

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas E. Muroski :
d/b/a Tom's Towing & Road Service : 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 6/1/78-5/31/81. :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Thomas E. Muroski, d/b/a Tom's Towing & Road Service the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas E. Muroski
d/b/a Tom's Towing & Road Service
416 W. Fifth St.
Oswego, NY 13126

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
18th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Thomas E. Muroski
d/b/a Tom's Towing & Road Service
416 W. Fifth St.
Oswego, NY 13126

Dear Mr. Muroski:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS E. MUROSKI	:	DECISION
d/b/a TOM'S TOWING AND ROAD 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 June 1, 1978	:	
through May 31, 1981.	:	

Petitioner, Thomas E. Muroski, d/b/a Tom's Towing and Road Service, 416 West Fifth Street, Oswego, New York 13126, 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, 1978 through May 31, 1981 (File No. 35634).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on March 10, 1983 at 10:45 A.M. with additional evidence to be submitted by May 15, 1983. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq. of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACTS

1. Petitioner, Thomas Muroski, d/b/a Tom's Towing and Road Service, was engaged in towing and road services throughout Oswego County. Petitioner operated from his personal residence.

2. On September 14, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against petitioner covering the period June 1, 1978 through May 31, 1981 for taxes due of \$1,042.79, plus interest of \$153.42, for a total of \$1,196.21.

3. On audit, the Audit Division reviewed sales invoices for the period March 1, 1980 through May 31, 1980 and found that all the invoices were recorded in the sales journal. The sales journal total for sales and sales tax collected agreed with the sales tax returns filed. The sales journal also agreed with the sales reported for income tax purposes.

The Audit Division verified that the nontaxable sales reported by petitioner were correct.

Petitioner's income tax returns for 1978, 1979 and 1980 showed net income of \$3,823.37, \$4,920.25 and \$5,246.44 respectively. The towing business was petitioner's only source of income. Petitioner was married and had three children.

The auditor was of the opinion that petitioner's mode of living was not consistent with his income and therefore performed a "source and application of funds" audit to reconstruct petitioner's income. Petitioner's personal living expenses were estimated to be \$9,828.00 per year based on an interview with petitioner. The net income reported for each of the above years was deducted from this amount resulting in an overapplication in each year. The Audit Division held that the source of funds for payment of the excess living expenses was from unreported receipts from the business. Such amount totaled \$14,897.00 for the audit period and additional sales taxes of \$1,042.79 was assessed thereon.

4. The Department of Taxation and Finance, in its answer to the perfected petition, stated that at a pre-hearing conference petitioner substantiated that

he received monetary gifts from relatives amounting to \$5,400.00 and as a result, petitioner's tax liability is reduced to \$664.79.

5. Petitioner did not maintain a personal or business checking account.

6. Petitioner argued that all sales are reflected in his books and records; he further argued that the Audit Division's estimate for food and clothing were excessive because he occasionally received these items from his family in exchange for services such as snow plowing and odd jobs.

Notwithstanding the foregoing arguments, petitioner maintained that the Audit Division did not allow for exempt sales which he estimated was 70 percent of gross sales.

CONCLUSIONS OF LAW

A. That the audit procedures described in Finding of Fact "3" were employed to verify the accuracy of the sales recorded in petitioner's books and records; that such procedures disclosed a significant variance between business income and personal expenditures to conclude that not all sales were recorded on the books and thus established the insufficiency and unreliability of petitioner's books and records (Matter of George Korba v. State Tax Commission, 84 A.D. 2d 655). Accordingly, the determination of additional taxes due was proper in accordance with the provisions of Section 1138(a) of the Tax Law (Matter of Chartair, Inc. vs. State Tax Commission, 65 A.D. 2d 44).

B. That petitioner failed to establish that any of the additional taxable sales determined by the Audit Division were in fact nontaxable as required by section 1132(c) of the Tax Law.

C. That in accordance with Finding of Fact "4", petitioner's liability is reduced to \$664.79.


D. That the petition of Thomas E. Muroski, d/b/a Tom's Towing and Road Service is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 14, 1981; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 742

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Thomas E. Muroski	
Street and No.	
416 W. Fifth St.	
P.O., State and ZIP Code	
Oswego, NY 13126	
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