

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
4 Star Auto Repairs, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 12/1/78-5/31/82. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he/she served the within notice of Decision by certified mail upon 4 Star Auto Repairs, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

4 Star Auto Repairs, Inc.
c/o Ota
787 Kimball Ave.
Yonkers, NY 10704

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
12th day of November, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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of
4 Star Auto Repairs, Inc. :

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for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 12/1/78-5/31/82.
:

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

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he served the within notice of Decision by certified mail upon John W. Graci, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John W. Graci
167 E. 106 Street
New York, NY 10029

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
12th day of November, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

November 12, 1986

4 Star Auto Repairs, Inc.
c/o Ota
787 Kimball Ave.
Yonkers, NY 10704

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
John W. Graci
167 E. 106 Street
New York, NY 10029

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
4 STAR 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, 1978	:	
through May 31, 1982.	:	

Petitioner, 4 Star Auto Repairs, Inc., c/o Ota, 787 Kimball Avenue, Yonkers, New York 10704, 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, 1978 through May 31, 1982 (File No. 47993).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 3, 1986 at 1:15 P.M., with all briefs to be submitted by May 18, 1986. Petitioner appeared by John W. Graci, Enrolled Agent. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether it was proper for the Audit Division to compute petitioner's gross sales using estimated markups.

II. Whether the Audit Division properly disallowed a portion of petitioner's claimed exempt sales.

FINDINGS OF FACT

1. On December 20, 1982, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, 4 Star Auto Repairs, Inc. Said notice,

which encompassed the period December 1, 1978 through May 31, 1982, determined additional sales and use taxes due of \$12,832.43, plus penalty of \$2,784.76 and interest of \$3,555.69, for a total amount due of \$19,172.88.

2. Petitioner executed a series of three consents, dated March 2, 1982, July 6, 1982 and October 15, 1982, wherein it agreed that the assessment of any sales and use taxes due for the period December 1, 1978 through May 31, 1982 could be determined at any time on or before December 20, 1982.

3. During the period at issue, petitioner operated an automotive repair shop which employed two mechanics along with two active corporate officers. No gasoline was sold by petitioner.

4. At the beginning of the field examination, the auditor was not furnished with sales invoices and he therefore determined that petitioner's books and records were inadequate. To verify reported gross sales, the auditor requested that petitioner keep its sales invoices and purchase invoices for the then-current month, which was March of 1982. After reviewing said invoices, the auditor determined that the markup, as shown on these invoices, was too low to be accepted.

5. To compute audited gross sales, the auditor used an estimated markup of 250 percent for automotive repairs and an estimated markup of 100 percent for body, fender and towing repairs. The following table sets forth the computation of audited gross sales:

Purchases for automotive repairs	\$154,038.00	
Estimated markup (250%) plus cost (100%)	x 350%	
Sales for automotive repairs		\$539,133.00
Purchases for body, fender and towing	\$ 14,665.00	
Estimated markup (100%) plus cost (100%)	200%	
Sales for body, fender and towing		29,330.00
Audited gross sales		\$568,463.00
Less: reported gross sales		510,424.00
Additional gross sales		<u>\$ 58,039.00</u>

The Audit Division considered the additional gross sales of \$58,039.00 to be fully taxable and determined a tax due of \$4,680.47.

6. In addition to the \$4,680.47 of tax due on additional taxable sales, the Audit Division also disallowed \$93,958.00 of claimed nontaxable sales, producing a tax due of \$7,555.32. Finally, the Audit Division determined that \$596.64 of tax was due on purchases of machinery and equipment made during the audit period. Petitioner does not contest the \$596.64 of tax due on the purchases of machinery and equipment.

7. At the hearing held herein, the auditor testified that the unacceptably low markup determined per his review of invoices for March of 1982 was "118.82% including costs". The audit workpapers submitted in evidence contain a worksheet entitled "Computation of Parts to Labor Ratio". Said worksheet computed a percentage of 118.82 percent by dividing the retail sale of labor (\$1,962.00) by the retail sale of parts (\$1,651.17). There were no workpapers submitted in evidence which computed a markup percentage for the March 1982 invoices.

8. Petitioner's overall markup per its books and records was 202.5 percent (\$510,424.00 reported gross sales divided by \$168,703.00 of purchases subject to markup). The overall markup estimated by the Audit Division was 236.9 percent. Petitioner submitted a sampling of sales and purchase invoices for the first five months of 1981 which showed that the reported markup of 202.5 percent was an accurate markup.

9. The disallowed nontaxable sales of \$93,958.00 represented exempt sales allegedly made by petitioner to diplomatic personnel. Said claimed exempt sales were disallowed by the Audit Division because petitioner could not produce or obtain certificates of diplomatic and consular tax exemption. Petitioner maintained that it was unable to obtain the requested exemption certificates since the diplomatic personnel involved had completed their tours

of duty in the United States and had returned to their respective homelands. It is not known why petitioner did not obtain the required exemption certificates at the time these sales were allegedly made to said diplomatic personnel.

CONCLUSIONS OF LAW

A. That petitioner has submitted sufficient evidence to show that its overall markup per books of 202.5 percent was accurate and that it reported the correct amount of gross sales on its sales and use tax returns. Accordingly, the assessment of additional tax due of \$4,680.47, which amount is based upon an increase in gross sales determined through the use of estimated markups, is to be deleted from the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1982.

B. That section 1132(c) of the Tax Law provides, in pertinent part, as follows:

"[I]t shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five...are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless... the purchaser prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a certificate of resale or an exempt organization statement in proper form."


C. That petitioner has failed to present certificates of diplomatic and consular tax exemption or any other evidence demonstrating that the purchaser was exempt from tax for any of the \$93,958.00 of disallowed exempt sales. Accordingly, that portion of the notice dated December 20, 1982 which assessed tax due of \$7,555.32 on disallowed exempt sales of \$93,958.00 is sustained.

D. That the petition of 4 Star Auto Repairs, Inc. is granted to the extent indicated in Conclusion of Law "A", supra; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

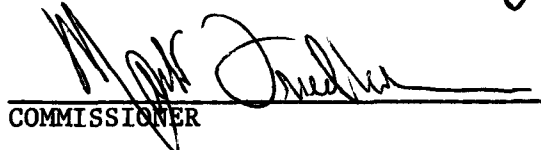
NOV 12 1986



PRESIDENT



COMMISSIONER



COMMISSIONER

P 319 372 988

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

PS Form 3800, June 1985

★ U.S.G.P.O. 1985-480-794

Sent to Star Auto Repairs Inc.	
Street and No. c/o Ota	
P.O. State and ZIP Code 781 Kimball Ave. Yonkers, N.Y. 10704	
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	

P 319 372 989

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

PS Form 3800, June 1985

★ U.S.G.P.O. 1985-480-794

Sent to John W. Graci	
Street and No. 167 E. 106 Street	
P.O. State and ZIP Code New York, N.Y. 10029	
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	