

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

July 15, 1983

Ropro, Inc.
Attn: Howard Roe
109 Stewart Ave.
Hicksville, NY 11801

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
Ropro, 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 12/1/74-11/30/77. :

State of New York
County of Albany

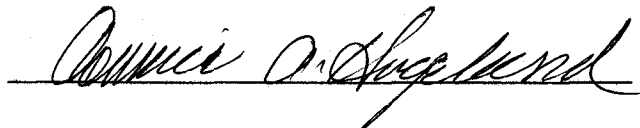
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Ropro, Inc., the petitioner in the within proceeding, by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

Ropro, Inc.
Attn: Howard Roe
109 Stewart Ave.
Hicksville, NY 11801

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

In the Matter of the Petition

of

ROPRO, 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 December 1, 1974 :
through November 30, 1977. :

Petitioner, Ropro, Inc., 109 Stewart Avenue, Hicksville, New York 11801, 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, 1974 through November 30, 1977 (File No. 27756).

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 20, 1982 at 1:15 P.M., with all briefs to be submitted by November 26, 1982. Petitioner appeared by Joel Brill, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the field audit performed by the Audit Division properly reflected the additional sales and use taxes due from petitioner where a three-month review of sales and a one-month review of purchases were made.

FINDINGS OF FACT

1. On June 20, 1979, the Audit Division, as a result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Ropro, Inc. for the period December 1, 1974 through November 30,

1977. The Notice asserted additional sales and use taxes due of \$7,949.55, plus minimum interest of \$1,815.17, for a total due of \$9,764.72.

2. Petitioner, by signature of its president, Howard Q. Roe, executed three consents to extend the period of limitation for the issuance of an assessment for the period December 1, 1974 through November 30, 1977 to June 20, 1979.

3. Petitioner is a swimming pool contractor doing business under the trade name of "Swimming Pools by Mitchell". Petitioner installs new swimming pools constituting capital improvements to real property and also performs repair and maintenance services. Sales of swimming pool supplies are also made.

4. The following records were requested and made available for audit: sales tax returns, Federal and State income tax returns, cash receipts journal, sales invoices (test period), check disbursements journal, purchase invoices (test period) and cancelled checks. Although the Audit Division listed the general condition of records available as "poor", any records requested were made available for audit. Petitioner maintained his books and records on a cash basis of accounting; therefore, the Audit Division performed its audit on that basis.

5. On audit, the Audit Division found that petitioner reported only taxable sales and tax due on its sales and use tax returns filed for the audit period. Gross sales and purchases subject to use tax were not reported. Petitioner determined the amount of its taxable sales by dividing the sales taxes collected by the appropriate sales tax rate.

The Audit Division reviewed sales invoices for the period March, April and May, 1977 and found that \$11,389.00 in sales were made in this period without the collection of sales tax thereon. The Audit Division disallowed

\$1,354.00 of such sales as not being capital improvements to real property and therefore taxable under section 1105(c)(5) of the Tax Law as maintaining, servicing or repairing real property.

Based on the review of the same three-month period, the Audit Division found that petitioner made taxable sales of \$11,687.00 but reported only \$4,195.00 on its sales and use tax returns filed.

The Audit Division proceeded to determine its percentage of error of 217.17666 per cent in the following manner:

| | <u>Based on 3-Month Analysis</u> | <u>Applied to Audit Period</u> |
|--------------------|--------------------------------------|------------------------------------|
| Non-Taxable Sales | \$11,389.00 | \$131,950.00 |
| Disallowed | 1,354.00 | 15,686.00 |
| Error | 11.888% | 11.888% |
| | | |
| Taxable Sales | \$11,687.00 | \$113,259.00 |
| Reported Taxable | 4,195.00 | 40,654.00 |
| Additional Taxable | \$ 7,492.00 | \$ 72,605.00 |
| Error | 178.59356% | 178.59356% |

The Audit Division then added the additional taxable sales for the audit period of \$72,605.00 to the disallowed non-taxable sales for the audit period of \$15,686.00 and divided the result by the reported taxable sales of \$40,654.00.

An analysis of petitioner's purchases was made for the month of October, 1975. Petitioner made purchases of materials totaling \$4,401.00 on which tax was paid on \$1,415.00 of those purchases, or 32.1 percent of the total. Total purchases made by petitioner for the audit period were \$98,281.00 on which the Audit Division applied the above percentage of tax paid purchases to determine tax paid purchases of \$31,548.00 for the audit period.

Based on Federal tax returns filed for the years 1974, 1975 and 1976, petitioner's average cost of materials was 44.42 percent of sales. The Audit Division determined purchases subject to use tax as follows:

| | |
|---|---------------------|
| Gross Receipts Including Tax | \$253,517.00 |
| Taxable Receipts Including Tax: | |
| Audited Taxable Sales | \$113,259.00 |
| Sales Tax | 8,308.00 |
| Disallowed Non-Taxable | <u>15,686.00</u> |
| Total | <u>137,253.00</u> |
| Non-Taxable Capital Improvements | \$116,264.00 |
| Percentage Representing Materials | 44.42% |
| Cost of Materials | \$ 51,644.00 |
| Tax Paid Purchases | <u>31,548.00</u> |
| Additional Purchases Subject to Use Tax | <u>\$ 20,096.00</u> |

The Audit Division thereby determined additional sales tax due of \$6,475.83 and use tax due of \$1,473.72 for the audit period.

6. At a conference held with the Audit Division, petitioner submitted an analysis of its bank deposits for the entire audit period and supporting sales invoices or contracts. The auditor was unable to make a complete review of the information submitted because her supervisor said she already had spent too much time on the case. Based on a partial review of the invoices submitted, the Audit Division redetermined additional taxable sales to be \$64,976.00 and purchases subject to use tax to be \$26,021.00.¹ This resulted in a reduction conceded by the Audit Division of total sales and use tax due to \$6,674.12.

7. Petitioner argued that its taxable repair and maintenance sales were more prevalent in the latter part of the audit period in which the Audit Division reviewed its sales; therefore, the months reviewed did not accurately reflect the business activity of the entire audit period. Petitioner submitted additional sales invoices and contracts throughout the audit period to establish the type of work that was performed.

¹ The Audit Division increased purchases subject to use tax due to the fact that petitioner substantiated more capital improvement sales in the entire audit period than that which was determined as a result of the original test period.

8. Petitioner submitted purchase invoices throughout the audit period to show that sales tax was paid thereon. Petitioner also contended that a payment made on account to one of its suppliers during the month of October, 1975, was incorrect due to many credits which were due. Petitioner failed to show, however, how this would change the findings of the Audit Division in its review of that month for tax paid purchases since the Audit Division conformed to petitioner's cash accounting basis.

9. Petitioner had adequate records available for a detailed analysis of its sales and purchases.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available.

B. That although there is statutory authority for use of a test period when necessary to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

That petitioner maintained adequate records from which an exact amount of tax could have been determined for the audit period. Moreover, the test period used on audit did not accurately reflect the changing business activities of the petitioner. That the audit results are therefore limited to the additional sales tax determined due for the period March, April and May, 1977 and use tax determined due for the month of October, 1975.

C. That the petition of Ropro, Inc. is granted to the extent indicated in Conclusion of Law "B" 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, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983

Rodrica Owclun
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. O'Neill
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ROPRO, INC.

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: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales and Use :
Taxes under Article 28 & 29 of the Tax Law for the :
Period December 1, 1974 through November 30, 1977.

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 19th day of August, 1983, she served the within notice of Decision by certified mail upon Ropro, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ropro, Inc.
c/o Mitchell Swimming, Inc.
ATTN: Howard Roe
109 Stewart Avenue
Hicksville, NY 11801

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
19th day of August, 1983.

Jean D. Schutt

Connie R. Hagelund

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

Remail

~~July 15, 1983~~

AUG 19 1983

Ropro, Inc.
Attn: Howard Roe
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Hicksville, NY 11801

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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

ALBANY
JUL 15 1983
N. Y.
PB 05917 L
112:
[REDACTED]

P 481 208 043

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to | |
| Ro pro Inc. | |
| Street and No. Attn: Howard Roe | |
| 109 Stewart Ave. | |
| P.O., State and ZIP Code | |
| Hicksville, NY 11801 | |
| 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 481 208 350

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to Repro Inc. | |
| C. Mitchell Swimming Inc. | |
| Street and No. (Attn: Howard Roe) | |
| 109 Stewart Ave | |
| P.O., State and ZIP Code | |
| Hicksville N.Y. 11801 | |
| 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



State of New York
STATE TAX COMMISSION
TAX APPEALS BUREAU

Date 8/19/83

To STC

This is a remail of
a S. C. Decision - Please
Associate

Thanks
Jean

TA 26 (9-79)

STATE OF NEW YORK

Commission

BUREAU

IMPUS

12227



REASON: CHECKED
Handwritten: [illegible]
The [illegible] refused

Ropro, Inc.
Attn: Howard Roe
109 Stewart Ave.
Hicksville, NY 11801

CERTIFIED

481 208 043

MAIL