

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
U-Need-A-Roll Off Corp. :
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 6/1/76-2/28/79. :

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 20th day of January, 1984, he served the within notice of Decision by certified mail upon U-Need-A-Roll Off Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

U-Need-A-Roll Off Corp.
c/o Nicholas Ferrante
50 Eads St.
W. Babylon, NY 11704

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
20th day of January, 1984.

David Parchuck

Conrad A. Hughes
pursuant to Tax Law section 174

Authorized to administer oaths

STATE TAX COMMISSION

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

Daniel Turchin
170 Broadway
New York, NY 10038

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.

David Parluck

Gumi A. Hapud
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 20, 1984

U-Need-A-Roll Off Corp.
c/o Nicholas Ferrante
50 Eads St.
W. Babylon, NY 11704

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
Daniel Turchin
170 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE TAX COMMISSION

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 May 10, 1983 at 10:45 A.M. with all evidence to be submitted by July 18, 1983. Petitioner appeared by Daniel Turchin, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether purchases of containers and compactors made by petitioner for use by its customers were retail sales to petitioner and therefore subject to sales or use tax, or whether such purchases were for resale to petitioner's customers.

II. Whether the Audit Division is bound by an advisory opinion rendered to another petitioner on the same issue.

III. Whether the Notice issued was within the time period set forth by the statute of limitations.

FINDINGS OF FACT

1. On October 3, 1980, as a result of a field audit covering the period June 1, 1976 to February 28, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against U-Need A Roll Off Corp. [sic] as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Simple Interest</u>	<u>Total</u>
5/31/77	\$ 140.00	\$ 39.09	
2/28/78	2,134.72	460.07	
5/31/78	770.00	149.58	
8/31/78	599.79	103.77	
11/30/78	645.54	97.97	
2/28/79	1,475.89	192.63	
	<u>\$5,765.94</u>	<u>\$1,043.11</u>	<u>\$6,809.05</u>

2. Petitioner executed three consents to extend the period of limitation for the issuance of an assessment for the period June 1, 1976 to February 28, 1979, the final one extending the period to September 20, 1980.

3. Petitioner provided trash removal services and also provided its customers with containers and compactors for the collection of refuse. Petitioner collected sales tax on its trash removal services.

4. Petitioner did not pay sales tax on the majority of its purchases of containers and compactors. The Audit Division therefore held these purchases subject to use tax in accordance with the provisions of section 1110 of the Tax Law. It was the Audit Division's position that they were retail sales to petitioner and not purchased for resale to its customers.

The Audit Division held total purchases of these containers and compactors in the amount of \$80,306.10 subject to use tax of \$5,621.43. The remaining fixed asset purchases of \$2,064.42 on which use tax of \$144.51 was assessed is not at issue herein.

5. The containers at issue are the type that can be automatically handled by trucks equipped for this purpose. The trash compactors are larger containers ranging in capacity from 15 to 42 cubic yards. Both types of receptacles are left with petitioner's customers for their use.

6. In support of its petition, petitioner relied on an advisory opinion rendered to Standard Commercial Cartage, Inc. (Petition No. S811118A). The opinion stated ... "[W]here a vendor of the service of trash removal in actuality operates within the context of a fee schedule providing for separate fees for service and rental, that is sufficient, even in the absence of a separation of charges in the billing, to warrant a finding to the effect that the containers are rented to the customers, and thus purchased for resale."

It was the petitioner's position that the department is bound by this ruling and should change its opinion in connection with the proceedings herein.

7. Petitioner submitted copies of a sampling of its customer ledger cards to show its billing method. Although not within the audit period, these ledger cards disclosed various rates charged to customers. Some customers were charged a flat fee per month for service. Other customers were charged a fee dependent upon the size of the container or compactor for a certain number of pickups and an additional fee for each pickup thereafter. Others were charged a fee for each pickup or charged per cubic yard picked up. Some customers using the same size containers for the same number of pickups were charged different fees. Occasionally, rentals of containers were made without pickup service; however, the number of containers or compactors used in such a manner, which were purchased during the audit period, is unknown.

8. Petitioner submitted into evidence a stamp imprint purportedly used on all monthly statements sent to its customers which states the following:

"Invoice reflects NYS sales tax and rental charge".

No other sales slips or invoices were issued during the billing period.

9. The time under which the use tax could be assessed for the period March 1, 1977 through May 31, 1977 had expired under the statute of limitations on September 20, 1980.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes sales tax on the receipts from retail sales of tangible personal property. Section 1101(b)(4) of the Tax Law excludes from the definition of "retail sales" sales for resale. The term "sale" as defined by section 1101(b)(5) of the Tax Law includes any rental, lease or license to use for a consideration.

B. That the containers and compactors at issue herein were supplied to petitioner's customers as part of its service with no distinguishable consideration having been billed for same. That the purchase of the containers and compactors were retail sales to petitioner and therefore subject to the sales or use tax imposed by Tax Law §§1105(a) and 1110.

C. That advisory opinions rendered pursuant to section 171, subdivision twenty-fourth of the Tax Law set forth the applicability of pertinent statutory and regulatory provisions to a specified set of facts. The advisory opinions are binding upon the Commission only with respect to the person requesting the opinion and to the specific facts contained in the petition.

D. That pursuant to provisions of Tax Law §1147(b) and (c), the tax for the period March 1, 1977 through May 31, 1977 was not timely assessed. The use tax due for such period is hereby cancelled.

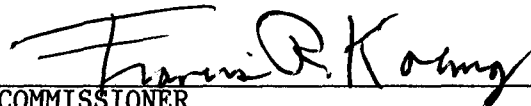
E. That the petition of U-Need-A-Roll Off Corporation is granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 3, 1980; and that, except as so granted, the petition is in all other respects denied.

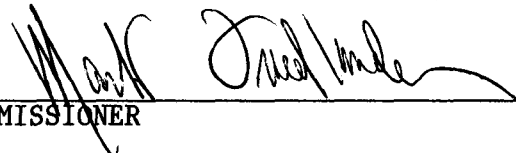
DATED: Albany, New York

STATE TAX COMMISSION

JAN 20 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 766

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Daniel Turchin	
Street and No.	
70 Broadway	
P.O., State and ZIP Code	
NY, NY 10038	
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 440 976 765

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse) Corp.

Sent to	
U-Need-a-Roll-off	
Street and No.	
50 Cads St.	
P.O., State and ZIP Code	
W. Babylon, NY 11704	
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