STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GERMANETTI & RYAN, INC.

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(s)~~ Period(~~s~~) September 1, 1970 through August 31, 1973.

AFFIDAVIT OF MAILING

State of New York
County of Albany

Marsina Donnini, 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 26th day of August, 1977, she served the within Notice of Determination by (~~certified~~) mail upon Germanetti & Ryan, Inc. (~~representative of~~) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Germanetti & Ryan, Inc.
Box 330
Massena, New York 13662

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
26th day of August, 1977.

Marsina Donnini

Janet Mark

TA-3 (2/76)

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

August 26, 1977

Germanetti & Ryan, Inc.
Box 330
Massena, New York 13662

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1138 & 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,

Paul B. Coburn
Supervising Tax
Hearing Officer

cc: ~~Petitioner's Representative~~

Taxing Bureau's Representative

TA-1.12 (6/77)

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application of GERMANETTI & RYAN, 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 Period September 1, 1970 through August 31, 1973.	:	DETERMINATION

Applicant, Germanetti & Ryan, Inc., Box 330, Massena, New York 13662, 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, 1970 through August 31, 1973. (File No. 01810).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on June 19, 1974 at 9:30 A.M. The applicant appeared by Hugh Germanetti, President. The Sales Tax Bureau appeared by Saul Heckelman, Esq. (James A. Scott, Esq., of counsel).

ISSUES

I. Whether applicant was liable for tax on materials used in a lump sum construction contract with the Power Authority of the State of New York.

II. Whether tax was due on transportation charges for the shipment of special trap rock aggregate from a Connecticut quarry to a concrete mixing plant at Massena, New York, said aggregate having been purchased not by the applicant, a contractor, but by the concrete supplier.

FINDINGS OF FACT

1. Applicant, Germanetti & Ryan, Inc., filed New York State sales and use tax returns for the period September 1, 1970 through August 31, 1973.

2. On November 15, 1973, 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 applicant in the amount of $7,203.93 in tax, plus $1,813.63 in penalty and interest, under Notice No. 90,751,298.

3. On November 19, 1973, Germanetti & Ryan, Inc. applied for revision of said determination of deficiencies in sales and use taxes.

4. Applicant entered into a contract with the Power Authority of the State of New York ("Power Authority") for the erection of a maintenance warehouse building at the St. Lawrence Power Project, Massena, New York. Paragraph 10 of "Information for Bidders" issued by the Power Authority provided as follows:

> "NEW YORK STATE SALES AND COMPENSATING USE TAX ACT.
>
> Under the Provisions of the New York State Sales and Compensating Use Tax Act, the Authority is an Organization exempted from the payment of such taxes on sales to it of tangible property or services. The Authority is not required to furnish exemption certificates, and the Authority's Contract may be accepted in lieu of an exemption certificate with the Contractor's Copy as proof that the sales are exempt."

Section 1.06 of the construction "Specifications" provided:

> "NEW YORK STATE SALES AND COMPENSATING USE TAX ACT
>
> Under the provisions of the New State Sales and Compensating Use Tax Act, the Authority is an organization exempted from the payment of such taxes on sales to it of tangible property or services. The Authority is not required to furnish exemption certificates, and the Authority's contract may be accepted in lieu of an exemption certificate with the Contractor's copy as proof that the sales are exempt.
>
> If Contractor is billed for any New York State or local sales or compensating use tax with respect to materials or items of equipment or components thereof to be incorporated in the work, he shall pay such tax under protest, preserving his rights to a refund, and shall notify the Authority of any such payment within fifteen (15) days of making it. Authority will assist Contractor in obtaining a refund of any such tax. If any such tax is finally determined to be payable by the highest authority

from which the Authority elects to seek a determination as to the legal necessity of such payment, the Authority will reimburse Contractor for the amount paid, including any penalty or interest.

If requested by Contractor, the Authority will reimburse Contractor prior to such final determination for any such tax paid under protest upon assignment by Contractor to Authority of all Contractor's rights.

Contractor will not be paid as to any item in connection with which material equipment or components thereof have been incorporated in the work unless he furnishes evidence that any such tax paid thereon was paid under protest."

5. Applicant interpreted said information and specifications to mean that a contractor, in computing his bid, was not to include sales or use tax on the materials to be used in the construction of the warehouse.

6. The Sales Tax Bureau has taken the position that since the contract at issue is a lump sum contract and not a time and materials contract, the applicant is the consumer of the materials purchased and used and, therefore, is liable for tax on such materials in the amount of $3,961.95.

7. The Power Authority of the State of New York has vigorously contested a number of assessments before the State Tax Commission and has been successful in sustaining its position that it is a tax exempt orgainzation, exempt from the imposition of any sales and use taxes on material and equipment purchased for its projects. In this case, the bid was made and the contract was negotiated and entered into with the provision and with the

intent of both parties that the purchase of materials and equipment for the construction of the warehouse would be exempt, and that the Power Authority would ultimately receive the benefit of the sales tax exemption.

8. The Power Authority received the benefit of the exemption from sales tax and the benefit did not accrue to the taxpayer.

9. Applicant entered into a series of contracts for the construction of carbon baking furnance foundations for the Aluminum Company of America at Massena, New York. The furnance foundations required the use of "trap rock concrete," i.e. concrete made with special trap rock aggregate which would not expand when heated. Applicant ordered the concrete from St. Lawrence Transit Mix Corporation ("St. Lawrence") of Massena, New York and, as the special aggregate was not available locally, directed St. Lawrence to obtain same from the nearest acceptable source, the New Haven Trap Rock Company ("New Haven") at Wallingford, Connecticut. St. Lawrence ordered the aggregate, which was shipped by rail from the quarry at Wallingford to St. Lawrence's plant at Massena, where St. Lawrence took possession of and title to same.

10. The cost of shipping the aggregate was about three times the cost of the aggregate itself. Applicant claimed that it had assumed from the outset that no sales or use tax would be payable on this unusually high cost factor, and that allowance for such tax was not included in its bid to Alcoa. Mr. Hugh Germanetti, applicant's president, wrote the following letter to St. Lawrence on August 27, 1971:

> "This letter supplements our Purchase Order No. 2263 for the delivery of concrete on the captioned project.
>
> It is our understanding that you will bill for the regular concrete in two parts. One portion will be the standard transportation allowance. We are not required to pay Use Tax on this portion.
>
> The trap rock concrete presents a special case. At our request, you will purchase a special aggregate from New Haven Trap Rock Company and have it shipped to Massena, New York. The very high freight cost of shipping the aggregate to Massena is the cause of the unusually high unit price of $41.00 per cubic yard.
>
> As freight charges are exempt from New York State Sales or Use Tax, trap rock concrete must be billed in a special manner. The billing must show the standard transportation allowance, the special freight charges and the balance, which is the standard concrete charge.
>
> As it may be difficult to calculate the exact freight charge per cubic yard of concrete delivered, please bill us at the total rate of $41.00 per cubic yard, showing just the standard transportation allowance. An adjustment for the special freight charge will be made after the trap rock concrete installation is complete and the exact freight charges are known.

> As we have a Direct Payment Permit, your firm will not be involved with Sales Tax. Our office will make Use Tax payments on the trap rock concrete as it is delivered in the same manner as regular concrete. A final Use Tax credit adjustment will be made when the project is complete."

The precise terms of purchase order 2263, referred to in the first paragraph of the letter, are not in the record.

11. Construction of the first furnace foundation begun by applicant in July of 1971 was completed in 1972. St. Lawrence paid New Haven for the aggregate used in the foundation and also paid Penn Central Transportation Company for the rail transportation charges. St. Lawrence billed applicant $41.00 per cubic yard as the concrete was delivered to the job site. Construction of the second foundation was begun early in 1973. The aggregate used in this foundation was delivered to St. Lawrence in October of 1972 and, as in the case of the first foundation, St. Lawrence paid for the aggregate and the transportation charges from the quarry to Massena. In March, 1973, however, applicant was advised by the Sales Tax Bureau that sales and use tax was payable on the transportation charges. Applicant then paid such taxes applicable to the materials used in the first foundation (accordingly, taxes on such materials are not at issue in this proceeding) and modified its agreement with St. Lawrence in the following manner: On March 22, 1973, applicant reimbursed St. Lawrence the sum of $63,464.69 (represent-

ing $17,149.71, the cost of the aggregate to be used in the concrete for the second foundation, plus $46,314.98, the rail charges for transporting said aggregate from the quarry to Massena) and thereafter paid for the concrete as delivered at the usual per cubic yard price for standard concrete. (The heat-resistant concrete was identical to standard concrete except for the fact that the special aggregate was used in place of the local aggregate.) Applicant claims that it took title to the aggregate upon making the payment of March 22, 1973. At that time, the aggregate was in the yard at St. Lawrence's plant and no concrete had been manufactured from it.

12. Applicant claims that although there was no written agency agreement, St. Lawrence purchased the aggregate and paid the rail transportation charges as its agent, and that the transportation costs should have been excluded from taxable receipts pursuant to section 1101(b)(3) of the Tax Law. The Sales Tax Bureau contends that a retail sale was made between St. Lawrence and applicant, rather than between New Haven and applicant, and, therefore, assessed $3,241.98 additional tax on the freight charges.

CONCLUSIONS OF LAW

A. That the Power Authority is exempt from sales tax, by law. Accordingly, applicant is not liable for tax on the

purchase of materials and equipment which were used for and incorporated into the maintenance warehouse project, since it was the intent of the parties that the purchase of such materials and equipment was to be exempt from tax, and the Power Authority actually received the benefit of the exemption.

B. That St. Lawrence was not applicant's agent in the purchase of the trap rock aggregate. The charges for transporting the aggregate from Wallingford, Connecticut to Massena, New York were expenses of St. Lawrence and not the applicant. Thus, said charges are not excludable from taxable receipts pursuant to section 1101(b)(3) of the Tax Law.

C. That the Sales Tax Bureau is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due and to delete $3,961.95 in tax, plus penalty and interest, imposed on the purchase of materials and equipment used for and incorporated into the construction of the Power Authority warehouse, and that, except as so modified, said determination is sustained and the application of Germanetti & Ryan, Inc. is otherwise denied.

DATED: Albany, New York
August 26, 1977

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER