STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUBO SALES CORP.	:	DETERMINATION DTA NO. 807347
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, 1985 through November 30, 1987.	:	

Petitioner, Rubo Sales Corp., 913 Sunrise Mall, Massapequa, New York 11758, 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, 1985 through November 30, 1987.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 15, 1991 at 1:15 P.M., and was continued to conclusion before the same Administrative Law Judge at the same location on June 24, 1991 at 1:15 P.M., with all briefs to be submitted by November 1, 1991. Petitioner filed its brief on September 13, 1991, the Division of Taxation responded with a letter brief on September 25, 1991, and petitioner filed its reply brief on October 11, 1991. Petitioner appeared by Milton Weinstein, Esq., and Lawrence Cole, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether petitioner has met its burden of establishing the nontaxability of certain sales claimed to have been made for resale and/or to exempt organizations.

II. Whether the Division of Taxation properly assessed sales tax, per Tax Law § 1105(b), upon payments by petitioner to its landlord for electricity provided to petitioner's store located in the Massapequa Mall.

III. Whether penalties assessed in connection with the audit herein should be reduced or cancelled.

FINDINGS OF FACT

On April 13, 1988, following a sales tax audit described more fully hereinafter, the Division of Taxation issued to petitioner, Rubo Sales Corp. ("Rubo"), two notices of determination and demands for payment of sales and use taxes due. The first of such notices assessed tax due for the period March 1, 1985 through November 30, 1987 in the amount of $37,761.03, plus penalty and interest. The second of such notices assessed omnibus penalty (only) for the period June 1, 1985 through November 30, 1987.

Petitioner, doing business as "Shiffs", is located at 913 Sunrise Mall, Massapequa, New York. Robert Klein is petitioner's president and sole shareholder.[1] Petitioner is engaged in the sale of party goods, paper plates, electric fixtures and light bulbs, notions, school supplies, stuffed animals, housewares (such as pots, pans, dishes, etc.) and other general use items. Mr. Klein described the business as one which purchased close-outs from other businesses or odd lots at "off-prices" and, in turn, resold such merchandise.

On or about October 1, 1987, the Division of Taxation commenced an audit of Rubo. The auditor contacted petitioner's president, Mr. Klein, who in turn directed the auditor to petitioner's then-accountant, one Harry Bartner.

The auditor's review of petitioner's business and its records revealed that petitioner filed sales tax returns on which taxable sales were reported as equal to gross sales. Petitioner's then-representative explained to the auditor that petitioner only reported on its returns those sales considered to be taxable sales. Among petitioner's records were listings of claimed nontaxable sales, on a daily total (as opposed to individually listed) basis, consisting of both claimed wholesale sales (i.e., sales for resale) and sales to exempt organizations. When the auditor specifically asked for substantiation of these claimed nontaxable sales, petitioner's then-

[1]Although not entirely clear from the record, it appears petitioner (or other entities owned by petitioner's president, Robert Klein) operated other stores somewhat similar to Shiffs, including one located in Hempstead, Long Island, New York. In any event, the focus of the subject audit was the Shiffs outlet located in the Massapequa Mall.

accountant indicated that cash register tapes were not maintained, and that no invoices were available allegedly because petitioner's sales help were not "entirely capable". Upon her initial audit visit to the store, the auditor was given some 259 certificates (exempt organization certificates) in connection with the claimed nontaxable sales. The auditor noted that on most, if not all, of such certificates no vendor name was listed and also, in a few instances, the certificates were undated and/or did not list a purchaser name and/or address. The auditor placed her initials on the certificates in all areas where they were incomplete, and advised petitioner to complete the same.

The auditor determined that petitioner's reported taxable sales per sales tax returns, plus the amount of (unreported) claimed nontaxable sales per petitioner's records (the aforementioned daily totals), constituted gross sales (i.e., no percentage or other extrapolation method was employed to increase gross sales). In turn, the auditor subjected such additional (unreported) claimed nontaxable sales to tax based on lack of substantiation of exemption. Stated differently, all sales per petitioner's books were considered taxable sales.

In addition to the foregoing, the auditor requested that petitioner provide rent bills for its leased space in the Massapequa Mall. Petitioner's accountant furnished two bills, one for October 1986 and one for September 1987. These bills reflected identical charges of $752.07 for each such month for electricity provided to petitioner's premises by the mall operator. There was no charge included for sales tax thereon. The auditor determined the same to be subject to tax, calculating such tax amount upon the constant monthly charge as totalled for the entire audit period.

In total, tax due as determined by the auditor for the entire audit period consisted of $2,004.30 due on electricity and $35,756.73 due on disallowed claimed nontaxable sales of $441,729.81.

According to the auditor's report, the audit was commenced on October 1, 1987 and was "closed", at least as defined by the affixation of the auditor's signature at the base of the audit report, on March 4, 1988. The auditor's supervisor, in turn, "signed off" on the audit report on

March 15, 1988. Thereafter, on April 13, 1988, the subject assessments were issued. As to the audit workpapers, the same reveal that petitioner reported as taxable some $140,234.00 out of $581,963.81 in gross sales, thus leaving $441,729.81 (or approximately 76% of gross sales) claimed as nontaxable sales. Of such claimed nontaxable sales, approximately 34% allegedly represent wholesale sales, whereas approximately 66% represent sales made to organizations allegedly exempt from tax.

Petitioner timely protested the notices described herein and requested a prehearing conciliation conference. A conference was held on February 7, 1989, at which petitioner, represented by one Saul W. Siegel, C.P.A.[2], presented invoices in an attempt to substantiate claimed nontaxable sales. These invoices were subsequently introduced in evidence during the instant proceedings (see, Finding of Fact "13", infra). In an attempt to verify the accuracy of these invoices, the Division of Taxation's auditor issued "verification letters" to the customers listed on the exemption certificates described hereinabove.

On June 9, 1989, a Conciliation Order was issued sustaining the notices of determination at issue in full.

On December 4, 1989, petitioner's representative herein made a written request to the Division of Taxation under the Freedom of Information Act ("FOIA"), as follows:

> "Under the FOIA, please send the entire file in the above proceeding [the subject matter] to include the following:
>
> (1) Complete set of workpapers
> (2) Audit report form 1637.2
> (3) Auditor's time sheets [DO-220.5]".

In response to this request, the three items enumerated in the request were forwarded to petitioner's representative. Responses received by the auditor in connection with the verification letters mentioned above were not included as part of the materials provided to petitioner's counsel under the FOIA request.

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[2]Petitioner retained Mr. Siegel, in place of Mr. Bartner, in order to comply with its bank's request that petitioner's accounting matters be handled by a certified public accountant.

At hearing, the Division of Taxation proceeded by offering the auditor's testimony as to the conduct of the audit and the basis for the assessments (those audit activities occurring up to the date of issuance of the notices). Thereafter, the Division attempted to introduce the responses to the verification letters. Petitioner's representative strenuously objected on the basis that the same were inadmissible because they constituted evidence gleaned from audit work undertaken subsequent to the "close of the audit". Petitioner's representative also objected because the invoices which gave rise to the verification letters had not yet been offered in evidence, and because the responses to the verification letters had not been included as part of the materials made available pursuant to the above-described FOIA request. In this latter regard, petitioner's counsel claimed surprise and prejudice in that since he had not seen the responses he was unprepared to respond thereto. The Division's attorney was instructed to hold the evidentiary offer of the verification responses in abeyance unless and until the invoices were offered in evidence. Thereafter during the proceedings, petitioner's counsel offered the invoices in evidence and the Division's counsel renewed his offer of the verification letters and responses. The respective offers were accepted and the described materials were included in evidence. In turn, petitioner's request for a continuance of the proceedings was granted. The Division's attorney was instructed to make the verification responses available to petitioner's counsel during the period of continuance such that petitioner could review the same and be prepared to respond thereto at the continued hearing date. This instruction was complied with over the period of continuance, and petitioner's representative was able to review the responses to the verification letters.

The invoices offered in evidence cover the months of the audit period, except for June and September 1985, October 1986, and September, October and November 1987, for which months no invoices were presented. The invoices themselves list the name but generally not a specific address of the customer, an exempt number, and in some cases the phrase "no tax". The invoices are not itemized as to the individual goods purchased or individual prices thereof, but rather include only a total dollar amount for the merchandise purchased and general

descriptions of the merchandise purchased (including terms such as "ass't. merch.", "party goods", "X-mas merch.", "fixtures", etc.). The invoice amounts are listed and totalled on an adding machine tape attached to each monthly bundle of invoices offered, such that the amount covered by the invoices totalled $378,402.67. Some of the invoices list no vendor, while others include the printed logo "Girl Meets Buy Gift Outlet" together with three store location addresses. The Massapequa Mall location was not included among such three listed addresses.

The auditor sent out verification letters to the purchaser named on each exemption certificate provided by petitioner, including those purchasers for which no invoices were presented. In turn, all customer names, as shown on the invoices, were listed for correlation to the verification responses as such were received. The Division received approximately 100 responses, some of which matched in name to vendees listed on the invoices, and some of which matched to the exemption certificates even though no invoices were presented. With respect to the verification responses, the same indicated that most of the alleged vendees did not shop in the store or had made no purchases in the store, that some of such vendees "had made purchases at a store bearing the same name but in a different location". Other responses specified that purchases were made "in the Hempstead store but not in the Massapequa store". Certain responses inquired as to how the Division of Taxation obtained the vendee's name, and also sought information as to who was using that vendee's exempt certificate. In sum, based on these responses, the Division of Taxation determined the invoices to be unreliable and made no adjustment to its disallowance of all claimed nontaxable sales.

Petitioner's president testified to his understanding of how the invoices offered as evidence herein were created. Mr. Klein testified that the invoices ("sales slips") were made up subsequent to the audit and in connection with the conciliation conference. More specifically, petitioner's accountant at the time of conference (Saul Siegel) advised petitioner's president that sales slips or invoices were "needed for the conference". The invoices were allegedly prepared by one of petitioner's clerks, allegedly on instructions from Mr. Siegel. Mr. Klein was not physically present at the time of the creation of the invoices, but rather "was out of town on

business".

Mr. Klein testified to petitioner's method of recording nontaxable sales. He noted that petitioner sells packages of greeting cards, the back portion of which packages include a blank white card some 8 to 10 inches long. According to Mr. Klein, the clerks at the store are instructed to pull these blank cards out of the packages for use in recording nontaxable sales. According to Mr. Klein, if a tax-exempt sale was requested, the clerk was instructed to ask the customer for the name of the exempt organization and to check the file of exemption certificates maintained by petitioner. If a certificate was on file for that customer, the sale was allowed on a tax-free basis and the name of the customer and the amount of money spent was allegedly recorded on the blank cards allegedly kept next to the registers. At the end of each day, the "slips" (the blank cards as filled in by the various clerks) were totalled. The slips were allegedly dated and included the exempt organization number of each organization thereon. In turn, Mr. Klein allegedly gave a daily total from these slips, or the slips themselves, to the accountant, which total in turn was included on worksheets used by the accountant in the preparation of petitioner's sales and use tax returns (the daily listing of nontaxable sales per Finding of Fact "4").

When questioned about why the original records on which the claimed nontaxable sales were recorded were not available, Mr. Klein testified that he "did not know what happened to the slips". Mr. Klein was unable to specify what his former accountant (Mr. Bartner) did with the slips after the workpapers were made. This testimony is contrasted with the auditor's testimony that Mr. Klein allegedly advised Mr. Bartner as to the nontaxable amounts, leaving the record unclear as to whether the cards themselves were actually presented to Mr. Bartner. Mr. Klein testified that although he was out of town when the invoices were created, the "new accountant [Mr. Siegel] must have had [the cards] [to make up the invoices]. I would guess the new accountant spoke to the old accountant and got what the old accountant had." In any event, the original cards were not presented during the course of these proceedings nor, apparently, at any time prior thereto (at conference or during the course of the audit).

The verification letters sent by the auditor listed as the vendor "Rubo Sales Corp.-'Girl Meets Buy'-Massapequa Mall". The verification letters also specified that the response was to pertain only to purchases of merchandise made at the Massapequa Mall and not at Hempstead or any other store. The word "only", pertaining to Massapequa Mall, was underscored and, on many of the letters, was highlighted in red.

The exemption certificates presented to the auditor initially at the store location, and subsequently submitted in evidence herein, include the auditor's initials in areas where petitioner was to complete the same. With respect thereto, petitioner completed such documents as requested. Specifically, as to vendor name, petitioner utilized a stamp which listed the vendor as "Rubo Sales Corp., Shiffs - Girl Meets Buy" (see, Finding of Fact "20", infra).

Mr. Klein described petitioner's location at the Massapequa Mall as having a 25-foot electric sign over the store carrying the name Shiffs. He also noted that a smaller sign, some 5 or 6 feet in length, was displayed at the front of the store bearing the name "Girl Meets Buy". The name Rubo Sales Corp. did not appear at the store location.

At hearing, petitioner submitted five specific exempt organization certificates with letters as to purchases, and seven "verifications" from purchasers regarding alleged purchases for resale. Petitioner did not specify any particular use to be made of such documents. Further, the dollar amounts of purchases described on these documents do not match to the dollar amounts on invoices relating (at least by name) thereto.

With respect to the issue of electricity, petitioner's lease for the premises provides, at page 11, paragraph 6.3 thereof, as follows:

> "Landlord shall furnish to Tenant on a rent inclusion basis the electric energy which Tenant shall require in the Demised Premises: that is, Tenant shall not be charged for electric energy by way of measuring the use or consumption on any meter or device, the furnishing of said electric energy being included in Landlord's services which are covered by the Fixed Minimum Rent, and Tenant agrees to accept and use the electricity so furnished."

The lease goes on to provide, at paragraph 6.4, inter alia, that petitioner shall pay for electricity on a fixed amount per month based on square footage, subject to price escalation as

described in paragraph 6.5 (involving square footage increases, public utility rate increases, tax increases on the sale or furnishing of electric energy, etc.).

SUMMARY OF THE PARTIES' POSITIONS

Petitioner maintains that its method of recording nontaxable sales was appropriate and satisfactory to substantiate nontaxability. Petitioner maintains such sales were recorded on the cards or "slips", as described, and that from such cards the daily total dollar amounts of such sales were entered on sales tax worksheets. Petitioner also alleges that the invoices created for purposes of conference, and submitted during these proceedings, were based on such cards and therefore suffice as a record of individual exempt or wholesale sales. Petitioner also maintains that the verification letters sent by the auditor "prove nothing" and, in fact, were either inadvertantly (at best) or purposely (at worst) misleading to those questioned since they included the name Rubo Sales Corp. but not Shiffs. Accordingly, petitioner argues that the types of responses indicating no purchases from Rubo Sales Corp. reflect confusion on the part of those responding. Petitioner also argues that submitting the verifications in evidence was inappropriate because the audit had closed on March 4, 1988. In this regard, petitioner alleges that evidence and audit work performed after such date is inadmissible and also that, since petitioner did not receive the verification responses as part of its FOIA request, it was prejudiced by being unable to investigate the accuracy thereof and respond thereto. Finally, with respect to the issue of tax on electricity, petitioner alleges the same to constitute rent not subject to tax (citing to Matter of Empire State Building Co. v. New York State Department of Taxation and Finance, 150 Misc 2d 747, 570 NYS2d 419).

The Division of Taxation asserts, by contrast, that disallowance of all claimed nontaxable sales was proper in that petitioner was (and is) unable to provide substantiation in the form of source records specifying and verifying the various purchasers and the specific items and amounts of the purchases. With respect to the electricity issue, the Division maintains only that the Matter of Empire State Building Co. (supra) is on appeal to the Appellate Division of Supreme Court.

CONCLUSIONS OF LAW

A. In this case, there are only two discreet issues presented. First, there is the question of whether petitioner created, maintained and provided upon audit, or, in the course of these proceedings thereafter, adequate documentation to substantiate those sales claimed to be nontaxable. Second, there exists the issue of whether payments for electricity furnished by a mall operator to one of its tenants, under the terms of a lease as described herein, constitute additional rent not subject to tax as opposed to taxable purchases of electricity or electrical services.

B. With respect to the first issue, Tax Law § 1132(c) provides a presumption that all receipts for property or services of any type mentioned in Tax Law § 1105(a) are taxable until the contrary is established, and the burden of establishing nontaxability rests with the person required to collect the tax (petitioner herein) or the customer (20 NYCRR 532.4[b][1]). At the time of audit, petitioner presented some 259 exemption certificates in support of claimed nontaxable sales as such were recorded on a daily total basis on workpapers used in the preparation of petitioner's sales and use tax returns. The auditor noted certain irregularities on the exemption certificates, as described, and advised petitioner to cure the same, which petitioner did. However, petitioner did not submit to the auditor upon audit any original source documents evidencing for each claimed exempt sale the name of the purchaser, or the amount and kinds of items purchased and their cost. Since the auditor was presented with no source records from which she could identify and verify upon audit the individual claimed nontaxable sales, she had no means of determining on audit whether such sales were in fact made to those individuals pursuant to the certificates on file with petitioner. Hence, the auditor disallowed all such sales as nontaxable and treated the same as subject to tax.

In turn, petitioner has not produced reliable evidence in the form of source documents substantiating such claimed sales or warranting any change to the disallowance made by the auditor. As to the invoices presented, it was admitted that the same were not source documents created contemporaneously with the sales in question, but rather were created at the time of a

conciliation conference, post-audit and allegedly because "the conferee needed invoices". There is much discussion in the form of testimony by petitioner's president that these invoices were created from source records allegedly then available, consisting of listings of individual sales written on the backs of blank cards taken from packages of greeting cards. There remains in contrast, however, the admitted fact that petitioner's president and sole witness in this proceeding was not directly involved in the creation of the invoices. Furthermore, the alleged original documents (the cards) were not presented to the auditor and were not presented at the time of these proceedings. In fact, petitioner's witness could not explain who had possession of such cards or whether they remain in existence. The invoices themselves list only customer names with no specific addresses and, while including exempt numbers, do not specify individual items purchased, but rather only include a total dollar amount of the purchase and a very general description of items purchased. In response to these invoices, the Division of Taxation issued verification letters as described. The responses thereto only serve to cast doubt on the validity of the invoices and the claimed purchases. In short, there remains no plausible explanation of where the original cards were kept and, more importantly, why the same were never available to the auditor or to anyone else during or after the time of audit (except for petitioner's president's statement that Rubo changed accountants, carrying with it an implication that perhaps the cards were lost in connection with such change). It is likely that petitioner in fact made sales which were not subject to tax either as sales to exempt organizations or as sales for resale. However, on this record it would be no better than speculation to choose some percentage or dollar amount of sales and allow the same as nontaxable. Petitioner's problem, stemming from its lack of or inability to produce original records, is very similar to that addressed in On the Rox Liquors, Ltd. v. State Tax Commn. (124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026), wherein the Court observed:

> "Although petitioner maintains a file of facially valid exempt organization certificates, as respondent tellingly observed in its decision, petitioner's 'recordkeeping left no means whereby sales reported as exempt could be tied to or compared with those exemption certificates * * * Without any means of identifying individual exempt sales, there was no way to determine, on audit, if all such sales were made to exempt organizations or to individuals properly buying on behalf of

exempt organizations.'

> As for petitioner's argument, that mere retention by it of an exempt organization certificate file fulfills its recordkeeping requirement and hence its burden of proof, despite the fact that its records do not reflect what specific sales were in fact made to these exempt organizations, to state the proposition is to refute it. Carried to its logical conclusion, this course of reasoning justifies the patently unacceptable consequence that vendors can claim any amount of exempt sales, without providing any documentation whatsoever to verify those sales." (Id., 507 NYS2d at 505.)

C. A word is in order as to petitioner's objections concerning submission of the verification letters into evidence. First, petitioner argues that the same may not be submitted since they were obtained as part of procedures conducted by the auditor subsequent to the close of the audit. For purposes of this discussion, the close of the audit will be deemed to be the date on which the notices of determination were issued. It is clear that the verifications were sent and the responses were obtained subsequent to that date. However, it must be noted that petitioner first offered the invoices during the course of the conciliation conference. It is only reasonable to assume the auditor would attempt to check the invoices in order to establish the veracity of the information contained therein. In turn, where (as here) the invoices are offered as evidence in support of exempt sales, the Division is in a position to offer a response thereto -- a response not otherwise possible where evidence not offered on audit is offered at hearing. More importantly, however, carried to its logical extreme, petitioner's argument would preclude the submission of any evidence by either party subsequent to an audit. Since the Division was not given the evidence on audit, it would be fundamentally unfair to limit the Division to a position determined upon audit evidence, yet allow a taxpayer to refute the same via previously unavailable (or withheld) information. Adopting petitioner's argument would leave the only evidence allowable at hearing to be that evidence proffered by a taxpayer at the time of audit (and utilized by the Division of Taxation in the conduct of its audit). Here, not only the verification responses but also the invoices themselves would be inadmissible. In this case, it was petitioner who attempted to provide additional information post-audit. Not only is there no prohibition against the Division of Taxation reviewing the same, but rather it would appear the Division was under some obligation to do so (see, Matter of Continental Arms v. State Tax

Commn., 72 NY2d 976, 534 NYS2d 362). In fact, it seems petitioner would exclude the verification responses, but seek to offer the invoices. Thus, petitioner would attempt to "hamstring" the Division by putting in evidence invoices created and first offered to the Division after the audit was concluded. This would leave the Division of Taxation in the untenable position of being precluded from continuing any audit investigation on such late-offered material or offering the results thereof. It is only common sense to conclude that the Division is entitled to conduct an investigation to establish or deny the veracity of such material and, if the same is offered as evidence at a hearing, be in a position to respond thereto.

With respect to the verification responses, petitioner also claims the Division failed to comply with FOIA by its failure to provide such responses to petitioner. Petitioner also claimed surprise when the same were first offered during the course of the initial day of hearing. With respect to the first claim, it is at least arguable that petitioner's own FOIA request contained some ambiguity as to what, if anything, was sought in addition to the three items enumerated in the request and supplied by the Division (see Finding of Fact "11"). Turning to the claim of surprise, the hearing was continued as described, during which continuance petitioner was afforded access to the verification responses thus gaining an opportunity to review the same and conduct its own investigation or take steps to determine whatever response petitioner would make to the verifications. Hence, any claim of prejudice and surprise resulting from the Division's alleged failure to comply with the FOIA was in effect cured by the granting of the continuance (see, Matter of Tao v. State Tax Commn., 125 AD2d 879, 510 NYS2d 233, lv denied 70 NY2d 601, 518 NYS2d 1023). Accordingly, petitioner's claims in this regard are unavailing. Finally, procedurally as to submission of the verification responses, the Division's offer thereof was held in abeyance until such time as petitioner offered the invoices in evidence, after which the Division was afforded the opportunity to submit the verifications in response.

D. Petitioner also argues that the nature of the Division's verification letters, which indicated Rubo Sales Corp. as the vendor, may have led to confusion on the part of those vendees canvassed, as described. In response, it must be noted that petitioner, initially, did not

include a vendor name on the exemption certificates it obtained when such were taken from the allegedly exempt organizations. Therefore, petitioner is at least partly responsible for any confusion over the name of the vendor. Furthermore, in completing the certificates, petitioner itself stamped three names as "vendor" on the certificates (see Finding of Fact "19"). Moreover, the verification letters specified they pertained to purchases at the Massapequa store in the Massapequa Mall only, as noted. In fact, some responses indicated that purchases were made in the Hempstead store but specifically not in the Massapequa Mall store, thereby indicating that at least some of those responding to the verification letters knew clearly of a distinction between the store locations. In sum of the foregoing discussion, it becomes clear that the invoices, and resultant verification letters and responses, tend to establish at best the unreliability of each other and highlight the problem caused by petitioner's failure to maintain original source records by which individual claimed exempt sales and sales for resale could be traced and tied to petitioner's claimed total amounts thereof. Coupling the same with the rather vague discussion of how the invoices were created and the fact that the alleged original records in the form of the "cards" were never available, leaves the invoices essentially to be accorded no weight. Thus, the verification letters and responses, although discussed at considerable length herein, are in fact of little consequence. The invoices were never part of the original audit work, only entered into the case when petitioner submitted the same post-audit, and have been largely discredited or at least brought into question by the subsequent audit investigation performed in the form of verifications. Therefore, whether or not the verification letters might have been clearer to a recipient had they borne the name "Shiffs", the fact remains that the verifications are of little consequence in this matter. In short, the problem presented here could have been avoided by the maintenance of original documents. Given the lack of original documents, the Division could have done essentially nothing post-audit. However, the auditor attempted to verify the invoice amounts, and presumably would have adjusted her audit results had the verification responses borne out the claim made by petitioner via the invoices. The verifications and responses thereto, however, only serve to diminish petitioner's already lacking case on proof

surrounding the claimed exempt sales.

E. With respect to the electricity issue, petitioner's lease as described (see Finding of Fact "22") leaves clear that petitioner pays for electricity at a fixed monthly amount determined upon square footage, and that no metering of petitioner's electricity usage is undertaken either by the landlord or by a public utility. Pursuant to the terms of the lease, petitioner's landlords did not sell electricity, but rather leased retail space an integral component of which was the provision of electricity, and in turn recouped the cost of such electricity by charging petitioner (and presumably the other mall tenants) an amount estimated to cover petitioner's proportionate share of such cost. Hence, the charges paid by petitioner were not for purchases of energy but were, as specified, additional rent charges. In essence, petitioner's payments for electricity may most accurately be described as an element of rent and, as such, not subject to tax (Empire State Building Co. v. New York State Department of Taxation and Finance, 150 Misc 2d 747, 570 NYS2d 419; see, Compton Advertising, Inc. v. Madison-59th Street Corp., 91 Misc 2d 768, 398 NYS2d 607, affd 63 AD2d 942, 407 NYS2d 436 [1st Dept 1978], lv denied 46 NY2d 706, 413 NYS2d 1027 [holding that payments for provision of electricity constituted rent]; cf., Debevoise and Plimpton v. New York State Dept. of Tax and Finance, 149 Misc 2d 571, 565 NYS2d 973).

F. Petitioner has offered no basis upon which it may be concluded that the method of reporting and recordkeeping vis-a-vis nontaxable sales was reasonable. Hence, penalties imposed for petitioner's failures in that regard are sustained.

G. The petition of Rubo Sales Corp. is granted to the extent indicated in Conclusion of Law "E", but is otherwise denied, and the notices of determination and demands for payment of sales and use taxes due dated April 13, 1988, as modified in accordance herewith, are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE