

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of
 A-Drive Corporation :

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 Periods 3/1/76-2/29/80 & 6/1/80-2/29/84.

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 6th day of April, 1987, he/she served the within notice of decision by certified mail upon A-Drive Corporation the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A-Drive Corporation
c/o Peter M. McGann
North Avenue
Garden City, NY 11530

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
6th day of April, 1987.

Janet M. Snay

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of
A-Drive Corporation :

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for the Periods 3/1/76-2/29/80 & 6/1/80-2/29/84.

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 6th day of April, 1987, he served the within notice of decision by certified mail upon Arthur Tarlow, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur Tarlow
David Tarlow & Company
60 East 42nd St.
New York, NY 10165

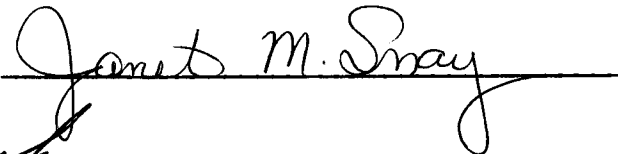
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
6th day of April, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



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

April 6, 1987

A-Drive Corporation
c/o Peter M. McGann
North Avenue
Garden City, NY 11530

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:
Arthur Tarlow
David Tarlow & Company
60 East 42nd St.
New York, NY 10165

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

A-DRIVE CORPORATION

DECISION

for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods March 1, 1976
through February 29, 1980 and June 1, 1980 :
through February 29, 1984. :

Petitioner, A-Drive Corporation, c/o Peter M. McGann, North Avenue, Garden City, New York 11530, 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 periods March 1, 1976 through February 29, 1980 and June 1, 1980 through February 29, 1984 (File Nos. 38147 and 64520).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 15, 1986 at 1:15 P.M., with all briefs submitted by November 17, 1986. Petitioner appeared by Arthur Tarlow, CPA. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional taxes due from petitioner for the periods March 1, 1976 through February 29, 1980 and June 1, 1980 through February 29, 1984.

II. Whether petitioner timely protested the May 20, 1985 Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

FINDINGS OF FACT

1. On March 19, 1982, the Audit Division issued to A-Drive Corporation a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1976 through February 29, 1980, hereinafter the "first audit period", stating total tax due in the sum of \$26,705.35, plus interest of \$11,117.25, for a total amount due of \$37,822.60.

2. On May 20, 1985, the Audit Division issued to A-Drive Corporation a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1980 through February 29, 1984, hereinafter the "second audit period", stating total tax due in the sum of \$17,042.33, plus interest of \$2,662.04, for a total of \$19,704.37. A second Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against the petitioner on May 20, 1985 for the same period, stating total tax due in the sum of \$60,888.35, plus interest of \$24,227.34, for a total amount due of \$85,115.69.

3. With regard to the first audit period, petitioner executed seven consents extending the period of limitation for assessment of sales and use tax permitting the Audit Division to assess petitioner for additional taxes until June 20, 1982. With regard to the second audit period, petitioner executed two consents extending the period of limitation for assessment of sales and use taxes. The first, executed June 20, 1983, permitted the Audit Division to determine sales and use taxes due from petitioner from the taxable period June 1, 1980 through May 31, 1981 at any time on or before September 20, 1984. The second consent executed by petitioner permitted the Audit Division to determine sales and use taxes due from petitioner for the taxable period June 1, 1980 through May 31, 1982 at any time on or before September 20, 1985.

4. On or about May 26, 1982, petitioner 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 March 1, 1976 through February 29, 1980.

5. On August 20, 1985, petitioner 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 June 1, 1980 through February 29, 1984. The first petition protested Notice Number S850520112C which stated total tax due in the sum of \$60,888.35. The second petition protested Notice Number S850520113C which stated total tax due of \$17,042.33.

6. Petitioner had originals of both petitions delivered to the Tax Appeals Bureau, Room 107, Building 9, State Campus, Albany, New York, on August 20, 1985, the ninety-second day after notice of the determination was given to petitioner. Delivery was effected by a private delivery company, Federal Express, and no evidence was submitted demonstrating service of the petitions by use of the United States Postal Service.

7. The Audit Division performed two separate and distinct audits for each of the periods herein, March 1, 1976 through February 29, 1980 and June 1, 1980 through February 29, 1984. Throughout both periods A-Drive Corporation was engaged in the business of leasing and selling automobiles.

8. The Audit Division's audit methodology with regard to the first period included tests of out-of-state sales, in-state sales, in-state rentals, recurring expense purchases, purchases of fixed assets and self use of vehicles. The results of these tests were agreed to by petitioner and a consent was signed on behalf of the corporation in the sum of \$5,975.92.

9. The Audit Division performed a detailed reconciliation of the sales tax payable account for the entire audit period, March 1, 1976 through February 29,

1980. The results of the reconciliation revealed that \$26,705.35 in sales taxes per petitioner's books and records were not reported on the applicable sales tax returns during the audit period. The schedule entitled "Summary of Tax Due from Sales Tax Payable Account" reveals total New York State tax collected per the cash receipts as \$528,682.96; tax collected from outside sources of \$23,468.08; total sales tax due per books and records of \$552,151.04; tax paid per the petitioner's ST-100's as filed for the audit period of \$531,974.75, leaving a difference between total sales tax due per the books and sales tax paid per the ST-100's filed of \$20,176.29. The Audit Division disallowed credit balances in the sales tax payable account in the sum of \$4,891.93 for the period ending May 31, 1976 and \$1,628.48 for the period ending August 31, 1979. With this modification and the exclusion of any differentials less than \$50.00 for any one period, the total amount assessed per the sales tax payable account was \$26,705.35.

10. Petitioner supplied no substantiating documentation to explain the differences between total sales tax due per its books and records and the sales tax paid with its filed ST-100's for the audit period. However, it is noted that the transcript of sales tax collected by source per ST-100 worksheets and cash receipts indicate sales tax collected for the period ending August 31, 1977 of \$24,709.51. In fact, this was the amount remitted by petitioner with its ST-100 for the same period.

11. Petitioner contends that the audit report incorrectly reflects the amounts of sales tax collected and remitted for the periods ending August 31, 1977 and November 30, 1977, explaining that the sales tax payable account is extremely complicated and contains entries of a sophisticated nature which the auditors either failed to understand or analyze correctly. Petitioner argues

that the auditors did not examine all books of original entry. However, it is noted that the transcript of sales tax payable account per general ledger was not reconciled with the tax paid per ST-100's nor was a breakdown made indicating whether or not taxes to more than one jurisdiction were included in the sales tax payable account per general ledger. It is also noted that petitioner was a quarterly filer of ST-100's and did not remit on a monthly basis as petitioner seems to assert.

12. The Audit Division's audit of petitioner for the second audit period consisted of an analysis of the sales tax accrual account, nontaxable leases, sales of leased cars, other income, fixed assets and tax due on the self use of vehicles. From this analysis, the Audit Division determined \$77,930.68 in additional sales and use taxes due.

CONCLUSIONS OF LAW

A. That, with regard to the first audit period, May 1, 1976 through February 29, 1980, the Audit Division did not err in its determination of additional sales and use taxes due from its detailed analysis of petitioner's tax account payable per ST-100 worksheets, cash receipts and general ledger for the entire audit period. Petitioner did not produce any substantiating documentation to support its claims of error with the exception of the period ended August 31, 1977. The cash receipts confirmed that the amount of tax collected by petitioner for the period ended August 31, 1977 was the amount remitted and hence, petitioner does not owe additional tax for said period.

B. That petitioner's contention that it was placed at a disadvantage because the Department's employees who conducted the audit were unavailable to testify is without merit, because the audit report, although hearsay, is admissible and subject to consideration. (Matter of Mira Oil Company v. Chu, 114

AD2d 619). Further, petitioner was given numerous opportunities to examine another Department employee in place of the departed Audit Division employees, but refused.

C. That, with regard to the second audit period, June 1, 1980 through February 29, 1984, Tax Law § 1138(a)(1) provides, in pertinent part, that:

"Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same."

D. That 20 NYCRR § 601.3(c) states:

"(c) Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, N.Y. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope.... The petition may also be filed with the operating bureau, by delivery, during business hours, at the offices of the particular operating bureau in Albany, N.Y."

E. That petitioner submitted no evidence to show the timely mailing of its petitions with regard to the notice of determination and demand for payment of sales and use taxes due for the period June 1, 1980 through February 29, 1984. The only evidence submitted by petitioner was evidence of delivery by a private delivery service indicating that delivery was made on the ninety-second day after issuance of the notices on May 20, 1985, and therefore was untimely.

F. That since the petitions were untimely, it is not necessary to decide whether the audit performed by the Audit Division for the second audit period was proper or erroneous.

G. That the petitions of A-Drive Corporation are granted to the extent set forth in Conclusion of Law "A"; that the Audit Division is

directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 19, 1982 accordingly; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987

Rodrick W. Allen
PRESIDENT

Francis R. Kolny
COMMISSIONER

[Signature]
COMMISSIONER