

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Tea Auto Clinic, Inc. :
and Eunice M. Accardi, Officer : 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 - 11/30/81.

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Tea Auto Clinic, Inc., and Eunice M. Accardi, Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tea Auto Clinic, Inc.
and Eunice M. Accardi, Officer
95-18 81st Street
Ozone Park, NY 11416

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
3rd day of January, 1986.

David Parchuck

James P. Hagan

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Tea Auto Clinic, Inc. :
and Eunice M. Accardi, Officer :

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 - 11/30/81. :

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Ira Rubenstein, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ira Rubenstein
299 Broadway Suite 1205
New York, NY 10007

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
3rd day of January, 1986.

David Parchuck

Anne A. Huglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 3, 1986

Tea Auto Clinic, Inc.
and Eunice M. Accardi, Officer
95-18 81st Street
Ozone Park, NY 11416

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
Ira Rubenstein
299 Broadway Suite 1205
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
TEA AUTO CLINIC, INC.	:	DECISION
and EUNICE M. ACCARDI, AS OFFICER	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1978	:	
through October 31, 1981.	:	

Petitioners, TEA Auto Clinic, Inc. and Eunice M. Accardi, as officer, 95-18 81st Street, Ozone Park, New York 11416, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through October 31, 1981 (File Nos. 46785 and 46786).

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 October 7, 1985 at 1:30 P.M. Petitioners appeared by Ira M. Rubenstein, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether petitioners filed a petition for a hearing with the State Tax Commission within 90 days of the issuance of the notices of determination and demands for payment of sales and use taxes due.

II. Whether the Audit Division properly determined additional sales tax due.

FINDINGS OF FACT

1. On December 17, 1982, as the result of a field audit, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner TEA Auto Clinic, Inc. The first was in the amount of \$16,033.28, plus interest of \$5,440.03, for a total due of \$21,473.31 for the period December 1, 1978 through May 31, 1981. The second notice was in the amount of \$2,539.88, plus penalty of \$456.09 and interest of \$400.33, for a total due of \$3,396.30 for the period June 1, 1981 through October 31, 1981. On the same date, the Audit Division issued identical notices to petitioner Eunice M. Accardi, as officer of TEA Auto Clinic, Inc.

2. On November 19, 1981, petitioner TEA Auto Clinic, Inc., by its president, Thomas C. Accardi, executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1978 through August 31, 1981 to December 20, 1982.

3. The first correspondence from either petitioner protesting the aforesaid assessments, of which there is any record, are petitions to the State Tax Commission dated July 7, 1983 and received in the Tax Appeals Bureau on July 14, 1983. Neither the State Tax Commission nor the Audit Division has any record of an earlier protest, in any form, of the December 17, 1982 notices of determination. The only evidence of a timely protest of the notices offered by petitioners was an affidavit from petitioners' accountant with a copy of a protest letter allegedly mailed to the Tax Appeals Bureau on January 10, 1983. The Tax Appeals Bureau has no record of ever having received such a letter. The petition which Eunice M. Accardi eventually filed in July, 1983 contained the following statement:

"After a recent meeting with our accountant, I find that little was done to answer notices, petition taxes and to arrange another meeting to come to some kind of settlement. Up until the present time we were led to believe that everything possible was being done to reopen our case for a new hearing."

4. The corporate petitioner operated a gas station in West Hempstead, New York which sold gas and provided repairs. On audit, said petitioner provided the auditor with sales tax returns, Federal income tax returns, a check disbursements journal, bank statements and cancelled checks. There were no purchase or sales invoices or daily receipts records available. The auditor decided to perform a purchase markup audit in view of the inadequacy of the records provided. The auditor obtained purchase information from the corporation's suppliers and found purchases were 11.35 percent over the gasoline purchases recorded on the books and records available. The purchases per the corporation's records were adjusted by 11.35 percent and then marked up by 4 percent to arrive at gasoline sales of \$192,765.00.

5. The business was sold to unrelated parties on October 26, 1982. To estimate repair sales, the auditor performed an observation test at the station while it was being operated by the new owners. The repair sales were estimated to be \$759.00 per week taking account of the fact that the corporate petitioner performed fewer repairs than the new owners. Total repair sales for the entire audit period were projected to be \$111,694.00. Cigarette sales were estimated to be \$695.00 resulting in total sales of \$305,154.00. The corporation had reported taxable sales of \$41,658.00; thus, additional taxable sales were \$263,496.00 resulting in sales tax due of \$18,471.66, plus \$101.50 tax due on the bulk sale of the business.

6. At the hearing, petitioners' representative requested additional time to review the audit workpapers and obtain additional documentation. It was

agreed by all parties to proceed on the jurisdictional issue of timeliness only and, if petitioners prevailed on said issue, to continue the matter for further proceedings on the substantive issues.

CONCLUSIONS OF LAW

A. That a notice of determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 90 days after giving of notice of such determination, shall apply to the State Tax Commission for a hearing. Tax Law §1138(a)(1). The burden of proving timely application for such hearing is upon petitioner. The evidence that an application for a hearing was timely made consisted solely of an affidavit with a copy of a letter allegedly mailed on January 10, 1983. Such evidence with no additional corroboration is insufficient to prove that the letter was timely mailed, especially in view of the Audit Division's failure to have any record of the letter's having been received. Furthermore, there are inconsistencies between statements made in the affidavit concerning timely filing and statements made by Mrs. Accardi in her petition to the effect that little was being done to answer notices and petition taxes. Petitioners' application for a hearing is, therefore, denied.


B. That in view of the foregoing, the second issue is rendered moot and it is unnecessary to conduct further proceedings on the substantive issues of petitioners' case.

C. That the petitions of TEA Auto Clinic, Inc. and Eunice M. Accardi, as officer, are denied and the notices of determination and demands for payment of sales and use taxes due issued December 17, 1982 are sustained.

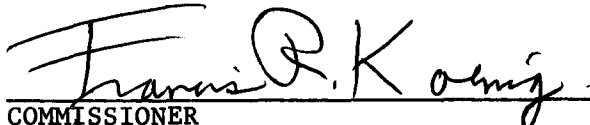
DATED: Albany, New York

STATE TAX COMMISSION

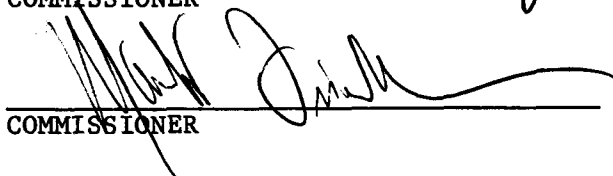
JAN 03 1986



PRESIDENT



COMMISSIONER



COMMISSIONER