

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Rugo Service, Inc. :  
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 12/1/78-8/31/81. :  
:

---

State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon Rugo Service, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rugo Service, Inc.  
214 Main St.  
Hempstead, NY 11550

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  
28th day of January, 1986.

David Parchuck

Connie Hagelund

Authorized to administer oaths  
pursuant to Tax Law section 174



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

January 28, 1986

Rugo Service, Inc.  
214 Main St.  
Hempstead, NY 11550

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  
Stephen Hochberg  
30 Beekman Place  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
RUGO SERVICE, 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 August 31, 1981.	:	

---

Petitioner, Rugo Service, Inc., 214 Main Street, Hempstead, New York 11550, 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 August 31, 1981 (File No. 41056).

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 July 22, 1985 at 1:15 P.M., with additional information to be submitted by October 31, 1985. Petitioner appeared by Stephen Hochberg, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly resorted to the use of a purchase markup audit to determine petitioner's sales and use tax liability.

FINDINGS OF FACT

1. On September 20, 1982, 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, Rugo Service, Inc., in the amount of \$21,564.67, plus interest of \$5,175.97, for a total due of \$26,740.64 for the period December 1, 1978 through August 31, 1981.

2. On June 4, 1982, petitioner, by its president, Rolf Stucke, executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1978 through May 31, 1979 to September 20, 1982.

3. Petitioner operated two service stations during part of the audit period, one in Queens and one in Hempstead, New York. The Queens station was closed prior to the conclusion of the audit period. Petitioner had two officers. One officer worked full time at each location. There were several employees at the Queens station. When the Hempstead station opened, business was slow and no employees other than the one officer were required. As business increased, employees were brought over from the Queens station.

4. On audit, the auditor determined that gasoline sales appeared to be properly calculated on the sales tax returns and reflected a proper markup and, therefore, gasoline sales were accepted as filed. With respect to sales of repair services, the auditor found that petitioner maintained complete records. However, there were errors made by petitioner's former accountant in computing the sales tax due on some of the repair sales. The accountant had eliminated sales tax from sales on the books which had originally been entered on the books exclusive of tax. Thus, the total sales price had been reduced by the amount of sales tax twice. These errors accounted for \$3,094.84 in additional tax due. Petitioner concedes that it owes this tax. Additionally, the auditor noted discrepancies between the purchases per petitioner's books and purchases reported on petitioner's federal income tax returns. These discrepancies were caused by unexplained adjusting entries made by petitioner's former accountant. Because of the discrepancies, the auditor performed a purchase markup audit.

5. To obtain a markup percentage, the auditor utilized three test months and compared repair sales to parts costs for those months. He calculated a markup of 168.4 percent which he applied to purchases for both stations for the audit period to arrive at taxable repair sales. The repair sales were allocated between the two stations and compared to repair sales as reported to obtain an error rate for each station. The error rates were then applied to taxable repair sales for each quarter to obtain additional taxable repair sales which were multiplied by the appropriate tax rate to determine additional sales tax due. The auditor also found tax due on equipment purchases totalling \$1,736.96 which petitioner concedes is due.

6. Petitioner's sales records consisted of sales books containing duplicate prenumbered sales invoices for every repair sale made during the audit period. Sales prices and sales tax were separately stated on every invoice. Periodically, the sales information was transferred to day sheets which summarized each day's activity. Petitioner maintained a complete set of the day sheets along with the sales invoices. All figures from the sales invoices were accurately transferred to the day sheets. The total repair sales recorded on the day sheets for the audit period were \$653,580.00. The total repair sales reported on sales tax returns were \$654,918.00. Petitioner maintains that it complied with the recordkeeping requirements of the Tax Law and that a test period and purchase markup audit was improperly used in this case.

#### 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 by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

Such external indices may not be used unless it is "virtually impossible to verify taxable sales receipts and conduct a complete audit" with available records (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 46).

B. That petitioner maintained all the sales invoices for repair sales for the entire audit period, along with other documentation with which a complete audit could have been performed. The discrepancy between purchases reported on an income tax return and purchases recorded in the general ledger was strictly an accounting error having no impact on the accuracy of sales as reported on petitioner's sales tax returns. In view of the completeness and accuracy of petitioner's sales records, such a discrepancy in reporting of purchases did not warrant the Audit Division's use of a test period and purchase markup audit. Petitioner's liability is, therefore, reduced to \$4,831.80, the total of the amounts conceded by petitioner in Findings of Fact "4" and "5".

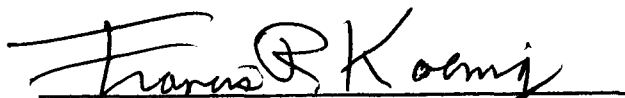
C. That the petition of Rugo Service, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1982 accordingly; and that, except as so granted the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986

  
PRESIDENT

  
COMMISSIONER

   
COMMISSIONER