

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

CARVER CONCRETE CORP.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales & Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~Year(s)~~ Period ~~(s)~~ :
June 1, 1969 through November 1, 1970.

State of New York
County of Albany

Bruce Batchelor , being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 21st day of December , 1976 , he served the within
Notice of Determination by ~~certified~~ mail upon Carver Concrete Corp.

~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

Carver Concrete Corp.
c/o Underhill Construction Corp.
344 Duffy Avenue
Hicksville, New York 11802

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) 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)~~
~~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

21st day of December , 1976

Bruce Batchelor

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

CARVER CONCRETE CORP.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales & Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~Year(s) 1969~~ Period ~~(s)~~ :
June 1, 1969 through November 1, 1970.

State of New York
County of Albany

Bruce Batchelor , being duly sworn, deposes and says that
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 21st day of December , 1976 , ~~he~~ served the within
Notice of Determination by ~~(certified)~~ mail upon Gerald Goldstein

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

Gerald Goldstein, Esq.
Belson, Connolly & Belson
32 Broadway
New York, New York 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) 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

21st day of December , 19 76

Bruce Batchelor

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

ADDRESS YOUR REPLY TO

December 21, 1976

TELEPHONE: (518) **457-3850**

**Carver Concrete Corp.
c/o Underhill Construction Corp.
344 Duffy Avenue
Hicksville, New York 11802**

Gentlemen:

Please take notice of the **DETERMINATION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(s) **1138 & 1243** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,

**Frank J. Puccia
Supervisor of Small
Claims Hearings**

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
CARVER CONCRETE CORP.	:	DETERMINATION
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 June 1, 1969 through November 1,	:	
1970.	:	

Applicant, Carver Concrete Corp., c/o Underhill Construction Corporation, 344 Duffy Avenue, Hicksville, New York, 11802, has filed an application 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 June 1, 1969 through November 1, 1970 (Claim #5895).

The applicant filed an application for a hearing to review a determination or for refund in the amount of \$4,335.94. A Small Claims Hearing was held before Joseph Marcus, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on June 9, 1976 at 9:15 a.m. Applicant was represented by David Livingston, Treasurer and Gerald Goldstein, Esq. The Sales Tax Bureau was represented by Peter Crotty, Esq., (Irwin Levy, Esq. of counsel).

ISSUE

Is the agreement for the construction of real property, entered into on June 21, 1968 by Carver Concrete Corp. and HRH Construction Corporation, signed on August 19, 1969, a "pre-existing lump sum or unit price construction contract" as defined in section 1119(a)(4) of Article 28 of the Tax Law?

FINDINGS OF FACT

1. Applicant, Carver Concrete Corp., was the subcontractor on a construction project known as Henry Phipps Plaza South located in the borough of Manhattan, City and State of New York. Applicant agreed to furnish all labor, materials, power and light, etc. necessary for the completion of the concrete and related work as detailed in the agreement.
2. The agreed price, as contained in section 4 of the agreement, was \$2,451,000.00.
3. Applicant submitted copies of purchase orders for materials, concrete and reinforcing steel dated as far back as August 7, 1968 and June 13, 1968.
4. Applicant was unable to state with certainty the existence of a performance bond relative to the obligation undertaken in the aforementioned agreement.
5. The copy of the agreement, as submitted by applicant, was incomplete. The last page of the agreement under paragraph (Y) and headed "arbitration" refers to the methods of settling any disputes that may arise. The controversies were to be submitted to the American

Arbitration Association for settlement. This section states, finally, that "failure of the subcontractor to comply with the provisions of this paragraph of the agreement shall constitute a material breach of the same with all the remedies to the contractor provided for in section 5, paragraph (b) of this agreement."

6. The referenced section 5, paragraph (b) was not submitted by applicant.

7. Taxpayer stated the agreement was entered into on June 28, 1968 and formalized by signatures on August 19, 1969. No reason for the delay was given.

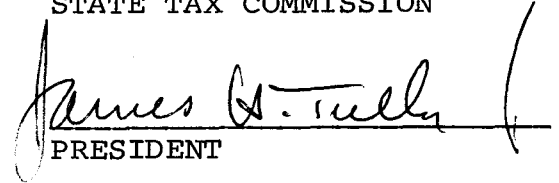
CONCLUSIONS OF LAW

A. That the "agreement" entered into was, in fact, not a pre-existing lump sum or unit price construction contract and therefore the element of irrevocability was not present as required by section 1119(a)(3) of the Tax Law. Section 1119(a) reads in part, "the term pre-existing lump sum or unit price construction contract shall mean a contract...which was irrevocably entered into prior to the date of enactment..." No where in the aforementioned agreement did the parties thereto indicate or allude to the irrevocable nature of the agreement. Nor did the applicant ascertain the existence of a surety which would have undertaken the completion of the contract in the event of default by the applicant.

B. The application of Carver Concrete Corp. is denied.

DATED: Albany, New York
December 21, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER