

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

SMITH BROTHERS CONSTRUCTION CO., 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 ~~(xxxxxx)~~ 1972:


State of New York
County of Albany

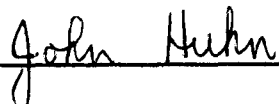
John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 1 day of September , 19 77, she served the within
Notice of Decision by ~~(certified)~~ mail upon Smith Brothers
Construction Co., Inc.
~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Smith Brothers Construction Co., Inc.
3305 Haseley Drive
Niagara, New York 14304
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)~~
~~xxx 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

1 day of September , 19 77





STATE OF NEW YORK
STATE TAX COMMISSION

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SMITH BROTHERS CONSTRUCTION CO., INC.:

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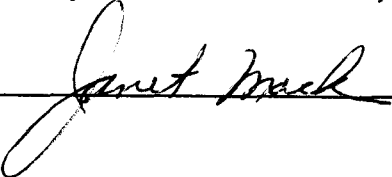
John Huhn, being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 1 day of September, 1977, he served the within
Notice of Decision by ~~(XXXXXX)~~ mail upon Samuel J. Civiletto, Esq.

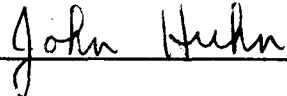
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Samuel J. Civiletto, Esq.
Grossman and Levine
8612 Buffalo Avenue
Niagara Falls, New York
and by depositing same enclosed in a postpaid properly addressed 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

1 day of September, 1977.







STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

September 1, 1977

Smith Brothers Construction Co., Inc.
3005 Haseley Drive
Niagara, New York 14304

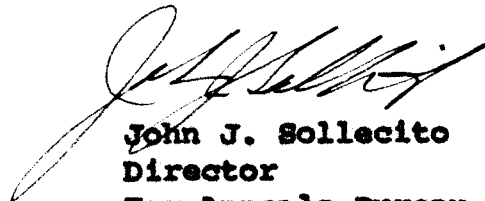
Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1139 & 1243** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


John J. Sollecito
Director
Tax Appeals Bureau

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SMITH BROTHERS CONSTRUCTION CO., INC. :
for Revision of a Determination or for :
Refund of Sales and Use Taxes under :
Articles 28 and 29 of the Tax Law for :
the Year 1972. :
:

A formal hearing was held before Alan R. Golkin, Esq., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 11, 1977 at 9 A.M. Petitioner appeared by Samuel J. Civiletto, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Arnold M. Glass, Esq. of Counsel).

Whether petitioner, Smith Brothers Construction Co., Inc.,
is entitled to a refund of sales taxes paid by it, as a contractor,

to its suppliers and/or vendors and sub-contractors, incident to construction of a building or structure for the Orleans County Industrial Development Agency, because of petitioner's intent in calculating its bid prices and further because of the tax exempt status of the project owner.

FINDINGS OF FACT

1. Petitioner, Smith Brothers Construction Co., Inc., timely filed on October 16, 1974 an Application for Credit or Refund of State and Local Sales and Use Taxes paid in 1972.

2. Petitioner paid sales taxes to its suppliers and sub-contractors in the amount of \$20,898.27 incident to the construction of the S.A. Cook Warehouse in Medina, New York.

3. The Orleans County Industrial Development Agency is tax exempt as an agency of the State of New York, a public corporation or political subdivision as set forth in section 1116(a)(1) of the Tax Law.

4. Petitioner did not know said Agency was tax exempt, and neither the contract nor the bids were prepared accordingly, all of which was done on forms required by said Agency.

5. Petitioner made purchases from suppliers and sub-contractors of tangible personal property to be used in the aforementioned warehouse construction project.

6. Petitioner claims exemption from the imposition of sales taxes under section 1115(a)(15) of the Tax Law, saying the tangible personal property purchased by petitioner was to be and was used in erecting a building, and was sold to the project owner before said personal property became a part of the structure.

7. Said purchases by petitioner were made incident to the erection of a building for an exempt organization and became integral components thereof.

8. Neither the bid nor the contract contained separately stated amounts for labor and materials, but, in fact, required and contained a lump sum price.

9. Petitioner failed to prove that sales tax was not paid to petitioner by the project owner in that the bid sheets admitted into evidence did not specifically state that no sales tax was included, but merely failed to mention sales tax. Said estimating sheets setting forth cost estimates for various categories may or may not have included sales tax therein.

10. The bid specifications clearly stated that the contractor was liable for all sales, consumer use and other consumer taxes in Article 4, Section 4.6 of Taxes, and GC-2 of the Addendum thereto added that the contractor was to secure and properly complete a New York State Certificate of Capital Improvement, to be signed by the owner, in accordance with which said owner would be free of liability for sales tax, all of which petitioner did.

CONCLUSIONS OF LAW

A. That the purchases made by petitioner constituted retail sales subject to sales tax within the meaning of section 1105(a) of the Tax Law.

B. That the project owner, Orleans County Industrial Development Agency, was a tax exempt organization within the parameters of section 1116(a)(1) of the Tax Law.

C. That petitioner's purchases constituted integral components of the building being erected, but said purchases were made pursuant to specifications, a bid and a contract setting forth a lump sum price, absent any breakdown of costs into separate categories for labor and materials.

D. That petitioner made purchases of tangible personal property but did not sell said items to the project owner as tangible personal property as required by section 1115(a)(15) of the Tax Law, as applicable in 1972, since the lump sum contract governed payment by owner to petitioner, and, therefore, petitioner was the ultimate consumer. (McClendon Blacktop Co., Inc. v. State Tax Commission, August 12, 1971)

E. That the petition of Smith Brothers Construction Co., Inc., for credit or refund of state and local sales or use tax is denied.

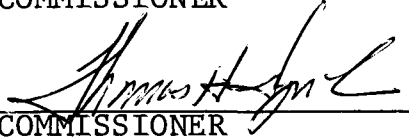
DATED: ALBANY, NEW YORK

September 1, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER