

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
Y&G, INC.	:	DECISION
		DTA NO. 814647
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 September 1, 1990 through August 31, 1993.	:	

Petitioner, Y&G, Inc., c/o Yourik Atakhanian, 1425 Bruckner Boulevard, Bronx, New York 10472, filed an exception to the determination of the Administrative Law Judge issued on October 9, 1997. Petitioner appeared by Rose, Michlin, Karpf & Company (Bruce Danoff, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner's request for oral argument was granted. However, due to a subsequent change in representation, petitioner no longer wished to appear at oral argument. Therefore, oral argument was not held.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner has proven that its claimed nontaxable sales were exempt from tax pursuant to Tax Law § 1117.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner sold used cars during the period September 1, 1990 through August 31, 1993 under the name of State Farm Auto Sales. The business was located at 120-15 Flatlands Avenue, Brooklyn, New York. Some, if not most, of petitioner's business involved selling damaged cars, and, in particular, damaged cars acquired from insurance companies.

The Division of Taxation (hereinafter "Division") informed petitioner by letter dated August 23, 1996 that a sales tax audit of petitioner's business had been scheduled. The letter was signed by Eva Faltas, the auditor in this matter.

Petitioner provided the auditor with sales tax returns, Federal and State income tax returns, sales journals, cash receipts journals, bank statements (some were missing), and resale certificates for the audit period. Sales invoices for a test period were provided (some invoices were missing). Petitioner also provided form 508, Motor Vehicle Register, known as a police book (hereinafter "police book") for the period September of 1991 through August of 1993,¹ and certain forms MV-50 Certificate of Sale (hereinafter "MV-50"). The latter is a New York State Department of Motor Vehicles (hereinafter "DMV") form.²

The auditor determined that petitioner's records were adequate to conduct the audit and an audit method election form was signed whereby petitioner and the Division agreed to a test

¹The audit workpapers clearly state that a police book was provided for this period of time. The police book submitted into evidence at the hearing does not include this entire time period (see, Finding of Fact "16"). It would appear that the use of the term police book includes more than one actual book.

²It is not possible from the record to determine which or how many of these forms were provided for the test period. It is only possible to determine that some, but not all of the MV-50s were provided.

period audit of petitioner's sales for the period June 1, 1991 through May 31, 1992. Results from this test period audit would then be projected over the entire audit period. Several consents extending the statutory time limits for the Division to assess tax were signed, the final one extending the period to assess tax until December 20, 1994.

The auditor determined from petitioner's records total gross sales for the test period of \$4,995,291.00. The auditor then identified \$2,071,420.00 in sales that petitioner had claimed were not subject to tax pursuant to Tax Law § 1117. The auditor requested substantiation for the asserted nontaxable transactions. Not counting the original audit appointment letter, there were four written requests for documentation to support the asserted exempt sales. The auditor did not receive what she determined to be sufficient documentation from the taxpayer.

The auditor then mailed purchase questionnaires to each of petitioner's customers who purchased a motor vehicle within the test period, with the exception of other dealers. The auditor obtained addresses for this mailing from the records supplied by petitioner. Three sample letters and responses were introduced into evidence as part of the audit report. The letter requested that the purchaser provide the Division with the following information regarding any used car purchased from petitioner: date of purchase, purchase price, trade-in allowance, sales tax per invoice, net amount paid, amount paid by cash, amount paid by check, a copy of the bill/invoice/receipt, and a copy of both sides of any check used to pay for the motor vehicle. The auditor mailed 627 questionnaires with the following results:

NY customer - did purchase	58
NY customer - did not purchase - sales tax paid	6
NY address - undeliverable	65
Out-of-state address - did purchase	7
Out-of-state address - did not purchase	5

(3 returned questionnaires, 2 telephone calls)	
Out-of-state address - undeliverable	67
Unaccounted for	419

The auditor gave petitioner credit for the seven responses received back from customers with out-of-state addresses indicating that a purchase of a motor vehicle had been made.

It is petitioner's contention that the auditor disallowed all sales where a satisfactory response to the auditor's letter was not received. Petitioner points to the auditor's testimony on cross-examination in support of its assertion. A review of the audit workpapers, together with the auditor's testimony on redirect, makes it clear that the auditor first disallowed all of petitioner's claimed exempt sales pursuant to Tax Law § 1132(c), and then allowed those sales where she determined there was an adequate response to her letter.

Petitioner asserted during the course of the audit that the sales in question were nontaxable because they were sales to nonresidents of New York and therefore exempt pursuant to Tax Law § 1117. Petitioner's position was clearly communicated to the Division in a letter to the auditor dated December 7, 1994³ explaining the procedures followed by petitioner in selling a motor vehicle as follows:

The customer states whether he is a resident or non-resident of New York. If the person is a resident, the current sales tax is charged and collected. If a person is not a resident of New York, he states that fact and signs a bill of sale which indicates the following:

A. Make, model, color, and vehicle identification number of auto.

³This letter was written by Mr. Bruce Danoff, one of petitioner's representatives, in response to a request from the Division for petitioner to describe what documentation it required from nonresident purchasers prior to determining no sales tax was due on the transaction. The letter was actually written after the Notice of Determination was issued, but it is an accurate and concise statement of petitioner's position as to what documentation is sufficient to prove an exempt sale under Tax Law § 1117.

- B. Stock number of auto.
- C. Purchaser's name and address.
- D. Total cost of car and deposit on account.
- E. Signature of buyer.

As previously discussed with you, this is the same information that Section 1117. . . states is needed for non- residents. It does not state that additional documentary evidence is needed. It clearly states that an affidavit, statement or additional evidence is needed. Those are the guidelines my client has been using in the sale of cars.

It was therefore petitioner's position during the course of the audit and the hearing process that it had provided the Division with sufficient documentation to prove that the asserted exempt sales were not subject to tax under Tax Law § 1117.

The auditor did not agree with petitioner's position and determined that petitioner had provided inadequate documentation for nontaxable sales pursuant to Tax Law § 1117. Therefore, the auditor determined petitioner's additional liability by dividing the claimed nontaxable sales that she had disallowed by petitioner's gross sales for the test period to obtain a margin of error as follows: \$2,071,420.00 (disallowed nontaxable sales per the auditor for the test period) divided by \$4,995,047.00 (gross sales per petitioner's records for the test period) resulted in a 41.47 percent margin of error. The auditor then applied the margin of error to the gross sales per petitioner's records for the entire period of the audit to determine nontaxable sales for the entire audit period as follows: 41.47 percent of \$17,791,047.00 (gross sales per petitioner's records for the entire audit period) resulted in \$7,377,947.00 in additional taxable sales for the audit period.

On November 28, 1994, the Division issued to petitioner a Notice of Determination for sales and use taxes due for the period September 1, 1990 through August 31, 1993 for

\$608,680.65 in tax, \$188,173.19 in interest and \$237,512.90 in penalty for a total due as of that date of \$1,034,366.74.

A Conciliation Order was issued on December 15, 1995, denying petitioner's request and sustaining the statutory notice. A petition contesting the order was filed with the Division of Tax Appeals on January 2, 1996.

Appearing as petitioner's witnesses were Mr. Bruce Danoff, its accountant and one of its representatives, and Mr. Yourik Atakhanian, its vice president. The majority of the testimony of these witnesses concerned the legal issue of whether it was possible to register a motor vehicle in New York State without a New York State address or a completed MV-50, including inspection information, and whether it is possible to register a motor vehicle in New York State without proof of payment of sales tax. Any portion of the witnesses' testimony relating to the particular practices of petitioner, to the extent it was relevant, has been included in the remaining findings of fact.

While not mentioned in the petition in this matter, petitioner's witnesses explained during the hearing that certain transactions that were disallowed by the auditor listed State Farm Auto Sales as both the seller and the purchaser. It was explained that these were salvage vehicles petitioner wished to repair prior to selling and that, under those circumstances, DMV required petitioner to obtain clear title to the motor vehicles. This required petitioner to, in effect, sell the vehicle to itself. This type of transaction did not involve any consideration, but was merely a transfer of title. In its brief the Division agrees that there are four such transactions occurring in the audit period and agrees that these transactions will be removed from the disallowed sales of the test period and that the tax will be recalculated based upon the new margin of error obtained.

The Division stated that these items are no longer at issue and that the Division would provide the identity of these items and a recalculation of the tax. The Division of Tax Appeals has not received such information from the Division or the petitioner. While these items are no longer at issue, they must be identified as they currently are included in the Notice of Determination. The four transactions as listed in the audit workpapers all set forth State Farm Auto Sales in Brooklyn as the purchaser and all show zero sales tax paid. The transactions are:

<u>Date</u>	<u>Stock #</u>	<u>Make</u>	<u>Model</u>	<u>Sales Price</u>	<u>Page # of audit workpapers</u>
12/04/91	A01928	85-FERR	TEST	\$72,000.00	14
1/09/92	A01867	87-NIS	PU	\$ 2,800.00	16
3/12/92	A02094	91-HON	ACC	\$13,100.00	20
4/29/92	A02531	84-DAT	300ZX	\$ 1,700.00	23

As agreed to by the Division these transactions are to be allowed for the test period and the amount of the assessment reduced accordingly.

The Division has a preprinted form, DTF-820, entitled Certificate For Purchase of Motor Vehicle By Non-Resident of New York State or Non-Resident of Local Taxing Jurisdiction, which it accepts as sufficient documentation that a sale qualifies as exempt under Tax Law § 1117. This form contains certain required information about the vehicle, and contains a statement that the purchase is not subject to sales tax:

because the purchaser is not a resident of New York State, does not have a permanent place of abode in this State and is not carrying on any employment, trade, business or profession in this State in which the motor vehicle will be used.

The form contains spaces for the purchaser's name, address, permanent place of abode, and, if the vehicle is used in a business, the business address. There is also a signature line for the purchaser. Petitioner did not use this form for transactions it claimed were exempt under Tax

Law § 1117. Rather, petitioner submitted other evidence that it asserts substantiates the exempt nature of the transactions.

Each of petitioner's customers received a form MV-50. The MV-50 requires information about the motor vehicle being sold (such as the year, make, model, etc.), the dealer and the purchaser (name and address information), the odometer reading of the motor vehicle, and the signature of the dealer and purchaser. Just above the signature lines is a dealer certification including language whereby the dealer certifies:

All New York State and local taxes due as a result of this sale have been collected from the purchaser. False statements made herein are punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law.

The instructions for completing the MV-50 support petitioner's position that an MV-50 is to be completed for the sale of each motor vehicle, including those to be registered or titled in another state, in that the instructions specifically state that for such cars the original MV-50 is to be given to the purchaser at the time of delivery of the motor vehicle.

Petitioner also submitted DMV form MV-82 entitled Registering a Vehicle in New York State. The form explains what paperwork is necessary for various different actions a person might take. For registering a car for the first time a sales tax clearance is required. Acceptable proof of sales tax clearance is:

1. If the vehicle is bought from a dealer, a Certificate of Sale (MV-50) or the original bill of sale indicating sales tax was collected.
2. If sales tax has not been paid to a registered New York dealer or to the Tax Department, it will be collected by DMV when the vehicle is registered and/or titled. Complete Form DTF-802.
3. If an exemption from sales tax is claimed, complete form DTF-803.

4. If partial sales tax was paid to another state, complete Form DTF-804 and pay the remainder of the tax due to New York State. The original bill of sale is required. Forms may be obtained from any Motor Vehicles office or from the Tax Department.

Also in evidence is a police book marked Book #7 Stock #2270-2666 with an opening date listed as March 21, 1992 and a closing date of May 21, 1992 (there are sales listed with dates after May 21, 1992). For each sale of a motor vehicle there is listed in the police book: date sold; sold to including name and address; MV-50 number; liens; information on the loan of dealer plates, if any; insurance company name, policy number and date; inspection station number, including inspection date and certificate number; and miscellaneous remarks including odometer readings. For those entries where an out-of-state address is listed for the purchaser the notation "out of state" is listed in the column for insurance information and "NA" is listed in the column for inspection information. Each entry does have a listing in the MV-50 number column.

Petitioner was granted time after the close of the hearing to submit additional documentation as follows: DMV rules, regulations and procedures regarding the requirements of registering a motor vehicle in New York State; and computer records from DMV regarding the specific registration history, if any, in New York State of the particular vehicles sold by petitioner during the test period. Petitioner submitted copies of section 401 of the Vehicle and Traffic Law, DMV form MV-82.1 entitled Registering a Vehicle in New York State, DMV publication CR-81 entitled Information and Regulations For Junk and Salvage Vehicle Businesses, a DMV publication entitled Motor Vehicle Dealers and Transporters Regulations, and a group of documents that appear to be copies of computer screen printouts. These documents were received by the Division of Tax Appeals on January 13, 1997.

On February 10, 1997, together with petitioner's brief, petitioner submitted another copy of the computer printouts, this time with an accompanying affidavit. The affidavit is signed by Jeannie Pepa and provides:

I have worked with Department of Motor Vehicle paperwork for approximately 7 ½ years.

The paperwork provided is from the Department of Motor Vehicles computer system. This paperwork shows the history of the questioned vehicles.

EXPLANATION:

1. No Hit means there is no New York history on the vehicle.
2. Any car that shows current ownership still in the dealers [sic] name has never been submitted in New York.
3. Any car that comes up with a New York history has been put through an inspection.
4. With salvage history vehicles cars can be registered out of State and inspected in New York.
5. A car that is purchased as salvage does not have insurance or gas station emission. The car must be towed until inspected.

The information appearing on the printouts varies and there is more than one printout per page.

Using the first two printouts as examples, the information provided is as follows:

Printout Number One

- 1). Towards the top of the printout is handwritten "#2399".
- 2). The results of the search are listed as "YOUR SEARCH RESULTED IN A 'NO-HIT' CONDITION. YOUR SEARCH ARGUMENT WAS JT2MX83ESL0063787 PRESS ENTER TO RETURN TO THE MENU."

Printout Number Two

- 1). Towards the top of the printout is handwritten "#2411".

2). In the upper right hand corner appears "BALANCE: 258.00".

3). The printout goes on to list: Raquel D. Wallace as the current owner; the vehicle identification number and description; an address of 729 East 31st Street, Brooklyn; a statement that the owner of the vehicle and the registrant are different; and the plate number of the registrant.

4). The printout states that title was issued on November 18, 1992.

5). Under prior owners are listed first the current owner at the above address, then Raguel [sic] D. Wallace with an address of 455 Emory Street, Norfolk, Virginia, and then petitioner. Above each of the prior owners the printout states "TITLE ONLY".

Petitioner provided no accompanying explanation of the documents other than the affidavit of Ms. Pepa. There is no detailed explanation connecting the motor vehicles listed in the computer printouts to transactions occurring during the audit period. It appears that the handwritten numbers on the printouts are stock numbers which could provide a means of relating the printouts to petitioner's transactions. However, the only lists of transactions in the record that include stock numbers are those included in the audit work papers and those are only for the test period, not the entire audit period. Neither stock number 2399 nor 2411 appear on the auditor's list. Therefore, the first printout for stock number 2399 cannot be matched to any transaction in the record. Pursuant to the affidavit of Ms. Pepa, since a search for this motor vehicle resulted in a no-hit, it means that this vehicle has no New York history. However, there is no method of verifying that this vehicle was included in the audit.

The police book lists customer names, and since names appear on some of the computer printouts it is possible to at least attempt to match the printouts to transactions in the audit or test period. Stock number 2411 is in the police book. The date sold (from the police book) and the date the title was issued (from the computer printout) are both August 11, 1992 which is not in

the test period and explains why this transaction is not listed in the audit work papers. According to Ms. Pepa's affidavit, since this motor vehicle has a New York history, the car has been inspected; if it were a salvage vehicle it could have been inspected in New York and registered elsewhere; and, if it were purchased as a salvage vehicle, it must be towed until it is inspected because it does not have insurance or gas station emission. This computer printout is particularly confusing since it states that the owner and registrant are not the same and lists the registrant's plate number. It is not possible to tell whether that is a New York State registration or an out-of-state registration, nor is this explained. Nor is it explained anywhere what "BALANCE: 258.00" means, or if the number is applicable to fees owed DMV or to sales tax.

It is petitioner's position that it need not submit the documentation required by Tax Law § 1117 on the form prepared by the Division, but that it is sufficient to provide the required information in any form. Petitioner contends that the bills of sale, MV-50s and the police book listing out-of-state addresses for purchasers, together with the requirement that a car cannot be registered in New York State without payment of sales tax and that the motor vehicles sold by petitioner to customers with out-of-state addresses were never registered in New York State, is sufficient documentation to prove that the transactions at issue were not subject to sales tax pursuant to Tax Law § 1117. Furthermore, petitioner argues that the Division should have been required to check with DMV to determine whether any of the motor vehicles that were the subject of the sales disallowed by the auditor were ever registered by New York State, and that the Division should not have based its audit on unreliable customer questionnaires.

The Division argues that even if petitioner's assertions are taken as true, petitioner has not sustained its burden of proof in documenting that the sales were exempt under Tax Law § 1117.

The Division admits that its form 820 is not the sole method for a taxpayer to prove that it had nontaxable sales pursuant to Tax Law § 1117. However, the Division argues that for a sale of a motor vehicle to be exempt pursuant to that provision the purchaser must be a nonresident of New York State, have no permanent place of abode within the State, and have no business that would require the motor vehicle to be driven in New York State. Furthermore, whatever form of documentation a taxpayer chooses to rely on must provide evidence of all of these statutory requirements. The Division argues that petitioner's documentation, which tends to prove only an out-of-state address, is insufficient.

Petitioner argues that through the computer printouts, it has proven that its claimed nontaxable sales involve cars that were either never registered in New York or were not registered in New York directly after the transaction. Furthermore, any cars registered at a later date could only be registered upon payment of the sales tax.

The Division's brief included an argument that petitioner's computer printouts should not be allowed into evidence because: there are no official DMV markings on the documents, there is no official explanation of the term "no hit," it does not appear that all vehicles in the period were searched, and the documents do not clearly indicate registration or sales tax history. In response petitioner argues that the affidavit explaining the printouts stated: that the records were obtained from the DMV computer system; adequately explained the term "no hit"; and that the affiant was an independent agent.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that petitioner failed to establish that certain of its claimed nontaxable sales of motor vehicles were, in fact, exempt from tax. The

Administrative Law Judge stated that the computer printouts submitted into evidence by petitioner were not reliable to establish that any of the vehicles in question were never registered in New York State. The Administrative Law Judge noted that the computer printouts were accompanied by an affidavit which did not adequately explain how the documents were obtained nor did the affidavit provide any basis for the conclusions which petitioner sought in order to support its argument.

The Administrative Law Judge reasoned that petitioner was required to prove all of the requirements of Tax Law § 1117 in order to qualify for exemption from the sales tax. She noted that even if petitioner established that the motor vehicles it sold were never registered in New York State, that fact alone is not enough for petitioner to be entitled to the exemption. Moreover, petitioner was required to demonstrate that the out-of-state purchasers of the motor vehicles did not have a permanent place of abode in New York State or businesses in which the motor vehicle purchased would be used within the State.

The Administrative Law Judge rejected petitioner's argument that it was improper for the auditor to rely on questionnaires sent to its customers to disallow exempt sales. The Administrative Law Judge determined that the auditor did not rely on the questionnaires in her disallowance of claimed exempt sales. Rather, the Administrative Law Judge noted that the audit was conducted using the books and records of petitioner to determine gross sales. After calculating gross sales, the auditor then reviewed the claimed exempt sales. In reviewing petitioner's documentation which consisted of bills of sale, MV-50s and the police book, the auditor disallowed these sales based upon insufficient documentation. The Administrative Law Judge emphasized that it was after the auditor disallowed the sales that she initiated contact with

customers of petitioner by sending to them a letter requesting verification of out-of-state purchases. The Administrative Law Judge stated that although the questionnaires did not address each element of Tax Law § 1117, the auditor had the discretion to allow seven of the claimed nontaxable transactions based upon the responses she received. With respect to the remaining disallowed sales, the Administrative Law Judge concluded that petitioner failed to prove that it was entitled to the exemption set forth in Tax Law § 1117.

ARGUMENTS ON EXCEPTION

Petitioner asserts that the records which it maintained satisfy the requirements of Tax Law § 1117 given the list of requirements set forth in the New York State Vehicle and Traffic Law. Moreover, petitioner argues that the auditor's method of mailing questionnaires to out-of-state purchasers and her subsequent disallowance of all sales to non-responding purchasers was improper. Lastly, petitioner states that the computer printouts submitted into evidence clearly established that the vehicles it sold to out-of-state purchasers either were not initially registered in New York State or, in fact, as of the date of printout, were never registered in New York State. Therefore, it requests that its petition be granted in all respects.

In opposition, the Division states that the Administrative Law Judge properly decided that petitioner failed to meet the requirements for exemption from sales tax on the sales of certain of its motor vehicles as set forth in Tax Law § 1117. The Division asserts that petitioner's argument that DMV records which indicate that sales tax was never paid on a certain vehicle does not address the requirements of the statute that need to be met in order to avail itself of the exemption. The Division argues that Tax Law § 1117 clearly requires that petitioner must prove that at the time of delivery of a motor vehicle to its customer that the claimed out-of-state

purchaser: (1) is a nonresident of New York, (2) has no permanent place of abode in this State and (3) does not engage in any employment, trade, business or profession in which the motor vehicle will be used in this State. The Division emphasizes that, since petitioner has failed to establish entitlement to the exemption, such sales are taxable pursuant to Tax Law § 1132(c). Therefore, the Division requests that the determination of the Administrative Law Judge be sustained.

OPINION

Pursuant to Tax Law § 1105(a), the retail sales of motor vehicles within this state are subject to sales tax except as otherwise provided in Article 28. Petitioner was required to collect sales tax at the time that it received payment for the motor vehicles sold (*see*, Tax Law § 1131[a]; § 1132[a]). As set forth in Tax Law § 1132(c), it is presumed that sales tax is due on the sale of any motor vehicles in this state by petitioner unless the contrary is established by petitioner.

Tax Law § 1117, in effect during the audit period at issue, provided for an exemption from sales tax as follows:

(a) Receipts from any sale of a motor vehicle shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five, despite the taking of physical possession by the purchaser within this state, provided that the purchaser, at the time of taking delivery:

(1) is a nonresident of this state,

(2) has no permanent place of abode in this state,

(3) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state, and

(4) prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require to assure proper administration of the tax imposed under subdivision (a) of section eleven hundred five.

Petitioner argues that the documentation it maintains concerning the sales of vehicles meets the requirements of Tax Law § 1117 and, thus, it is entitled to exemption of its claimed nontaxable sales. The documentation which petitioner maintains is the bills of sale, MV-50s and the police book which indicates out-of-state addresses for purchasers. Petitioner states that if a purchaser explains that it is a nonresident, petitioner does not collect sales tax. However, petitioner's documentation falls short of establishing the first three criteria listed above for exemption.

Petitioner's interpretation of the statute fails to recognize that despite a person's status as a nonresident of the State of New York, that person can either have a permanent place of abode within this state and/or use the vehicle purchased in a trade or business in this state which would disqualify the sale as nontaxable even though the purchaser is a nonresident (*see*, 20 NYCRR 526.15). The statute is clear that *all three requirements* need to be met in order to qualify as a nontaxable sale. Petitioner cannot simply accept a statement from an out-of-state purchaser that such purchaser is a nonresident without inquiring as to whether the purchaser will use the vehicle in New York for a trade or business or whether the purchaser has a permanent place of abode in New York. There is no dispute that petitioner did not inquire as to these other two factors. Accordingly, petitioner has failed to sustain its burden to demonstrate that it is entitled to the exemption contained in Tax Law § 1117.

Petitioner continues to argue that the auditor disallowed all sales to purchasers to whom she sent a questionnaire who failed to respond. Petitioner mischaracterizes the testimony of the auditor. The auditor clearly disallowed all sales based upon the insufficiency of the documentation maintained by petitioner. Subsequently, she sent questionnaires to those claimed out-of-state purchasers in an attempt to verify the claimed information. If she received a satisfactory response from a recipient of her questionnaire, she allowed the sale as nontaxable. On cross-examination, she was repeatedly questioned by petitioner's representative concerning her *allowance* of certain claimed nontaxable sales based upon responses she received to her mailed questionnaires. At no point did the auditor testify that her disallowance of certain nontaxable sales was based upon any failure to respond to her mailings. Accordingly, petitioner's argument is rejected.

Lastly, we agree with the Administrative Law Judge that the computer records introduced by petitioner were unreliable. As noted by the Administrative Law Judge, there is no indication on the face of these computer printouts to show where they were generated from and the affidavit fails to shed any light on the ambiguity of the evidence. There is no mention of DMV anywhere on these printouts. Since the affidavit does little to provide any foundation to the submission, we refuse to give any weight to these records. Therefore, we sustain the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Y&G, Inc. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Y&G, Inc. is denied; and

4. The Notice of Determination dated November 28, 1994, as modified by the findings of fact above, is sustained.

DATED: Troy, New York
February 4, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner