

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

EVANS PLUMBING AND HEATING, 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(s)~~ Period(s)
March 1, 1973 through February 29, 1976

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 13th day of December, 1977, she served the within

Notice of Determination by ~~(certified)~~ mail upon Evans Plumbing & Heating, Inc.

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Evans Plumbing and Heating, Inc.
421 Roosevelt Ave.
Endicott, New York 13760

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)~~
~~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

13th day of December, 1977

Janet Mack

John Huhn



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

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

December 13, 1977

Evans Plumbing and Heating, Inc.
421 Roosevelt Ave.
Endicott, New York 13760

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,


Joseph Chynoweth
Hearing Examiner

cc: ~~Petitioner's Representative~~

Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Application :
of :
EVANS PLUMBING AND HEATING, INC. : DETERMINATION
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 March 1, 1973 through :
February 29, 1976. :

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on February 3, 1977 at 9:00 A.M. Applicant appeared by Karl E. Spencer, vice-president of said applicant and Mr. E.D. Talmadge, a corporate employee. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq. of counsel).

Whether an audit of the applicant's books and records by the Sales Tax Bureau properly reflected the additional tax due.

FINDINGS OF FACT

1. On June 14, 1976, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the applicant. The Notice was issued in accordance with an audit of the applicant's books and records.

2. On audit, the Sales Tax Bureau determined that the applicant failed to pay sales and/or use taxes in the sum of \$4,853.07 on the purchase of materials used in the performance of capital improvements to real property. Although the additional tax due resulted from the applicant's failure to pay tax on materials used in capital improvements, said additional tax was derived from two areas of the applicant's business:

a) additional taxes in the sum of \$1,862.00 was due on material used in capital improvement work for the Raymond Corporation which furnished applicant with a copy of its Direct Payment Permit.

b) the remaining additional tax due of \$2,991.07 resulted from a "margin of error" test whereby the Sales Tax Bureau reviewed the sales invoices for June, July and August of 1975, and determined that several of the sales on which the applicant billed its customers' sales tax were capital improvements.

Therefore, in addition to the tax charged to the customer and paid to the Sales Tax Bureau, a tax should have been paid by the applicant on the purchase of the materials used in these jobs.

3. Applicant is a plumbing and heating contractor located in Endicott, New York. During the audit period, the applicant was hired by the Raymond Corporation, a manufacturer, to furnish and install a variety of heating and plumbing systems. The installations constituted capital improvements to real property. The Raymond Corporation furnished the applicant with a Direct Payment Permit and stated that it (the Raymond Corporation) self-assessed the sales tax and paid the tax to the State of New York.

4. In addition to the work done for the Raymond Corporation, the applicant performed other repairs and capital improvements. It used its experience as well as information supplied by the Sales Tax Bureau in determining whether sales tax should be charged to its customer. On some of the sales billings that applicant deemed to be capital improvements, the applicant separately listed sales tax on the material portion of the billing.

Example: Applicant, Invoice No. 6694, dated June 24, 1975.

Material at cost	\$ 785.36
Labor cost	978.55
	<hr/>
	1,763.91
15% overhead	264.59
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	2,028.50
15% profit	304.28
	<hr/>
	2,322.78
7% tax on materials	54.98
	<hr/>
Total	\$2,387.76

Applicant contended that the tax on materials in these billings was a recovery of its sales tax obligation. The Sales Tax Bureau claimed that this was an erroneous collection of sales tax.

CONCLUSIONS OF LAW

A. That the purchase of materials by the applicant for use in capital improvements to real property for the Raymond Corporation constituted retail sales within the meaning and intent of section 1101(b)(4) of the Tax Law, and as such, are subject to the imposition of the sales tax according to section 1105(a) of the Tax Law. Therefore, the applicant is liable for additional tax due in the sum of \$1,862.00 for that portion of the audit. The Instructions Concerning the Use of a Direct Payment Permit (ST-123.1), relating to contractors states: "...a contractor or subcontractor performing capital improvement work may not accept a Direct Payment Permit from his customer."

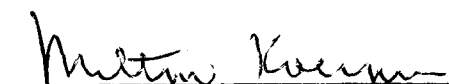
B. That the applicant properly charged sales tax on jobs it deemed to be of a repair nature. The separate listing of sales tax on only the material portion of the billing is not evidence that the applicant erroneously charged sales tax on capital improvements, but such listing of tax is rather an inclusion of the applicant's sales tax obligation. Therefore, the tax due in the sum of \$2,991.07, resulting from a "margin of error" test of the applicant's sales, is cancelled.

C. That the application of Evans Plumbing and Heating, Inc., is granted to the extent of reducing the additional tax due from \$4,853.07 to \$1,862.00, together with such interest as may be lawfully owing; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 14, 1976; and, that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
December 13, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER