

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

July 15, 1983

3RD Avenue Grinding Shop, Inc.
4116 3rd Ave.
Brooklyn, NY 11232

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
Harold S. Keller
5602 4th Avenue
Brooklyn, NY 11220
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
3RD Avenue Grinding Shop, 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 6/1/75-5/31/78. :

State of New York
County of Albany

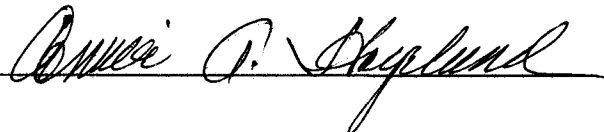
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon 3RD Avenue Grinding Shop, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

3RD Avenue Grinding Shop, Inc.
4116 3rd Ave.
Brooklyn, NY 11232

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 :
3RD Avenue Grinding Shop, 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 6/1/75-5/31/78. :

State of New York
County of Albany

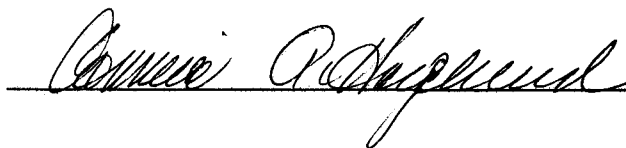
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Harold S. Keller the representative of the petitioner in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

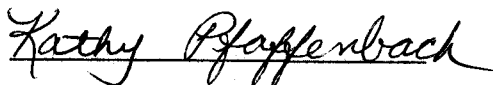
Harold S. Keller
5602 4th Avenue
Brooklyn, NY 11220

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
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	:	
3RD AVENUE GRINDING SHOP, 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 June 1, 1975	:	
through May 31, 1978.	:	

Petitioner, 3rd Avenue Grinding Shop, Inc., 4116 3rd Avenue, Brooklyn, New York 11232, 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 June 1, 1975 through May 31, 1978 (File No. 27913).

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 December 1, 1982 at 2:45 P.M., with all briefs to be submitted by December 31, 1982. Petitioner appeared by Harold S. Keller, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether a field audit performed by the Audit Division properly reflected the additional sales and use tax liability asserted against petitioner.

FINDINGS OF FACT

1. On July 1, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against 3rd Avenue Grinding Shop, Inc. for the period June 1, 1975 through May 31, 1978. The Notice asserted additional sales and use tax due of \$28,871.96, plus penalty and interest of \$14,921.46, for a total of \$43,793.42.

2. Petitioner executed a consent to extend the period of limitation for the issuance of an assessment for the period March 1, 1975 through May 31, 1978 to July 1, 1979.

3. Petitioner was in the business of grinding, filing and sharpening instruments such as band saws, mainly for industrial customers. It also sold a small amount of items such as saws and keys at retail.

4. On audit, the Audit Division reviewed sales made by petitioner and found a large discrepancy between gross sales recorded in its books and those reported on sales and use tax returns filed.

The Audit Division then requested sales invoices for the period December, 1976 through February, 1977 in order to verify any exempt sales made by petitioner. The auditor felt this period was representative of sales and would reflect the types of sales made throughout the audit period. Sales invoices for December, 1976 were not available. The Audit Division reviewed the sales invoices provided for January and February, 1977. Based on the invoices provided, petitioner made total sales of \$15,418.01 of which \$13,317.19 were taxable sales and the appropriate sales tax collected thereon. Petitioner's sales records disclosed total sales of \$24,524.03 for the two months.

Petitioner's sales as recorded in its books were \$485,199.00 for the audit period. The Audit Division held these sales subject to tax of \$38,815.92 in their entirety. Petitioner reported and paid sales tax of \$11,991.00 on sales and use tax returns filed. The difference of \$26,824.92 was held due.

The Audit Division then reviewed purchases made by petitioner of grinding supplies and materials during the month of January, 1977, purchases in the truck expense account for the period December, 1976 through February, 1977, and office supplies for the period December, 1976. The Audit Division found

some purchases on which no tax was paid and determined a percentage of additional purchases subject to use tax as follows:

	<u>Total Reviewed</u>	<u>Additional Taxable</u>	<u>Percentage</u>
Grinding Supplies and Materials	\$827.28	\$333.00	40.25%
Truck Expense	555.87	107.50	19.3 %
Office Supplies	357.88	4.10	1.15%

The Audit Division then applied the percentages to the purchases in the appropriate accounts for the entire audit period and determined total purchases subject to use tax as follows:

	<u>Account Total</u>	<u>Additional Taxable %</u>	<u>Purchases Subject to Use Tax</u>	<u>Additional Tax Due</u>
Grinding Supplies and Materials	\$16,691.83	40.25%	\$6,718.00	\$537.44
Truck Expense	17,230.04	19.3 %	3,325.00	266.00
Office Supplies	3,462.95	1.15%	40.00	<u>3.20</u>
Additional Use Tax Due on Purchases				<u>\$806.64</u>

The Audit Division also found a purchase of an automatic saw sharpener in the amount of \$15,505.00 on which no sales tax was paid. It held this purchase subject to use tax of \$1,240.40.

The Audit Division thereby determined the total sales and use tax due of \$28,871.96 for the audit period.

5. Petitioner contended that 50 to 60 percent of its customers are exempt from paying sales tax. It argued that any difference between the sales as recorded in its books and those reported on sales and use tax returns filed is exempt sales. Petitioner offered no documentary evidence to support this contention.

6. Petitioner had undergone a sales tax audit subsequent to the one in issue. Petitioner argued that all of its nontaxable sales were substantiated

on the second audit and that the findings should revert to the original audit since the majority of its customers were the same.

In support of its position, petitioner submitted copies of the audit workpapers covering the period September 1, 1979 through May 31, 1982 to show that no additional taxable sales were found. Petitioner did not report gross sales during this period; however, it did report taxable sales of \$463,745.00 during the 11 quarters subsequently audited with tax remitted thereon of \$37,313.00.

7. Petitioner relied on the services of its accountant in preparing sales and use tax returns filed.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides in part, as follows:

"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...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 prescribe... or (2) the purchaser prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence... which the tax commission may require demonstrating that the purchaser is an exempt organization... the sale shall be deemed a taxable sale at retail."

B. That petitioner failed to sustain its burden of proof under section 1132(c) of the Tax Law to show that the difference between its gross sales as recorded in its books and records and those reported on its sales and use tax returns filed were not subject to tax.

The Audit Division, however, in its review of petitioner's sales during January and February, 1977, found that petitioner made and substantiated nontaxable sales totaling \$2,100.82. Of the total gross sales made by petitioner during that period of \$24,524.03 (Finding of Fact "4"), this represents 8.57

percent of petitioner's sales being nontaxable. The Audit Division failed to consider such sales in its overall audit findings.

C. 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. That the available information disclosed that 8.57 percent of petitioner's gross sales were nontaxable and the findings are reduced to reflect such sales.

D. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of recordkeeping 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's recordkeeping was insufficient for the determination of an exact amount of tax; therefore the audit method employed by the Audit Division was proper and in accordance with the provisions of Tax Law §1138(a).

E. That it is apparent that petitioner has corrected any recordkeeping errors it might have made in the past as evidenced by the fact that the subsequent audit revealed no additional taxable sales since petitioner reported such sales in conformance with the original audit findings. That the penalties and interest in excess of the minimum statutory rate are hereby cancelled.

F. That the petition of 3rd Avenue Grinding Shop, Inc. is granted to the extent indicated in Conclusions of Law "C", and "E" 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 July 1, 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


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 208 094

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>3rd Ave. Huntington Shop</i>	
Street and No. <i>4116 3rd Ave.</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11232</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 481 208 095

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Harold S. Kelleo</i>	
Street and No. <i>5602 4th Ave.</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11220</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