which was a condition necessary for the proper performance and compliance with the lease agreement. Petitioner failed to identify the application of the retained "up charges" as

to whether they were applied to unpaid rental receipts, sales for resale, or whether they were net of the application of both. Therefore, the "up charges" not refunded by petitioner constitute a taxable receipt as defined by 20 NYCRR 526.5(j).

D. Although there is statutory authority for the use of a test period to determine the amount of tax due when a filed return is incorrect or insufficient, resort to this method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit. (Chartair, Inc v. State Tax Commission, 65 A.D. 2d 44).

That there is no indication in the record that petitioner's records were inadequate. Thus the projection of the actual retained "up charges" for the period February 1, 1975 through January 31, 1977 over the period March 1, 1974 through January 31, 1975 was not proper (Finding of Fact "4"). Therefore, the additional tax due for "up charges" is limited in that it is only to be computed based upon the actual additional taxable sales found to be due for the period audited (February 1, 1975 through January 31, 1977) of $61,546.00.

E. That the uncontested tax due on furniture and fixtures of $268.42 is sustained (Finding of Fact "4").

F. That the petition of Green Valley Ice Cream Corp. is granted to the extent indicated in Conclusion of Law "D" 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 June 20, 1978 with applicable penalties and interest thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Green Valley Ice Cream Corp. c/o Binder, MishKin, Stangler & Stear	
Street and No. One Old Country Rd.	
P.O., State and ZIP Code Carle Place, NY 11514	
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	
TOTAL Postage and Fees	$
Postmark or Date	

PS Form 3800, Feb. 1982

P 389 758 577

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Harvey Fox Binder, MishKin, Stangler & Stear	
Street and No. One Old Country Rd.	
P.O., State and ZIP Code Carle Place, NY 11514	
Postage	$
Certified Fee	
Special Delivery Fee	
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Return Receipt Showing to whom and Date Delivered	
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TOTAL Postage and Fees	$
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