

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rosedale Garage, Inc. :
and Anthony & Amelia Strati, as Officers : 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 6/1/79 - 8/31/82. :

State of New York :

ss.:

County of Albany :

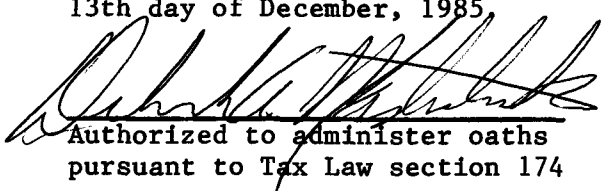
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Rosedale Garage, Inc. and Anthony & Amelia Strati, as Officers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Rosedale Garage, Inc.
and Anthony & Amelia Strati, as Officers
92 Preston Ave.
White Plains, NY 10605

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
13th day of December, 1985


Authorized to administer oaths
pursuant to Tax Law section 174



Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rosedale Garage, Inc. :
and Anthony & Amelia Strati, as Officers : AFFIDAVIT OF MAILING
:
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
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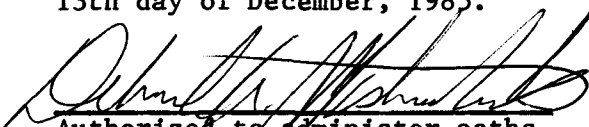
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Don J. Guarnieri, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

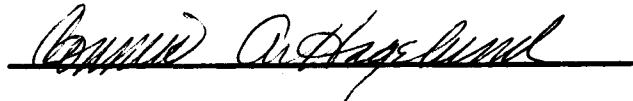
Don J. Guarnieri
94 North Broadway
Irvington, NY 10533

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
13th day of December, 1985.


Authorized to administer oaths
pursuant to Tax Law section 174



Connie A. Hagelund

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

December 13, 1985

Rosedale Garage, Inc.
and Anthony & Amelia Strati, as Officers
92 Preston Ave.
White Plains, NY 10605

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
Don J. Guarnieri
94 North Broadway
Irvington, NY 10533
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROSEDALE GARAGE, INC.	:	
and	:	DECISION
ANTHONY STRATI and AMELIA STRATI	:	
AS OFFICERS	:	
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, 1979	:	
through August 31, 1982.	:	

Petitioners, Rosedale Garage, Inc. and Anthony Strati and Amelia Strati as officers, 92 Preston Avenue, White Plains, New York 10605, 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, 1979 through August 31, 1982 (File Nos. 45736, 45737 and 45738).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 9, 1985, at 9:00 A.M. Petitioners appeared by Don J. Guarnieri, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' sales tax liability.

FINDINGS OF FACT

1. On May 11, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Rosedale Garage, Inc. ("Rosedale") in the amount of

\$23,462.08 plus interest of \$5,844.29 for a total due of \$29,306.37 for the period June 1, 1979 through August 31, 1982. On the same date, the Audit Division issued identical notices to petitioners Anthony Strati and Amelia Strati, as officers of Rosedale.

2. Petitioners had executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through February 29, 1980 to June 20, 1983.

3. Petitioners operated a gas station which sold tires, batteries and accessories and provided automobile repair services in addition to selling gasoline. Upon audit, the auditor found a discrepancy of \$174,435.83 between Federal income tax returns and sales reported on sales tax returns and a discrepancy of \$158,868.07 between petitioners' cash receipts journal and sales reported on sales tax return. Since petitioners' records were inaccurate and inadequate, the auditor performed a purchase markup test to determine petitioners' sales tax due. The auditor determined individual markups on gasoline, soda, oil and tires, batteries and accessories (for simplicity hereinafter referred to as TBA). Individual markups for each item in the TBA category were also determined. The auditor applied the markups to Rosedale's purchases for the entire three year audit period resulting in audited taxable sales of \$2,239,029.89. The auditor subtracted reported sales from the audited sales to arrive at additional taxable sales of \$246,839.89.

4. Petitioners agreed with the results of the audit with the exception of the TBA determination and the fact that no credit was given for tax exempt sales. With respect to the exempt sales, petitioners had no exemption certificates or other proof of exempt sales, however, they thought some type of allocation should be given for such sales. The TBA markup yielded TBA sales for the audit period of \$174,654.48. Rosedale's accountant did his own independent audit

using the Audit Division's markup percentages and determined that TBA sales for the audit period totalled \$125,305.00. However, petitioners' accountant's audit method involved applying the Audit Division's markup percentages to one year's purchases and multiplying the result by three as opposed to the Audit Division's use of all of Rosedale's purchases for the entire three year period.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides in part, that sales will be deemed taxable at retail unless the vendor takes from the purchaser a proper exemption certificate. Although this presumption may be overcome by sufficient evidence, see Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983, merely stating that tax exempt sales occurred and that a percentage of sales should be allocated as exempt is not sufficient evidence to overcome the presumption of taxability. In the absence of any evidence to the contrary, all sales must be deemed to be subject to tax.

B. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684.

C. That the audit performed by Rosedale's accountant was not sufficient to refute the findings of the Audit Division. Petitioners utilized only one year's purchases to determine sales for a three year period whereas the Audit


Division utilized the total purchases for the three year audit period to determine sales and therefore the Audit Division's method was more representative of sales for the audit period and thus more accurate.

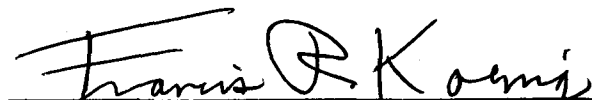
D. That the petition of Rosedale Garage, Inc. and Anthony Strati and Amelia Strati, as officers, is denied and the notices of determination and demand for payment of sales and use taxes due issued May 11, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 684 313 056

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Charles George Jr.</i>	
Street and No. <i>1000 1st Ave. N.Y.C. 10022</i>	
P.O., State and ZIP Code <i>92 1st Ave. N.Y.</i>	
Postage <i>White Plains NY 10605</i>	\$
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	

P 684 313 057

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Don J. Guarniere</i>	
Street and No. <i>94 West Broadway</i>	
P.O., State and ZIP Code <i>New York NY 10533</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	