

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

READY MIX & SUPPLY CORP.

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 and 29 of the
Tax Law for the ~~XXXXXX~~ Period(s)
9/1/68 - 5/31/71.

State of New York
County of Albany

Bruce Batchelor, 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 9th day of February, 1977, she served the within
Notice of Determination by ~~(XXXXXX)~~ mail upon Ready Mix & Supply Corp.

~~(XXXXXX)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Ready Mix & Supply Corp.
Tivoli Street
Albany, New York 12201

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 ~~(XXXXXX)~~
~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the
last known address of the ~~(XXXXXX)~~ petitioner.

Sworn to before me this

9th day of February, 1977.

Bruce Batchelor

Janet Bush

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
READY MIX & SUPPLY CORP.

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 and 29 of the :
Tax Law for the ~~XXXXXX~~ Period(s) :
9/1/68 - 5/31/71.

State of New York
County of Albany

Bruce Batchelor , 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 9th day of February , 1977, she served the within
Notice of Determination by (~~certified~~) mail upon Eugene J. Steiner, Esq.

(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Eugene J. Steiner, Esq.
90 State Street
Albany, New York 12207

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

9th day of February , 1977.

Bruce Batchelor

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

February 9, 1977

TELEPHONE: (518) **457-1723**

Ready Mix & Supply Corp.
Tivoli Street
Albany, New York 12201

Gentlemen:

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

Please take further notice that pursuant to
Section(s) **1138 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.

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,

Enc.

Paul B. Coburn
Supervising Tax
Hearing Officer

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
READY MIX & SUPPLY CORP.	:	
For Revision of a Determination or for	:	DETERMINATION
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Period September 1, 1968 through	:	
May 31, 1971.	:	

Applicant, Ready Mix & Supply Corp., Tivoli Street, Albany, New York, applied 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 September 1, 1968 through May 31, 1971.

A formal hearing was held at the offices of the State Tax Commission, Building # 9, State Campus, Albany, New York on May 8, 1975, before L. Robert Leisner, Hearing Officer. The taxpayer appeared by Eugene J. Steiner, Esq. The Sales Tax Bureau appeared by Saul Heckelman, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the assessment of additional tax for the period September 1 through November 30, 1968, was made within the limitations of time prescribed by law.

II. Whether certain transactions constituted sales of parts and repair services from Albany Gravel Co., Inc. to Ready Mix & Supply Corp., the receipts from which were subject to sales or use taxes.

III. Whether the charges for labor and materials qualified for a production exemption under the Tax Law.

FINDINGS OF FACT

1. The taxpayer, Ready Mix & Supply Corp., ("Ready Mix"), timely filed New York State sales and use tax returns for the period September 1, 1968 through May 31, 1971.

2. On December 17, 1971, as the result of a field audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Ready Mix in the amount of \$8,705.49, including penalty and interest, under Notice No. 90,747,406. The assessment was based on additional tax allegedly due on repairs to equipment and purchases subject to use tax.

3. The taxpayer timely applied for revision of the determination of the deficiencies in sales and use taxes.

4. Charles K. Maxwell was president of both Ready Mix and Albany Gravel Co., Inc. ("Albany Gravel"), from the early 1930's until his death in 1952. During that time, Mr. Maxwell owned a controlling interest of at least 50% in each corporation. During the audit period, Mr. Maxwell's widow, Florence Maxwell, held the

majority of stock in Ready Mix, but owned no stock in Albany Gravel. She was, however, a director of both corporations in addition to being an officer of Ready Mix.

5. Since the early 1930's, Ready Mix's place of business has been located on property adjacent to property owned by Albany Gravel. At some time in the early 1930's, the common management of the two corporations decided to repair and maintain trucks owned by the two corporations at a shop in a garage on the Albany Gravel property, just off the Ready Mix property line. The shop employees were carried on the books of Albany Gravel as its employees, and any labor performed by them on Ready Mix Trucks was "backcharged" or billed to Ready Mix. Material, such as parts used in the repair or maintenance of Ready Mix trucks, was purchased by Albany Gravel and was also billed to Ready Mix.

6. Although the relationship between the two corporations was not as close during the audit period as it was during the lifetime of Charles K. Maxwell, the same arrangement was continued. Albany Gravel backcharged, or billed, Ready Mix on a weekly basis for labor and on a monthly basis for materials used in the repair and maintenance of Ready Mix trucks. For labor, Albany Gravel backcharged the actual time worked by the shop employees at the union rate, plus 18% as insurance costs and an additional 25% as "shop charge and supervision." For materials, Albany Gravel billed

the actual cost of each particular item, including the sales tax which had been paid on such item by Albany Gravel. Albany Gravel did not earn a profit on the services or materials.

7. The shop personnel did no work for individuals or firms other than Ready Mix and Albany Gravel.

8. During the audit period (and in fact for many years prior thereto), Ready Mix and Albany Gravel were parties to common union agreements with the union representing the shop workers. The agreement dated May 5, 1969, for example, identified the parties as follows:

"This AGREEMENT, Effective as of May 1, 1969, is between READY-MIX AND SUPPLY CORPORATION, and ALBANY GRAVEL CO., INC. (hereinafter referred to as the Company) and LODGE 838 of the INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS (hereinafter referred to as the Union)."

9. Although all shop personnel received their wage or salary checks from Albany Gravel, two such employees, the shop superintendent and the lead mechanic, also received annual bonus checks from Ready Mix. Taxes were withheld by Ready Mix from such bonuses.

10. Shop employees who were injured while working on Ready Mix trucks never brought suit for said injuries against Ready Mix, but instead made workmen's compensation claims against Albany Gravel.

11. The Sales Tax Bureau has taken the position that the services performed by shop personnel on Ready Mix trucks constituted

taxable repair services, and that the material installed on such trucks was tangible personal property subject to sales or use tax.

12. Ready Mix contends that the statute of limitations expired for the period September 1 through November 30, 1968; that it and Albany Gravel were engaged in a joint venture as to the operation of the shop, and that since the shop employees were employees of the joint venture, their services were rendered as employees of Ready Mix and were, therefore, not subject to sales tax; and that the labor and material charges were expended in the manufacturing process and, therefore, were not subject to tax.

13. There was no written agreement of joint venture between Ready Mix and Albany Gravel.

14. Ready Mix offered no testimony or other evidence as to the purpose or use of the parts or materials upon which the tax was assessed.

CONCLUSIONS OF LAW

A. That the time for issuing the assessment of additional tax for the period September 1, 1968 through November 30, 1968 did not expire until December 20, 1971, and the assessment issued on December 17, 1971 was, therefore, timely under section 1147(b) of the Tax Law.

B. That the backcharges for the labor of shop employees on applicant's trucks constituted receipts from the sale of repairs to tangible personal property not held for sale in the regular course of business, within the meaning and intent of section 1105(c)(3) of the Tax Law, and were thus subject to sales tax.

C. That the backcharges for the materials purchased by Albany Gravel and installed by shop employees on applicant's trucks were receipts from the retail sale of tangible personal property, within the meaning and intent of section 1105(a) of the Tax Law and are thus subject to sales tax.

D. That since the applicant failed to pay sales tax to Albany Gravel, such tax is payable directly to the Tax Commission pursuant to section 1133(b) of the Tax Law.

E. That the applicant has not shown that a bona fide joint venture existed between itself and Albany Gravel. Even assuming that such a joint venture existed, applicant would not escape taxation. Such a joint venture would constitute a separate and distinct person within the meaning and intent of section 1101(a) of the Tax Law, and the repairs performed by its employees to applicant's trucks, would remain taxable to applicant. In addition, repairs performed by said employees to the trucks of Albany Gravel would also become subject to taxation.

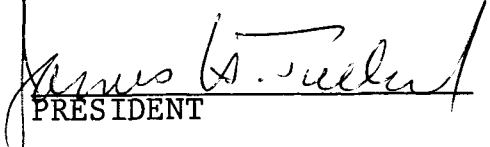
F. That the production exemptions set forth in sections 1115(a)(12) and 1210(a)(1) of the Tax Law apply only to tangible personal property

and do not apply to labor. Moreover, applicant did not sustain its burden of proof that the materials upon which the tax was assessed qualified for such exemption. Accordingly, no production exemption is available for either the labor or materials upon which the tax was assessed.


G. That the application is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 17, 1971, is sustained.

DATED: Albany, New York
February 9, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER