STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition   :

     of   :

  X.L.O. CONCRETE CORP.   :   DECISION

for Revision of a Determination or for Refund   :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1981 :
through November 30, 1982.

Petitioner, X.L.O. Concrete Corp., 1079 Yonkers Avenue, Yonkers, New York
10704 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 September 1,
1981 through November 30, 1982 (File No. 46394).

A small claims hearing was held before Richard L. Wickham, Hearing Officer,
at the offices of the State Tax Commission, Two World Trade Center, New York,
New York, on October 31, 1984 at 10:45 A.M., with additional evidence to be
submitted by November 26, 1984. Petitioner appeared by James Costigan, Secretary.
The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of
counsel).

ISSUE

Whether petitioner's construction contract with Kingsbridge Development
Corp. was irrevocably entered into prior to the enactment of the law increasing
the tax rate from 8 to 8¼ percent in New York City thereby allowing petitioner
to obtain a refund of the ¼ percent tax paid on tangible personal property used
in the performance of said contract.

FINDINGS OF FACT

1. On January 7, 1983, petitioner filed an Application for Credit or
Refund of State and Local Sales and Use Tax claiming a refund of $4,610.10 for

"sales tax paid in connection with purchases of materials used solely in the performance of lump sum contracts... entered into prior to September 1, 1981."

2. On June 20, 1983, the Audit Division - Central Sales Tax Section denied $4,065.55 of petitioner's claim. The partial denial letter mailed to petitioner stated, in part:

> "Your contract with Kingsbridge Development Company (sic)
> (Madison Park Towers) was not entered into until July 20,
> 1981, the effective date of the ¼% increase in New York
> City was July 11, 1981. To be eligible for a refund your
> firm would have had to have a pre-existing lump sum or unit
> price construction contract which was irrevocably entered
> into prior to the effective date of July 11, 1981, pursuant
> to Section 1119(A)(6) (sic) of the New York State Sales and
> Use Tax Law."

3. Petitioner's contract with Kingsbridge Development Corp., (Kingsbridge) provided that petitioner, as subcontractor, complete the superstructure concrete work with respect to the construction of a residential building at 3-9 East 22nd Street and 2-8 East 23rd Street, New York City. In the performance of the subcontract agreement, petitioner purchased building materials for use (i.e. plywood for forms) or consumption (i.e. concrete) in the project at a cost of $1,626,223.57. For said purchases, petitioner paid $134,163.44 or 8¼ percent state and local sales tax to its various suppliers.

4. Petitioner maintains that while its written contract with the Kingsbridge is dated July 20, 1981, said written agreement merely affirms an oral agreement reached prior to July 11, 1981 and that the date of July 20, 1981 stated on the contract is erroneous. Mr. James Costigan, secretary of petitioner, testified that negotiations with Kingsbridge for the superstructure concrete work began nine months to a year before the execution of the written contract. Mr. Costigan further testified that the price to be paid to petitioner was set at a

meeting held June 29, 1981[1] and that the written subcontract agreement was signed sometime in December, 1981 at which time concrete work had been completed on 25 floors of the 30 story residential structure.

5. Petitioner introduced into evidence a letter dated July 20, 1981 that it had received from Kingsbridge (Mr. Frederick Rose). Said letter confirmed the agreement reached that day for the completion of superstructure concrete work at the job site at 3-9 East 22nd Street and 2-8 East 23rd Street, New York City. Petitioner also introduced a letter dated December 11, 1981 received from Kingsbridge (Mr. Bruce Weill). Said letter purportedly transmitted the subcontract agreement for signature. The subcontract agreement which petitioner executed with Kingsbridge is dated July 20, 1981.

CONCLUSIONS OF LAW

A. That section 1119(a)(3) of the Tax Law allows for a refund of tax paid on the sale to or use by a contractor or subcontractor of tangible personal property that is used by him solely in the performance of a pre-existing lump sum or unit price construction contract. Said section defines the term pre-existing lump sum or unit price construction contract to mean, in pertinent part:

> "(A) contract for the construction of improvements to real property under which the amount payable to the contractor or subcontractor is fixed without regard to the costs incurred by him in the performance thereof, and which (i) was irrevocably entered into prior to the date of the enactment of this article or the enactment of a law increasing the rate of tax imposed under this article...".

---

[1] Mr. Costigan's testimony was that there were three meetings with Kingsbridge. At the first meeting held June 29, 1981, the contract price was negotiated with a Mr. Bruce Weill and ratified at meetings held July 2, 1981 with a Mr. Bernard Strassner and July 16, 1981 with a Mr. Frederick Rose. Mr. Strassner and Mr. Rose allegedly managed Kingsbridge.

B. That by the enactment on July 11, 1981 of chapter 485 of the Laws of 1981, section 1109 was added to the Tax Law imposing in the metropolitan commuter transportation district an additional $\frac{1}{4}$ percent sales and use tax.

C. That petitioner's contract with Kingsbridge for substructure concrete work was entered into after July 11, 1981. The letter of Frederick Rose for Kingsbridge confirms the agreement finalized on July 20, 1981. The subcontract agreement shows as the execution date July 20, 1981.
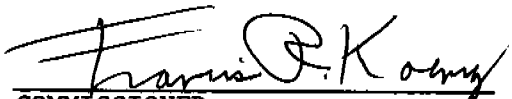
D. That the petition of X.L.O. Concrete Corp. is denied and the Audit Division's partial denial of the claim for refund in the amount of $4,065.55 is sustained.
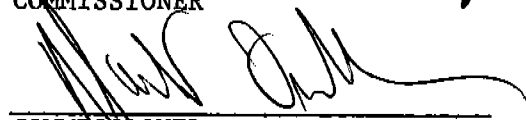
DATED: Albany, New York

FEB 20 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER