STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Greco Bros. Amusement Co., Inc.	AFFIDAVIT OF MAILING
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 9/1/78-8/31/81.	

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

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 25th day of May, 1984, he served the within notice of Decision by certified mail upon Greco Bros. Amusement Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Greco Bros. Amusement Co., Inc.
Main St.
P.O. Box G
Glasco, NY 12432

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Greco Bros. Amusement Co., Inc.	AFFIDAVIT OF MAILING
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 9/1/78-8/31/81.	

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

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 25th day of May, 1984, he served the within notice of Decision by certified mail upon Michael E. Catalinotto, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael E. Catalinotto
Maynard, O'Connor & Smith
P.O. Box 180
Saugerties, NY 12477

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

Greco Bros. Amusement Co., Inc.
Main St.
P.O. Box G
Glasco, NY 12432

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
Michael E. Catalinotto
Maynard, O'Connor & Smith
P.O. Box 180
Saugerties, NY 12477
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of GRECO BROS. AMUSEMENT CO., INC. 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 September 1, 1978 through August 31, 1981.	DECISION

Petitioner, Greco Bros. Amusement Co., Inc., P.O. Box G, Main Street, Glasco, New York 12432, 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 September 1, 1978 through August 31, 1981 (File No. 38546).

On June 6, 1983, petitioner advised the State Tax Commission, in writing, that it desired to waive a hearing and to submit the case to the State Tax Commission based on the entire record contained in the file. All briefs were to be submitted by August 29, 1983. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether petitioner is liable for use tax on its purchases of vending and amusement machines placed in various locations in New York State.

II. Whether the method by which petitioner was reporting use tax for the use of such machines on sales and use tax returns filed was proper.

III. Whether the denial of an alternate method of reporting use taxes is discriminatory and denies petitioner equal protection under the Tax Law.

FINDINGS OF FACT

1. On June 16, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Greco Bros. Amusement Co., Inc. covering the period September 1, 1978 through August 31, 1981. The Notice was issued as a result of a field audit and asserted additional tax due of $21,026.18, plus interest of $4,472.75, for a total of $25,498.93.

2. Petitioner, by signature of its president, Frank D. Greco, executed a consent to extend the period of limitation within which to issue an assessment for the period September 1, 1978 through November 30, 1979 to December 20, 1982.

3. Petitioner has been a distributor of various types of vending machine devices including but not limited to amusement machines, cigarette vending machines, and food dispensing machines. In addition, petitioner withdrew from its inventory and placed such equipment in service on the premises of others for the purpose of making sales through these machines.

When petitioner placed a piece of equipment in a location and took back another piece of equipment which it had previously placed in that location, it paid a use tax on the difference in value between the new equipment being placed and the old equipment being removed. The value of the new equipment was determined according to a pricing guide provided by the manufacturer of the equipment, and the value of the old equipment was determined in accordance with a price guide for used equipment akin to a guide used by automobile dealers in determining trade-in value for used automobiles.

4. The Audit Division asserted that petitioner's use of the machines on its vending route was subject to the compensating use tax at full value regardless of the fact that such machines might have been subsequently resold by petitioner.

It took the position that petitioner was liable for use tax on the replacement cost of the equipment and that petitioner was not entitled to any credit for the value of the equipment replaced. The Audit Division therefore determined the additional use tax due of $21,026.18.

In support of its position, the Audit Division maintained that the use of the terms "credit", "accepted", "payment" and "resale", as used in the exclusion in section 1110 of the Tax Law, presupposes some type of transaction between two separate entities; and, therefore, use of the terms establishes that the clause was intended to refer to a transaction where a vendor sells the property subject to tax to a customer.

5. Petitioner's arguments were two-fold. First, petitioner argued that it should not be subjected to any sales or use tax with respect to the equipment being operated by it in that the acquisition of the equipment was for the purpose of resale, and the equipment's use was incidental to the primary purpose for which it was acquired, its eventual sale. Petitioner contended that the placement and operation of the equipment by it was simply a means of promoting machines for eventual sale to the owner of the premises where the equipment was located or to such other individuals who may have occasion to come in contact with said equipment.

Petitioner made an analogy to vehicles used by automobile dealers for the purpose of demonstration where such vehicles are not taxable to the dealer since they are intended for resale and will be subject to a sales tax at such time when they are sold.

6. Secondly, petitioner maintained that if its use of the aforesaid equipment was subject to a compensating use tax, a credit for the machine replaced should be allowed. Petitioner relied on that portion of Tax Law §1110

which states in summary that the tax shall be at the appropriate rate of the consideration given for the use of property, but excluding any credit for tangible personal property accepted in part payment and intended for resale.

Petitioner argued that the Tax Law contains no provision indicating that, in order to obtain such a credit, the transaction must be between two separate entities. If it did, petitioner hypothesized that the same tax result could have been achieved by forming two separate corporations: one for the purpose of operating the equipment, the other for the purpose of selling such equipment.

Petitioner argued that the Tax Law was ambiguous in respect to petitioner's business operation and, therefore, should be construed in its favor.

7. In further support of its petition, petitioner argued that the Department has established a formula by which automobile dealers may remit a compensating use tax for the use of vehicles for business or personal purposes without taxing the full retail value or cost to the dealer.[1] Similarly, petitioner claimed that it should not have to pay a use tax based on the full value of the equipment being used by it, and that the tax should be reduced by the amount of the credit which it has been claiming for the equipment being replaced. Petitioner argued that the denial of such credit would also deny it equal protection under the law.

8. Petitioner did not seek necessarily to avoid taxation on its use of equipment, but sought some equitable solution for the remitting of same.

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[1] Motor vehicles owned by a dealer and used occasionally for business or personal purposes are subject to a tax computed at a two percent monthly depreciation rate. Tax Info. Bklt. No. 5., ST-215, 9-73; Op. Counsel 1965 NYTB-V.3, P. 19, Info. Ltr. 6, 8-2-65.

Petitioner operated between 60 and 70 machines on its route; however, no route list was maintained or made available on audit. The Audit Division determined petitioner's purchases for compensating use tax purposes as follows: an average turnover of 18 machines per quarter was determined, based on those reported, and multiplied by the average cost per machine for each of the three years under audit. This resulted in machine replacement cost. The reported purchases were deducted therefrom and the difference was held to be additional taxable purchases.

CONCLUSIONS OF LAW

A. That section 1110(A) of the Tax Law imposes the compensating use tax on the "use within this state...of any tangible personal property purchased at retail...". Section 1101(b)(6) of the Tax Law defines use as "(t)he exercise of any right or power over tangible personal property by the purchaser thereof...".

B. That petitioner's withdrawal of vending and amusement machines from its inventory for temporary use in its business operations constitutes a taxable use within the meaning and intent of sections 1101(b)(6) and 1110(A) of the Tax Law (see C. H. Heist Corp. v. State Tax Commission, 50 N.Y.2d 438).

C. That section 1110(A) of the Tax Law further provides that the use tax shall be applied to "the consideration given or contracted to be given for such property...excluding any credit for tangible personal property accepted in part payment and intended for resale...".

D. That the language of section 1110(A) is similar to that of section 1101(b)(3) of the Tax Law on which 20 NYCRR 526.5 provides:

> "(f) Trade-in. Any allowance or credit for any tangible personal property accepted in part payment by a vendor on the purchase of tangible personal property or services and intended for resale by such vendor shall be excluded when arriving at the receipt subject to tax."

E. That inasmuch as petitioner's replacement machines were drawn from its inventory of machines, no trade-in allowance was made by "a vendor on the purchase of tangible personal property". The Audit Division, accordingly, was correct in applying the compensating use tax to the cost of said machines from the manufacturer thereof.

F. That the statute does not provide for an alternate method of reporting use tax for the petitioner herein. That whether the denial of an alternate method of reporting use tax is discriminatory and denies equal protection under the Tax Law raises a constitutional question. That the constitutionality of the laws of the State of New York is presumed at the administrative level of the New York State Tax Commission. There is no jurisdiction at the administrative level to declare such laws, as applied to petitioner, unconstitutional.

G. That the petition of Greco Bros. Amusement Co., Inc is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 16, 1982 is sustained.

DATED: Albany, New York

MAY 25 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 440 977 044

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Michael E. Catalinotto, Jr.	
Street and No. Maynard O'Connor Smith	
P.O., State and ZIP Code P.O. Box 180	
Postage Saugerties NY 12477	
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 440 977 043

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Treas Bros Amusement	
Street and No. Main St.	
P.O., State and ZIP Code P.O. Box D.	
Postage Treas NY 12433	
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