

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
T & J Auto Repairs, 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 12/1/75-11/30/79. :

AFFIDAVIT OF MAILING

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 T & J Auto Repairs, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

T & J Auto Repairs, Inc.  
210 Delancey St.  
New York, NY 10002

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

James A. Haynes  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

*Annmarie A. Hays*  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 25, 1984

T & J Auto Repairs, Inc.  
210 Delancey St.  
New York, NY 10002

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  
Henry Reiningger  
40 First Ave.  
New York, NY 10009  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
T & J AUTO REPAIRS, 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, 1975	:	
through November 30, 1979.	:	

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Petitioner, T & J Auto Repairs, Inc., 210 Delancy Street, New York, New York 10009, 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, 1975 through November 30, 1979 (File No. 33962).

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 February 9, 1983 at 9:15 A.M. and continued to its conclusion on September 16, 1983 at 9:00 A.M. Petitioner appeared by Henry Reininger, Esq. The Audit Division appeared by Paul B. Coburn and John P. Dugan, Esqs. (Alexander Weiss and Angelo Scopellito, Esqs., of counsel).

ISSUES

I. Whether the records maintained by petitioner were sufficient for verification of an exact amount of taxable sales receipts.

II. Whether the 250 percent markup determined and applied to petitioner's purchases on audit properly reflected the sales made by petitioner.

FINDINGS OF FACT

1. On April 20, 1981, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against T & J Auto Repairs, Inc. covering the period December 1, 1975 through November 30, 1979. The

Notices were issued as a result of a field audit and asserted additional sales tax due of \$17,218.58 plus penalty and interest of \$11,052.87 for a total due of \$28,271.45.

2. Petitioner executed consents extending the time for issuing an assessment for sales and use taxes due for the period at issue to September 20, 1981.

3. Petitioner operated an auto body repair shop. Sales and use tax returns filed were prepared by petitioner's accountant from bank deposits made. Receipts from any customers deemed to be exempt from tax were deleted to determine taxable sales.

4. On audit, the Audit Division found that petitioner did not issue or retain sales invoices for every sale made. Petitioner retained a log of estimates made; however, this was not conclusive of its sales. The Audit Division attempted to perform a markup analysis; however, purchases of auto parts could not be associated with any particular estimate or sales invoice.

The Audit Division estimated petitioner's markup to be 250 percent on materials and supplies. This was the industry average based on past office experience. The Audit Division computed petitioner's sales for the period December 1, 1975 through November 30, 1979 as follows:

Purchases	\$199,186.00
Markup and Cost	350%
Gross Sales	<u>\$697,150.00</u>
Non-taxable Sales <sup>1</sup>	<u>29,352.00</u>
Audited Taxable Sales	<u><u>\$667,798.00</u></u>

Petitioner reported \$452,549.00 in taxable sales on sales and use tax returns filed. The Audit Division held the additional taxable sales of \$215,249.00 subject to sales tax of \$17,218.58.

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<sup>1</sup> The Audit Division accepted the nontaxable sales as reported by petitioner based on a test of nontaxable sales for the quarter ended August, 1979.

The additional taxable sales determined constitutes an error factor of 47.56 percent. In one of its attempts on audit to verify taxable sales reported, the Audit Division analyzed paint purchases and related those purchases to the number of jobs recorded. Based on the volume of paint purchased, the Audit Division determined an error factor of 62.75 percent. Although not used in the determination of tax due, the Audit Division felt this analysis confirmed the 250 percent markup on purchases determined on audit.

5. Petitioner argued that the markup determined on audit was much too high for its business operation. Further, petitioner argued that all of its purchases were not sold in that the premises was subject to numerous break-ins and pilferage by employees. Petitioner, however, failed to submit any evidence of such losses.

6. Petitioner did submit a sampling of purchase invoices from some of its suppliers showing both list and net selling prices. Based on this evidence submitted, petitioner's markup on parts averaged 25 percent.

Petitioner also submitted its estimate log for the period October 26, 1979 through February 1, 1980. Although not conclusive of sales made, this evidence did show that 54.35 percent of the estimated amounts constituted charges for materials and parts and 45.65 percent constituted labor charges. A 25 percent markup on parts which constitutes 54.35 percent of sales effectively yields a markup, considering labor charges, of 130 percent. Petitioner's average markup on materials and supplies based on U.S. Corporation Income Tax Returns filed during the audit period was 150 percent.

7. The Audit Division asserted penalty and interest due to the fact that the additional tax determined due was substantial. Petitioner maintained a good compliance record for filing its sales and use tax returns on a timely basis.

CONCLUSIONS OF LAW

A. 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. If necessary the tax may be estimated on the basis of external indices such as purchases or other factors.

That the Audit Division, lacking source documents to verify taxable sales receipts, marked up petitioner's purchases based on past experience in the industry. The application of that markup disclosed that the returns filed were insufficient. That the audit method used by the Audit Division was proper.

B. That the Audit Division, however, in reviewing petitioner's records available failed to properly compute petitioner's actual markup on purchases. That based on substantial evidence submitted, petitioner's markup on purchases, considering labor charges, was 150 percent (see Finding of Fact "6").

C. That the penalties and interest in excess of the minimum statutory rate are cancelled.


D. That the petition of T & J Auto Repairs, Inc. is granted to ~~the~~ extent indicated in Conclusions of Law "B" and "C" above; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued April 20, 1981; and that except as so granted, the petition is in all other respects denied.

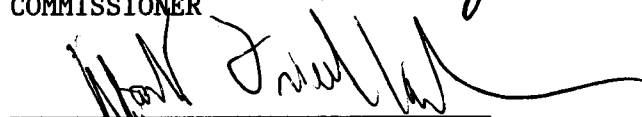
DATED: Albany, New York

MAY 25 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 440 977 049

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>T &amp; J Auto Repairs Inc</i>	
Street and No. <i>210 Delaney St</i>	
P.O., State and ZIP Code <i>New York NY 10002</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 440 977 050

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Henry Feininger</i>	
Street and No. <i>40 First Ave.</i>	
P.O., State and ZIP Code <i>New York NY 10009</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