

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

May 20, 1983

Bruce Wyss  
d/b/a Wyss Bruce Auction Service  
Box 10, Rt. 20  
Madison, NY 13402

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  
Le Roy Hodge  
P.O. Box 317  
Hamilton, NY 13346  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Bruce Wyss :  
d/b/a Wyss Bruce Auction Service : **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 :  
3/1/75 - 5/31/78. :

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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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Bruce Wyss, d/b/a Wyss Bruce Auction Service the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bruce Wyss  
d/b/a Wyss Bruce Auction Service  
Box 10, Rt. 20  
Madison, NY 13402

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  
20th day of May, 1983.

David Parchuck

James A. Heggen

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	:	
Bruce Wyss	:	
d/b/a Wyss Bruce Auction Service	:	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 3/1/75 - 5/31/78.	:	

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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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Le Roy Hodge the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Le Roy Hodge  
P.O. Box 317  
Hamilton, NY 13346

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  
20th day of May, 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	:	
	:	
BRUCE WYSS	:	DECISION
D/B/A WYSS BRUCE AUCTION SERVICE	:	
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, 1975	:	
through May 31, 1978.	:	

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Petitioner, Bruce Wyss, d/b/a Wyss Bruce Auction Service, Box 10, Route 20, Madison, New York 13402, 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, 1975 through May 31, 1978 (File No. 24649).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 29, 1980 at 9:15 A.M. and scheduled for continuance on October 30, 1981. Petitioner advised the State Tax Commission on October 26, 1981 that he desired that the matter be decided on the existing record. Petitioner appeared by LeRoy Hodge, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the result of a field audit whereby the Audit Division used a test period to verify petitioner's exempt sales properly reflected petitioner's sales tax liability.

FINDINGS OF FACT

1. On September 25, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Bruce Wyss d/b/a

Wyss Bruce Auction Service covering the period March 1, 1975 through May 31, 1978. The Notice was issued as a result of a field audit and asserted additional tax due for the period June 1, 1975 through May 31, 1978 of \$4,459.74, plus penalties and interest of \$1,830.82, for a total amount due of \$6,290.56.

2. Petitioner's business activity consisted of holding auctions at his own facilities and occasionally at homes of clients who required his services.

3. On audit, the Audit Division found that petitioner's records consisted of clerk sheets (lists of items sold with bidding numbers assigned to customers at each auction), sales slips, resale certificates and bank statements with canceled checks. The Audit Division found all records to be available; however, it was necessary to sort out the source documents since the sales were not summarized in any formal book of entry.

The Audit Division proceeded to review individual sales made by petitioner during the period December 1, 1976 through February 28, 1977 at the three auctions held during this period. The Audit Division accepted as correct the sales made where tax was charged. Where no tax was charged, the Audit Division matched the sale with exemption certificates. The remaining sales totaled \$11,002.43. These were neither substantiated by certificates nor designated by petitioner as being to a dealer. These sales were held subject to tax for that period. The Audit Division then determined an error of omission of 51.5 percent based on taxable sales reported on the tax return for that period of \$7,260.00. It applied 51.5 percent to the total taxable sales reported by petitioner on sales and use tax returns filed for the audit period.

and determined additional taxable sales of \$75,328.93 and additional tax due thereon of \$4,459.74.<sup>1</sup>

4. Petitioner contended that merchandise was often taken on consignment where the consignor would buy back the consigned goods if the desired price was not bid by another customer. Petitioner failed to show how this type of transaction would affect the audit results since the Audit Division allowed petitioner credit for this type of transaction.

5. Petitioner submitted a summary analysis of taxable sales made for the entire audit period. His analysis showed taxable sales were made of \$150,078.30. Petitioner reported taxable sales of \$144,328.00 on sales and use tax returns filed. This resulted in additional taxable sales of \$5,750.30 and tax due thereon of \$345.02.

6. Petitioner argued that the period examined by the Audit Division was not indicative of summer months when more dealers were present at the auctions. The hearing was continued for the purpose of having petitioner review his records for the mutually agreed upon period of June 1 through August 31, 1977 and substantiate any exempt sales made to dealers for that period. Petitioner offered no additional substantiation of exempt sales at the hearing or upon submission.

7. The Audit Division failed to establish the necessity for a "test period" audit.

8. Seven of the eight sales and use tax returns submitted by the Audit Division were filed by petitioner beyond their due dates.

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<sup>1</sup> The Audit Division erred in its computation of the error of omission but at no time increased the resultant tax asserted due.

CONCLUSIONS OF LAW

A. That although there is statutory authority under section 1138(a) of the Tax Law 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 record keeping 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.

B. That although the Audit Division found petitioner's records to be kept in an informal manner, no evidence exists that the records were incomplete or insufficient to conduct a complete audit. The petitioner analyzed his own records and determined an underreporting of taxable sales made for the audit period of \$5,750.30 and an admitted tax deficiency of \$345.02.

C. That section 1132(c) of the Tax Law states that it shall be presumed that all receipts for property subject to tax are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax unless a vendor shall have taken from the purchaser a certificate to the effect that the property was purchased for resale or for some use by reason of which the sale is exempt from tax. That petitioner failed to show that receipts in the amount of \$11,002.43 in the test period were not subject to tax. That the additional tax due, however, is limited to the tax asserted in that period.

D. That the petition of Bruce Wyss d/b/a Wyss Bruce Auction Service is granted in conjunction with Conclusions of Law "B" and "C" 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 September 25, 1978

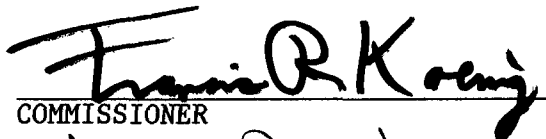
with applicable penalties and interest thereon; and that, except as so granted,  
the petition is in all other respects denied.

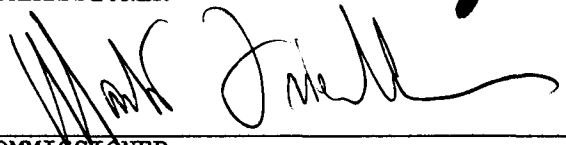
DATED: Albany, New York

STATE TAX COMMISSION

MAY 20 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 481 207 810

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Bruce Wyss</u>	
<u>11612 Wyss Bruce Auction Service</u>	
Street and No.	
<u>Box 10, Rt. 20</u>	
P.O., State and ZIP Code	
<u>Madison, NY 13402</u>	
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 481 207 811

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Le Roy Hodge</u>	
<u>P.O. Box 317</u>	
Street and No.	
P.O., State and ZIP Code	
<u>Hamilton, NY 13346</u>	
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