

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
INTERBORO SURFACE CO., INC. :  
(Formerly Known as Sicilian Asphalt :  
Paving Co.) :  
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 ~~(Week(s))~~ period August 1, 1965  
through February 29, 1968

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

State of New York  
County of Albany

Rae Zimmerman, 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 23rd day of February, 1972, she served the within Notice of Decision (or Determination) by (certified) mail upon Charles Simmons, Esq. (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Charles Simmons, Esq.  
Royall, Koegel & Wells, Esqs.  
200 Park 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 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

23rd day of February, 1972

Linda Wilson

Rae Zimmerman

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
INTERBORO SURFACE CO., INC. :  
(Formerly Known as Sicilian Asphalt :  
Paving Co.) :  
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 ~~Year(s)~~ period August 1, 1965  
through February 29, 1968.

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

State of New York  
County of Albany

Rae Zimmerman, 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 23rd day of February, 1972, she served the within Notice of Decision (or Determination) by (certified) mail upon Interboro Surface Co., Inc. (formerly known as Sicilian Asphalt Paving Co.) (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Interboro Surface Co., Inc.  
(Formerly Sicilian Asphalt Paving Co.)  
99 Paidge Avenue  
Brooklyn, New York 11222  
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

23rd day of February, 1972

Linda Wilson

Rae Zimmerman



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE  
BUILDING 9, ROOM 214A  
STATE CAMPUS  
ALBANY, N. Y. 12226

STATE TAX COMMISSION

NORMAN F. GALLMAN, ACTING PRESIDENT  
A. BRUCE MANLEY  
MILTON KOERNER

STATE TAX COMMISSION  
HEARING UNIT

EDWARD ROOK  
SECRETARY TO  
COMMISSION

ADDRESS YOUR REPLY TO

Albany, New York

**February 23, 1972**

**Interboro Surface Co., Inc.**  
**(Formerly Sicilian Asphalt Paving Co.)**  
**99 Ridgeway Avenue**  
**Brooklyn, New York 11222**

**Gentlemen:**

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

Please take further notice that pursuant to **sections 1138 and 1243** of  
the Tax Law any proceeding in court to review an adverse decision  
must be commenced within **four months** after  
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 relat-  
ing hereto may be addressed to the undersigned. These will be referred  
to the proper party for reply.

Very truly yours,

**Lawrence A. Newman**

HEARING OFFICER

cc Petitioner's Representative  
Law Bureau

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
INTERBORO SURFACE CO., INC. :  
(Formerly Known as Sicilian Asphalt : DETERMINATION  
Paving Co.,) :  
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 August 1, 1965 through :  
February 29, 1968. :

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Interboro Surface Co., Inc., a registered vendor, filed an application for revision or refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through February 29, 1968. A formal hearing was held before Lawrence A. Newman, Hearing Officer, in the offices of the State Tax Commission in the City of New York on May 21, 1970, and concluded on February 25, 1971. The vendor was represented by Royal, Koegel & Wells, Esqs. (Charles A. Simmons, Esq., and Frank N. Panza, Esq., of Counsel).

ISSUES

- I. Whether the creation of asphaltic mixes to specifications is a manufacturing or fabricating process, and
- II. Whether the mixes used in these operations were offered for sale to others.

FINDINGS OF FACT

1. The vendor, Interboro Surface Co., Inc., formerly known as Sicilian Asphalt Paving Co., had timely filed sales and use taxes returns for the periods August 1, 1965 through February 29, 1968.
2. On November 20, 1968, the vendor filed the equivalent of a claim for refund in the amount of \$72,747.55.
3. On January 20, 1969, the Sales Tax Bureau authorized a refund to the vendor of \$30,628.95 in sales and use taxes, together with interest of \$2,829.38, for a total sum of \$33,458.33. The

refund was approved by the Department of Audit and Control on February 6, 1969.

4. The vendor had conceded a disallowance of his refund claim in the amount of \$11,161.22, leaving a difference in the amount of \$30,957.38, consisting of compensating use taxes based upon the difference in value between the cost and the allegedly equivalent retail value of asphaltic concrete used in lump sum capital improvement work by the vendor.

5. The vendor is primarily engaged in road paving. The vendor owns and operates a plant where it prepares asphalt mixes from petroleum base materials and stone aggregates.

6. A mix containing a base material including asphaltic cement is blended with pre-heated aggregate at a temperature of 275 to 300 degrees Fahrenheit. The product is then deposited in special trucks and transported to a construction site where it is deposited on the roadbed. Within four hours of its creation, the mix cools and hardens into asphaltic concrete. The formula of the mix may vary in accordance with the strict specifications of a government agency or the accepted standards of the asphalt producing industry. These specifications and standards generally result from studies of the projected use of the roadbed. Cement of higher penetration grades are used on airports and roads while lower penetration grades are used on commercial paving jobs and in hot climates. Similarly, the sizing of the aggregate will vary with use.

Based on the audit test period, it was determined that of a total sampling of 12,412 tons of asphaltic concrete, 12,176 tons, or 99% of the production of these type of mixtures were delivered to construction sites by the vendor and deposited on the sites for road paving. The remaining 236 tons, or 1% of production was disposed of in unsolicited sales to peddlers at the plant sites from whatever mix was currently being prepared.

7. Another mix containing a liquid or emulsified asphalt base is created by the vendor at a temperature of 100 to 120 degrees Fahrenheit as a short-term stockpiling mix. This product is packaged and sold to third persons under the trade name "Shellco". This blend remains usable for many weeks and is generally used for repairing small areas temporarily or on lightly used driveways. The vendor collected and remitted sales taxes on these sales.

8. The vendor creates mixes from asphaltic cement only when ordered for a particular project and to definite specifications. The mixes containing a liquid or emulsified base are stockpiled or packaged without being ordered. Precisely the same machinery is used in the preparation of all mixes, but the mixing times, aggregate composition, and petroleum bases vary.

DETERMINATION

A. The vendor manufactured, processed or assembled asphalt mixes which it used in its own operations, and also offered these mixes for sale to others in the regular course of its business.

B. The vendor is not engaged in the fabrication and installation of tangible personal property to the specifications of an addition or capital improvement to real property, property or land within the meaning and intent of Article 28 of the Tax Law.

C. The vendor is liable for a compensating use tax based on the price at which the asphaltic concrete is offered for sale by the vendor to others.

D. Except for the sum of sales and/or use taxes in the amount of \$30,628.95 and interest, which was previously authorized for refund on January 20, 1969, by the Sales Tax Bureau, (item 3 above), the claim for refund by the vendor is hereby denied.

DATED: Albany, New York

*February 23, 1972*

STATE TAX COMMISSION

*Korman Galligan*  
COMMISSIONER

*Bruce Marley*  
COMMISSIONER

*Walter Koehn*  
COMMISSIONER

**CHARLES M. MATTHEWS**

**REGIONAL DIRECTOR**

**NEW YORK STATE PETROLEUM COUNCIL  
SUITE 200 - 142 STATE STREET  
ALBANY, NEW YORK 12207**

**TELEPHONE:  
518-465-3563**

## BLACKTOP PRODUCERS AND THE VALUE ADDED TAX

The State Tax Commission is assessing a value added Use Tax against blacktop producer-contractors by charging tax on the value, rather than the cost, of blacktop used by producer-contractors in performance of their own lump sum or unit price contracts.

These companies collect and remit sales tax on blacktop sold to customers, based upon the selling price. As to this aspect of their business, there is no dispute.

On material incorporated in their own contracts, they pay sales tax on the costs to them of the ingredients going into the mix. This treatment followed from the determination of the State Tax Commission since the sales and use tax became effective on 8/1/65 that a lump sum or unit price contractor is the consumer of personal property which he incorporates in an improvement to real property.

The assessments of the value added tax are being contested. Only one assessment has proceeded through formal hearing before the Commission. That involved Interboro Surface Co. Inc. and the Commission upheld the assessment. Interboro has appealed to court and the case is now pending in the Appellate Division, Third Department.