

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

December 20, 1983

Mr. Speedy, Inc.
ATTN: Carl Veale
42 W. Main St.
Rochester, NY 14614

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Eugene Parrs
Woods, Oviatt, Gilman, Sturman & Clarke
44 Exchange St.
Rochester, NY 14614
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition
of
Mr. Speedy, Inc.

for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the
Period 12/1/76-11/30/79.

State of New York }
County of Albany } ss.:

Eugene Parrs
Woods, Oviatt, Gilman, Sturman & Clarke
44 Exchange St.
Rochester, NY 14614

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.

David Parluck

Barbara A. Hagedorn
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MR. SPEEDY, 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, 1976 :
through November 30, 1979.

Petitioner, Mr. Speedy, Inc., Attn: Carl Veale, 42 West Main Street, Rochester, New York 14614 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, 1976 through November 30, 1979 (File No. 33466).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Room 1300, Rochester, New York 14604 on March 7, 1983 at 1:15 P.M., with all briefs to be submitted no later than May 21, 1983. Petitioners appeared by Eugene Parrs, Esq. and David Bernardi, CPA. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUES

I. Whether certain sales made by petitioner were made to customers who were exempt from paying the sales tax thereon.

II. Whether petitioner is liable for the sales tax on individual items sold for 10¢ or less where he could not collect tax from his customers.

FINDINGS OF FACT

1. On November 10, 1980, as a result of a field audit, petitioner Mr. Speedy, Inc. was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Said notice asserted additional sales tax of \$21,438.57 plus

interest of \$4,272.94 for a total of \$25,711.51 and covered the period December 1, 1976 through November 30, 1979.

2. Petitioner, under signature of its president Carl Veale, consented to extend the period of limitation to assess the period December 1, 1976 through August 31, 1977 to December 20, 1980.

3. Petitioner operates a walk in retail photo copy business where all types of photo copies are made and sold. Sales ranged from large multiple copy sales to sales of individual copies made at 10¢ and/or less.

4. On audit, the Audit Division found that very few sales invoices were available and the balance of the records was inadequate to verify exempt sales reported on sales and use tax returns filed. It was alleged by petitioner's representatives that perhaps a disgruntled employee, who disappeared about the same time as the records, was responsible for any missing records.

5. The audit performed consisted of accepting the gross sales as reported on the sales and use tax returns filed for the audit period in the amount of \$388,410.00, deducting the taxable sales reported of \$20,007.00 for the same period and leaving petitioner the burden of proving that the balance, \$368,403.00, was non-taxable sales as claimed. Approximately 2½ months were allowed petitioner to obtain verification from his customers that he made non-taxable sales to them, and as a result was able to show that he made \$62,136.90 of non-taxable sales during the audit period. This left \$306,266.10 in unsubstantiated exempt sales and thus the above notice was issued reflecting tax due at the 7 percent rate in the amount of \$21,438.57.

6. As the result of a pre-hearing conference, petitioner was able to substantiate that an additional \$56,704.44 of non-taxable sales were made during the audit period. This reduced the unsubstantiated exempt sales to

\$249,561.66 and the tax asserted due to \$17,469.33 which is the amount at issue at this hearing.

7. Petitioner maintained that approximately \$108,000.00 of the sales made during the audit period were those of individual copies at 10¢ or less, and that because it could not collect tax on these sales due to the structure of the 7 percent tax collection chart prescribed by regulation 20 NYCRR 530.17 that it was not required to remit tax on these sales.

8. At the hearing petitioner submitted three customers' letters sent to petitioner at its request in an attempt to verify additional non-taxable sales.

A letter from MXR Innovations, Inc. stated that only 1979 invoices could be readily located and that 1979 invoices reflected both taxable and nontaxable purchases. The letter did not indicate the amount of the 1979 purchases made but stated that a \$22,000.00 estimate of petitioner for the period under audit would be reasonable in the absence of a more accurate figure. A review of other evidence submitted at the hearing showed that \$2,980.43 was allowed as nontaxable sales made to MXR; the record is void as to whether or not this is the same entity.

A letter from Reliable Furniture, Inc., indicated that it purchased \$9,000.00 of printed material from petitioner during the audit period. The letter stated that the purchases were exempt as materials used for resale. No copies of invoices accompanied this letter; the letter did not explain in detail how the materials were resold.

A letter from Center for Organization Development indicated that it purchased \$5,600.00 of materials during the audit period and that in addition it was a tax exempt organization. No copies of invoices accompanied the letter and no exempt organization number was supplied.

None of the above three letters were accompanied by exemption certificates or exempt organization certificates.

9. At the hearing petitioner submitted a list of several other customers who did not respond to its customer canvas for one reason or another. (i.e. out of business). Estimated sales figures for each were supplied and totalled \$98,600.00 which, petitioner alleged, were sales which should also be considered non-taxable. For some of the customers plates prepared for the printing of materials sold were submitted to substantiate that some sales were made to these customers. Also, some of the organizations were tax exempt organizations. However, the plates bore no evidence and no other evidence was submitted to indicate the amounts of sales made and whether or not the sales made to these customers were during the audit period. In addition, allowances were made for non-taxable sales made to some of these customers. There were no exemption certificates or exempt organization certificates presented for any of these customers.

10. At the time of the hearing petitioner's president, Mr. Carl Veale, was out of town for business purposes and was therefore not available to testify concerning the unavailability of the records or the additional non-taxable sales purportedly made.

CONCLUSIONS OF LAW

A. That 20 NYCRR 530.17 sets forth a 7 percent combined state and local tax bracket schedule which does not allow for the collection of any tax on sales of 10 cents or less. However, section 1137(a) of the Tax Law provides that every person required to file a return under section 1136 of the Tax Law, such as petitioner, whose total taxable receipts are subject to the tax imposed pursuant to subdivision (a) of section 1105 of the Tax Law shall, at the time

of filing such return, among other things not present in the instant case, pay to the tax commission:

"(i) Four percent of the total of all receipts,... subject to tax under this article, and if any of such receipts, ... are subject to local tax imposed pursuant to article twenty-nine of this chapter, an additional percentage of the total thereof equal to the percentage rate of such local tax;"

That the sales made of 10 cents or less totalling approximately \$108,000.00 (Finding of Fact "7" supra) are taxable sales made by petitioner for which it must remit New York State and local sales tax (Matter of Komp v. State Tax Commission, 56 Misc. 2d 824).

B. That section 1132 (c) of the Tax Law states, in pertinent part:

"For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), ... of section eleven hundred five, ... are subject to tax until the contrary is established, and the burden of proving that any receipt,... is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may perscribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission, the number of his registration certificate, together with such other information as said commission may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, or (2) the purchaser prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail...."

That petitioner has failed to sustain its burden of proof in demonstrating that the sales made as described in Findings of Fact "8" and "9" supra

were in fact nontaxable sales. Therefore, these sales must be considered taxable sales within the meaning and intent of section 1132 of the Tax Law.


C. That the Notice at issue herein should be reduced to tax due of \$17,469.33 in accordance with Finding of Fact "6" supra.


D. That the petition of Mr. Speedy, Inc. is granted to the extent indicated in Conclusion of Law "C" above; that in all other respects the petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated November 10, 1980 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 20 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 167

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Mr. Speedy, Inc.</i>	
Street and No. <i>42 W. Main St.</i>	
P.O., State and ZIP Code <i>Rochester, NY 14614</i>	
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 470 315 168

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Eugene Paris</i>	
Street and No. <i>44 Exchange St.</i>	
P.O., State and ZIP Code <i>Rochester, NY 14614</i>	
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