

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

CARDINAL KITCHENS, INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Sales and Use :  
Taxes under Article(s) 28 & 29 of the :  
Tax Law for the Year(s) or Period(s) :  
8/1/65 through 2/28/69.

State of New York  
County of Albany

Donna Scranton, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1976, she served the within Notice of Determination by ~~(certified)~~ mail upon Benjamin Lewis (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Benjamin Lewis  
475 Fifth Avenue  
New York, New York 10017  
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

28th day of September, 1976

Donna Scranton

Janet Mack

STATE OF NEW YORK  
STATE TAX COMMISSION

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Tax Law for the ~~Year(s)~~ or Period(s) :  
8/1/65 through 2/28/69.

State of New York  
County of Albany

Donna Scranton, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1976, she served the within Notice of Determination by ~~(certified)~~ mail upon Cardinal Kitchens, Inc. ~~(representative of)~~ the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Cardinal Kitchens, Inc.  
410 4th Avenue  
Brooklyn, New York 11215

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

28th day of September, 1976.

Donna Scranton

Janet Bush



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

September 28, 1976

TELEPHONE: (518) 457-3850

Cardinal Kitchens, Inc.  
410 4th Avenue  
Brooklyn, New York 11215

GENTLEMEN:

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

Please take further notice that pursuant to  
Section(s) **1139 & 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,

  
PAUL B. COBURN  
SUPERVISING TAX  
HEARING OFFICER

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

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|--|---|---------------|
| In the Matter of the Application           | : |               |
| of   | : |               |
| CARDINAL KITCHENS, INC.                    | : | DETERMINATION |
| for a Hearing to Review a Determination    | : |               |
| of Sales and Use Taxes Due on a Denial     | : |               |
| of a Credit or Refund of Such Taxes under  | : |               |
| Articles 28 and 29 of the Tax Law for the  | : |               |
| Period August 1, 1965 through February 28, | : |               |
| 1969.                                      | : |               |

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Applicant, Cardinal Kitchens, Inc., 410 4th Avenue, Brooklyn, New York 11215, filed an application under sections 1138 and 1250 of the Tax Law for a hearing to review a denial of a claim for credit or refund of sales taxes imposed under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through February 28, 1969. (File No. 0-0001038).

Said claim for refund is in the amount of \$11,067.49, with appropriate interest, and consists of \$3,787.47, plus interest of \$453.17, paid pursuant to a determination of taxes due asserted by Notice No. 90,757,987 issued February 14, 1969, for the period August 1, 1965 through February 29, 1968; and \$6,826.85 paid with sales tax returns for the period March 1, 1968 to February 28, 1969.

A hearing was held on March 9, 1976, at 9:15 A.M. at the offices of the State Tax Commission, Two World Trade Center, New York, New York, before Nigel G. Wright, Hearing Officer. The applicant appeared

by Benjamin Lewis, Esq., of Lapatin, Lewis, Green, Kitzes & Blatteis, P.C. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel). The record of said hearing has been duly examined and considered.

#### ISSUE

Whether the applicant, who builds custom-made kitchen cabinets, was improperly denied a claim for the refund of use taxes paid, under clause B of section 1110 of the Tax Law, on the self-use of kitchen cabinets built and installed by himself in customer's homes is the issue in this case.

#### FINDINGS OF FACT

1. Cardinal Kitchens, Inc., is in the business of building and installing custom made kitchen cabinets. It maintains a showroom at 410 Fourth Avenue, Brooklyn, New York and has a factory at another location in Brooklyn.

2. The showroom contained a permanent display of model kitchens with applicant's cabinets in various sizes and styles. These models had been built by applicant. They were not intended for sale and were not sold to customers.

3. Applicant keeps no cabinets in inventory. It has no stock items for sale. It does not have a catalogue. There is no evidence that applicant advertises or holds out that it will sell or has a price for the sale of kitchen cabinets without installation.

4. The initial contact with a customer would generally be in applicant's showroom where the customer would choose materials, style, color, etc. For every sale, however, one of applicant's employees would visit the customer's home and make necessary measurements.

5. The applicant's contract includes a perspective drawing of the completed kitchen, a floor plan with dimensions, written specifications indicating style, color, materials, accessory rollers, latches, etc., and statements as to the customer's responsibilities and directions, where necessary, for electrical, plumbing and other installation work. The contract provides for a total price with a deposit, a part payment on delivery and final payment on completion.

6. Applicant partially builds the cabinets in its own factory, where it has about twenty-five employees. It uses the following materials: plywood sheets in various sizes, hardwood strips in various lengths, formica sheets and metal and plastic accessories, such as hinges, rollers, etc.

7. Plywood and formica are both products made by manufacturers from component elements and sold for use in the building trades.

8. After the cabinets are partially built, they are delivered to the customer's home. There, they are completed and installed in the customer's kitchen with wood screws through the walls and into the beams of the house. The installation might take four or five days.

9. A small fraction, less than ten percent of applicant's business, consists of the sale of cabinets and cabinet materials without installation to contractors, and to those home owners who wish to "do-it-themselves." The sales tax is charged on the full price paid by the customer on these sales unless a resale certificate is tendered.

10. There is no evidence in this case that custom-made kitchen cabinets, while not yet installed, are sold by other vendors competitive with this applicant. There is no evidence, by catalogues, advertisements or otherwise of any price that such cabinets would sell at.

11. The determination under review computed a use value for the custom-made cabinets prior to installation by calculating cost of materials and applying a percentage markup to cover labor costs. The figures used in such computations are not in dispute.

#### CONCLUSIONS OF LAW

A. That the applicant is not subject to tax and the denial of the refund was improper because said refund was denied on the ground that the applicant was a "manufacturer" and not a "fabricator" within the meaning of section 1110 of the Tax Law; that it has been stipulated that this is the only issue in the case; and that such ground is erroneous in that it is based upon the definition of "manufacturer" and of "fabrication" to the effect that an item has been "manufactured" when said item is "different in shape or form" than the materials from

which it is made; and that an item is "fabricated" when it is merely modified from an item which is already manufactured and when after the modification the manufactured item "retains its identity." These definitions must themselves be rejected because they assume that the distinction between an item which a contractor "fabricates" and an item which is "manufactured, processed or assembled" is mutually exclusive when it is very clear that the language of section 1110 in making special provision for items which a contractor "fabricates," is intended to be a limitation on the application of the self-use tax to items already classified as "manufactured, processed or assembled." The concept of fabrication, as used in this section, is encompassed within the concept of manufacturing, processing and assembling.

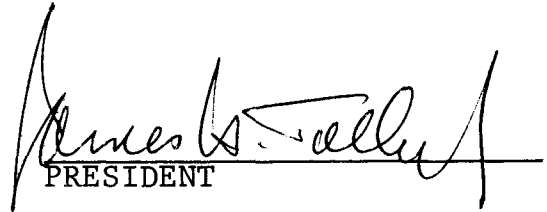
B. That aside from the stipulated issue, it is clear that the self-use tax cannot be applied to this applicant because the purpose of section 1110, and of the 1969 amendment thereto, is to subject to this use tax only those items built by a person and used in the person's own business, when the items are of such a character that they would normally be the subject of sale and purchase at a "prevailing normal purchase price" in an over-the-counter competitive market. They would thus be subject to the sales or use tax on such sales or purchases and that, on this record, there exists no evidence by way of catalogues or advertisements or otherwise that there exists for custom-made kitchen cabinets any significant over-the-counter competitive market, or that such cabinets have a prevailing normal price.



C. That because of the above reasons the refund in issue of applicant, Cardinal Kitchens, Inc., must be granted.

DATED: Albany, New York  
September 28, 1976

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER