

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the ~~Decision~~ Application

of

ALLIED PLASTERING CO., INC.

AFFIDAVIT OF MAILING  
OF NOTICE OF ~~DECISION~~ DETERMINATION  
BY ~~(CERTIFIED)~~ MAIL

For a Redetermination of a Deficiency or  
a Refund of Sales and Use  
Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~XXXXXX~~ Periods  
8/1/65 through 2/29/68

State of New York  
County of Albany

JANET MACK , 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 17th day of December , 1975 , she served the within  
Notice of ~~XXXXXX~~ (or Determination) by ~~(CERTIFIED)~~ mail upon Allied Plastering  
Co., Inc. ~~(representative of)~~ the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Allied Plastering Co., Inc.  
10 Fiske Place  
Mount Vernon, New York 10550

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the ~~(representative of)~~  
~~XX~~ 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

17th day of December , 1975

Mary Hoff

Janet Mack

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the ~~XXXXXX~~ Application

of  
ALLIED PLASTERING CO., INC.

AFFIDAVIT OF MAILING  
OF NOTICE OF ~~DECISION~~ DETERMINATION  
BY (~~CERTIFIED~~) MAIL

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Tax Law for the ~~XXXX~~ Periods  
8/1/65 through 2/29/68

State of New York  
County of Albany

JANET MACK, 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 17th day of December, 1975, she served the within  
Notice of ~~Decision~~ (or Determination) by (~~certified~~) mail upon Vincent Colletti

(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: Mr. Vincent Colletti  
Allied Plastering Co., Inc.  
10 Fiske Place

Mount Vernon, New York 10550  
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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) 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

17th day of December, 1975.

Mary [Signature]

Janet Mack



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

BUILDING 9, ROOM 107  
STATE CAMPUS  
ALBANY, N.Y. 12227

AREA CODE 518

STATE TAX COMMISSION  
HEARING UNIT

PAUL GREENBERG  
SECRETARY TO  
COMMISSION

ADDRESS YOUR REPLY TO

MR. WRIGHT  
MR. COBURN  
MR. LEISNER  
(518) ~~9055~~  
**457-3850**

**DATED:** Albany, New York  
**December 17, 1975**

**Allied Plastering Co., Inc.**  
**10 Fiske Place**  
**Mount Vernon, New York**

**Gentlemen:**

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

Please take further notice that pursuant to  
Section(s) **1139 and 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.

Any 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.  
These will be referred to the proper party for  
reply.

Very truly yours,

**Paul B. Coburn**  
HEARING OFFICER

Enc.

cc: Petitioner's Representative  
Law Bureau

AD-1.12 (8/73)

## STATE TAX COMMISSION

A formal hearing was held at the offices of the State Tax Commission, at 80 Centre Street, New York, New York, on December 8, 1971, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by Vincent Colletti and the Sales Tax Bureau was represented by Saul Heckelman, Esq., (Alexander Weiss, Esq. of counsel).

II. Is the State Tax Commission estopped from denying the applicant's refund application?

FINDINGS OF FACT

1. The taxpayer, Allied Plastering Co., Inc., timely filed a refund application for New York State sales and use tax returns for the periods 8/1/65 through 2/29/68.

2. On November 15, 1968, a denial of a portion of the refund claimed was issued by the Sales Tax Bureau in the amount of \$3,782.67.

3. The taxpayer made a timely application for a revision of the partial denial of its refund claim.

4. On February 15, 1963, Turner Construction Company (Turner) entered into a contract with the United States of America through the General Services Administration (GSA) for the construction of certain Federal buildings in New York City. Said contract contained the following provision under the title, "Modification of General Conditions, 1-09 Taxes".

"(C) (1) If the contractor is required to pay or bear the burden . . . (ii) of an increase in rate of any tax or duty, whether or not such tax or duty was excluded from the contract price, or of any interest or penalty thereon, the contract price shall be correspondingly increased: . . ."

5. On September 18, 1964, the applicant, Allied Plastering Co., Inc., entered into subcontract agreements with Turner for plastering and spray on fireproofing work. Both contracts contained provisions of identical language denominated as paragraph 13,

"Additional Provisions" in the fireproofing agreement and as paragraph 20, "Additional Provisions" in the plastering agreement.

These provisions stated as follows:

"The Contract Consideration includes New York City Sales and Use Tax at the rate in effect prior to June 1, 1963. Any increase in the rate of this tax shall result in an increase in the contract price in accordance with the provisions listed under Modification of General Conditions paragraph 1-09 entitled "Taxes."

6. On or about October 14, 1968, Turner received a State Tax Commission determination granting sales tax refunds based on a characterization of the general contract with the GSA as a pre-existing lump sum contract pursuant to section 1119(a)(3), Tax Law. This determination was disavowed by the State Tax Commission and, on December 18, 1969, the Sales Tax Bureau issued a Notice of Determination against Turner in order to recover the refunded amount.

7. The applicant paid all sales taxes for material purchased for the respective projects and filed for refunds pursuant to section 1119(a)(3), Tax Law. After denial of refund and application for revision of denial, a conference was held between applicant's representative, Vincent Colletti, and a representative of the Sales Tax Bureau on January 28, 1969. At that meeting, Mr. Colletti stated that Turner had received its sales tax refund pursuant to section 1119(a)(3). The Sales Tax representative indicated he would recommend

approval of the applicant's refund to the State Tax Commission.

8. On November 10, 1970, the applicant received a subcontract information letter from Turner. This letter stated that Turner had made final payment and that the applicant waived any further claims against Turner for New York City or State sales taxes. Applicant accepted these terms on November 16, 1970. The applicant relied, in part, on the initial determination of the Commission involving the Turner refund and on the statements of the Sales Tax representative in accepting the release of further claims against Turner.

#### CONCLUSIONS OF LAW

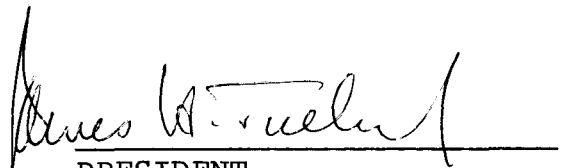
A. That, the subcontract agreements for plastering and fire-proofing were not pre-existing lump sum contracts. Under section 1119, Tax Law, a pre-existing lump sum contract must be a contract for the construction of improvements to real property under which the amount payable to the contractor or subcontractor is fixed without regard to the costs incurred by him in the performance thereof. Clearly, the tax escalation clauses present in both agreements remove the agreements from the lump sum category. These clauses peg the final payment figures to a variable tied to performance costs. The subcontract agreements were not fixed and were dependent on performance costs.


B. That, the State Tax Commission is not estopped from denying the instant refund application. A State agency or body cannot be estopped to assert its governmental power as to acts within its governmental capacity. Furthermore, the applicant did not prove that it relied predominantly on the initial Turner refund determination and the favorable recommendation of the Sales Tax Bureau representative in issuing its release to Turner. In any event, the applicant's reliance was not reasonable. The initial favorable determination for Turner did not preclude a different result in the applicant's case which was still pending. A favorable recommendation from an agent could not bind the Commission as to its final determination and therefore, could not reasonably support the applicant's reliance thereon.

C. The application is denied.

DATED: Albany, New York  
December 16, 1975

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER