

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the ~~Petition~~ Application

of

TURNER CONSTRUCTION COMPANY

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 ~~Year(s)~~ Periods
8/1/65 through 11/11/67

State of New York
County of Albany

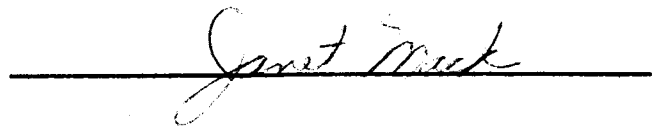
JANET MACK, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 17th day of December, 1975, she served the within
Notice of ~~Decision~~ (or Determination) by (~~CERTIFIED~~) mail upon Turner Construction
Company (XXXXXXXXXXXX) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Turner Construction Company
150 East 42nd Street
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

17th day of December, 1975.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the ~~XXXXXX~~ Application

of

TURNER CONSTRUCTION COMPANY

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For a Redetermination of a Deficiency or
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Tax Law for the ~~XXXXXX~~ Periods
8/1/65 through 11/11/67

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 Fred Ellison, Esq.

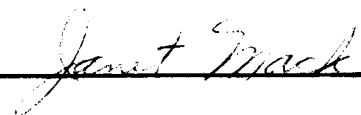
(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Fred Ellison, Esq.
French, Fink, Markle & McCallion, Esqs.
110 East 42nd Street
New York, New York 10017
and by depositing same enclosed in a postpaid 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

17th day of December , 1975 .







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) 4-XXXX
3850

DATED: Albany, New York
December 17, 1975

Turner Construction Company
150 East 42nd Street
New York, New York 10017

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
TURNER CONSTRUCTION COMPANY	:	DETERMINATION
for a 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 November 11, 1967.	:	

Applicant, Turner Construction Company, 150 East 42nd Street, New York, New York 10017, applied for a 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 November 11, 1967.

A formal hearing was held at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on April 10, 1973, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by French, Fink, Markle & McCallion, (Fred Ellison, Esq. of counsel) and the Sales Tax Bureau was represented by Saul Heckelman, Esq. (James Scott, Esq. of counsel).

ISSUES

I. Was the contract between the applicant and the General Services Administration a preexisting lump sum contract pursuant to section 1119 (a) (3), Tax Law?

II. Was the refund made by the State Tax Commission on or about October 14, 1968, a final and irrevocable determination of the applicant's tax liability?

III. Was the issuance of a Notice of Determination by the Sales Tax Bureau against the applicant on December 18, 1969, a valid exercise of its legal authority?

FINDINGS OF FACT

1. The taxpayer, Turner Construction Company, timely filed New York State sales and use tax returns for the period August 1, 1965 through November 11, 1967.

2. A Notice of Determination of sales and use taxes (and penalties) for the period August 1, 1965 through November 11, 1967, was issued on December 18, 1969, against the taxpayer under Notice No. 90709098.

3. The taxpayer applied for a revision of the determination of the deficiencies in sales tax.

4. On February 15, 1963, Turner Construction Company entered into a contract (Contract No. GS-02B-10,700) with the United States of America, through the General Services Administration ("GSA") for the construction of the United States Customs Court and Federal Office Building in New York City. Said contract contained a tax escalation clause entitled "1-09 Federal, State and Local Taxes" which included the following provisions:

"(C)(1) If the contractor is required to pay or bear the burden (i) of any tax or duty, which either was not to be included in the contract price pursuant to the requirements of paragraph (b) or was specifically excluded from the contract price by a provision of this contract or (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: Provided that the Contractor warrants in writing that no amount for such tax, duty or rate increase was included in the contract price as contingency reserve or otherwise: And provided further, that liability for such tax duty, rate increase, interest or penalty was not incurred through the fault or negligence of the contractor or its failure to follow instructions of the Contracting Officer."

"(4) Nothing in this Paragraph (C) shall be applicable to social security taxes; net income taxes; excess profit taxes; capital stock taxes; unemployment compensation taxes; or any State and local taxes, except those levied on or measured by the contract, including gross income taxes, gross receipt taxes, sales and use taxes, excise taxes, or franchise or occupation taxes measured by sales or receipts from sales."

5. By letter dated August 25, 1967, the GSA Regional Counsel requested the Department's opinion as to whether Turner Construction Company was entitled to a refund pursuant to the applicable refund provisions of the state and city tax laws for the payment of increased state and city sales taxes on building materials purchased in the performance of said contract. The GSA Regional Counsel specifically pointed out that the contract contained a tax adjustment clause and a copy of the tax adjustment clause was attached to the letter.

6. The Department of Taxation and Finance, by a letter dated September 20, 1967, replied to the GSA Regional Counsel's letter of August 25, 1967, and advised him that "With reference to the sales tax paid for tangible personal property which was used solely in the performance of Contract No. GS-02B-10,700, Turner Construction Company would be entitled to a refund...." The Department's letter also pointed out that Turner Construction Company had not as yet submitted its claim for refund.

7. A copy of the Department's September 20, 1967, letter to the GSA Regional Counsel advising that Turner Construction Company was entitled to a refund, was received by Turner Construction Company on October 25, 1967. Thereafter, on December 19, 1967, Turner

Construction Company duly filed with the Department a claim for refund of sales tax in the amount of \$50,640.90 paid by Turner Construction Company on materials purchased during the period August, 1965 through November, 1967, and used solely in the performance of said contract. The Department, by letter to Turner Construction Company dated February 13, 1968, requested information as to certain items comprising a portion of Turner Construction Company's claim and stated that the request was being made in connection with a lump sum construction contract entered into prior to April 14, 1965. Turner Construction Company furnished the requested information on April 4, 1968.

8. Subsequently, the Department, by letter to Turner Construction Company dated July 12, 1968, referred to Turner Construction Company's "claim for refund in the amount of \$50,640.90 in connection with a lump sum construction contract entered into prior to April 14, 1965" and advised Turner Construction Company that if it agreed to a partial denial of its claim in the amount of \$4,700.75, "a refund in the amount of \$45,940.15 will be approved and sent to the Department of Audit and Control for final approval in accordance with the State Constitution." The letter further stated that the determination "shall be final and irrevocable unless you [Turner] apply to the State

Tax Commission for a hearing within ninety days from the date of this letter in accordance with the provisions of section 1139(b) of the Tax Law." Turner Construction Company did not apply for such a hearing. On September 9, 1968, the applicant signed and returned to the Department the letter with a signed statement appearing at the foot thereof evidencing Turner Construction Company's acceptance of the allowance and approval of a refund to Turner Construction Company in the amount of \$45,940.15 and finally withdrawing its application for the amount of the remaining \$4,700.75 of the refund claim.

9. On or about October 14, 1968, the refund to Turner Construction Company in the amount of \$45,940.15 was approved by the State Tax Commission. The approval stated that "In accordance with the provisions of section 1119(3) of the Sales Tax Law, refund is granted of the tax paid for tangible personal property which is used solely in the performance of a lump sum construction contract entered into prior to April 14, 1965."

The refund was paid to Turner Construction Company by check #6921 dated November 12, 1968. The "Explanation of Refund" appearing on the Department's refund voucher dated October 15, 1968, shows that the refund was made on exactly the same basis set forth in the State Tax Commission's approval of the granting of the refund.

10. On December 18, 1969, the Sales Tax Bureau issued a Notice of Determination assessing tax due in the amount of \$45,940.15 plus interest thereon in the amount of \$3,031.41, for a total of \$48,971.56 on the grounds that the refund claim was invalid because the contract in question was not a preexisting lump sum contract pursuant to section 1119(a) (3) of the Tax Law.

CONCLUSIONS OF LAW

A. That, the contract in question was not a preexisting lump sum contract. The definition of lump sum contract contained in section 1119(a) of the Tax Law states that the amount payable under the contract must be fixed without regard to the costs incurred by the contractor or subcontractor during the actual performance of the contract. The inclusion of a tax escalation clause in the contract in question makes the amount payable variable according to tax costs actually incurred. Said contract cannot be characterized as a lump sum contract. The issuance of a refund was clearly erroneous.

B. That, the refund granted on or about October 14, 1968, was not a final and irrevocable determination of the State Tax Commission. The State Tax Commission is authorized to allow a refund or credit for sales and use taxes paid by a contractor or subcontractor for tangible personal property purchased in the performance of a preexisting lump sum contract pursuant to section 1119(a) (3) of the Tax Law. Since the

contract in question was not, in fact, a preexisting lump sum contract, the refund payment to the applicant was without legal sanction. Therefore, the directives of sections 1139(b) and 1139(c), Tax Law, imposing finality and irrevocability on refund determination are inapplicable since the initial erroneous refund was granted without legal authority.

C. That, the refund determination was not made binding on the State Tax Commission by the doctrines of res judicata, estoppel or accord and satisfaction. The doctrine of res judicata is applicable to determinations involving judicial process. The erroneous determination in question was issued by means of an administrative procedure. The doctrine of estoppel may not be utilized to prevent the collection of taxes lawfully imposed. In any event, the applicant failed to prove any detrimental reliance on the terms of the erroneous refund determination. Finally, the letter of the State Tax Commission dated July 12, 1968, was not an offer of settlement or compromise. It was merely a statement of proposed findings that gave the applicant an opportunity to either consent to the findings or contest the proposed decision. Said letter could not serve as a basis for an accord and satisfaction.

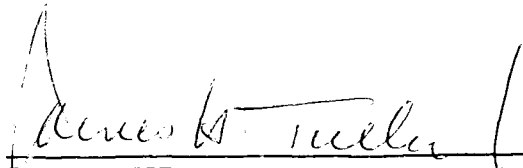
D. That, the Sales Tax Bureau issued the Notice of Determination dated December 18, 1969, in a timely fashion.

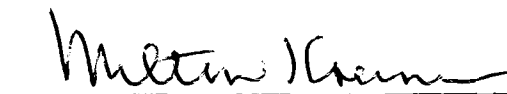
E. That, the assessment dated December 18, 1969, was valid and within the scope of the authority of the State Tax Commission under sections 1119(a) (3) and 1142, subdivision 6 of the Tax Law.

F. That, the application is denied.

DATED: Albany, New York
December 16, 1975

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER