

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

TRI DELTA CONSTRUCTION CORPORATION

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 ~~(a)~~ June
1, 1971 through February 15, 1972.

State of New York
County of Albany

Carmen Mottolese, 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 19th day of August, 1976, she served the within
Notice of Determination by ~~(certified)~~ mail upon Tri Delta Construction
Corporation ~~XXXXXX~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Tri Delta Construction Corporation
1299 Union Road
West Seneca, New York 14224

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

19th day of August, 1976

Carmen Mottolese

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

TRI DELTA CONSTRUCTION CORPORATION

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
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Taxes under Article(s) 28 and 29 of the :
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1, 1971 through February 15, 1972.

State of New York
County of Albany

Carmen Mottolese, 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 19th day of August, 1976, she served the within
William Pastore, Esq.
Notice of Determination by ~~(certified)~~ mail upon
(representative ~~(representative)~~ of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
William Pastore, Esq.
as follows: Norton, Sacks, Molineaux &
Pastore, Esqs.
230 Park Avenue
New York, New York 10017
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(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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Sworn to before me this

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Carmen Mottolese

Just Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N.Y. 12227

August 19, 1976

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

TELEPHONE: (518) 457-3850

Tri Delta Construction Corporation
1299 Union Road
West Seneca, New York 14224

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.

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,

Paul B. Coburn
Supervising Tax
Hearing Officer

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
TRI DELTA CONSTRUCTION CORPORATION	:	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 June 1, 1971 through February 15,	:	
1972.	:	

Applicant, Tri Delta Construction Corporation, 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 June 1, 1971 through February 15, 1972.

A formal hearing was held at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on December 11, 1973, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by Eugene R. Gallagher and the Sales Tax Bureau was represented by Saul Heckelman, Esq., (Solomon Sies, Esq., of counsel).

ISSUE

Whether or not the taxpayer is entitled to a refund for increased sales taxes paid by it with respect to a construction contract entered into prior to the enactment of the law increasing the sales tax.

FINDINGS OF FACT

1. The taxpayer, Tri Delta Construction Corporation, timely filed New York State sales and use tax returns for the period in issue. Taxpayer made application on February 24, 1972, for a refund of the additional 1% in sales tax it paid after June 1, 1971, with respect to a construction contract entered into prior to the enactment of the law increasing the sales tax.

2. By letter dated October 1, 1972, the Audit and Review Unit of the Sales Tax Bureau reversed a previous determination dated August 25, 1972, and disallowed the refund of the increased sales tax paid by the taxpayer in the amount of \$3,018.39. It is this application for refund and subsequent rejection that is the subject of the within matter.

3. On or about March 19, 1971, the taxpayer entered into a construction contract with the State University Construction Fund (hereinafter referred to as the "Fund") to excavate and perform site work for a lake at the State University of New York at Buffalo, Amherst site.

4. The contract was competitively bid and awarded to taxpayer as a result of its proposal dated February 3, 1971.

5. The construction contract provided among other things, that taxpayer be paid various specified unit prices per cubic yard of earth excavated, rock excavated, unsuitable material excavated and hauled off-site, granular filter material (Type A) placed and selected granular fill (Type B) placed.

6. The unit prices specified for each item of work and material varied depending upon whether the estimated quantity was increased or decreased.

7. The total base contract price calculated upon estimated quantities was \$1,370,000.00 of which \$1,320,000.00 was allocated for the work and labor performed and \$50,000.00 for the construction materials supplied.

8. The construction materials to be furnished and placed for the base construction contract consisted of slag, selected granular fill or rip-rap which materials were purchased by taxpayer and made a permanent part of the project.

9. The proposal required bidders to include separate prices for work and labor and for supplies and materials with respect to four options or alternates that the Fund might elect to add or delete from the base construction contract. (Exhibit "D", Proposal, pp. P-2).

10. The four alternates and the price adjustments proposed by taxpayer were as follows:

<u>WORK</u>	<u>AMOUNT</u>
<u>Alternate 1 (Add)</u>	
Increase area of Lake II excavation.	\$100,000.00
<u>Alternate 2 (Deduct)</u>	
Decrease area of Lake excavation.	\$ 70,000.00
<u>Alternate 3 (Deduct)</u>	
Decrease additional area of Lake excavation.	\$125,000.00
<u>Alternate 4 (add)</u>	
Field Office Trailers-Provide 4 each office type trailers with necessary power, water and sanitary utilities.	\$ 28,000.00

11. By letter of Intent dated March 18, 1971, the Fund authorized taxpayer to proceed with the construction work on March 19, 1971, and notified taxpayer that its proposal with respect to Alternates 1 and 4 were accepted and that Alternates 2 and 3 were rejected. Subsequently, the Fund deleted Alternate 4. The remaining alternate, i.e., Alternate 1, to increase the size of the lake area, specified the price of \$100,000.00, \$95,900.00 of which was for labor and \$4,100.00 for materials.

12. By Contract Change Order, the Fund subsequently increased and decreased the quantity of certain of the contract items and adjusted the total contract price as provided for in Section 4.03 and 4.05 and Schedule 1 of the Contract.

13. Thus, Contract Change Order No. 1 omitted 9,826 cubic yards of Type B selected granular fill and resulted in a credit to the Fund of a \$54,043.00 based upon \$5.50 per cubic yard allowed for deductions as provided for in Schedule 1 of the Construction contract at page A-28. Similarly, by Contract Change Order No. 5, the Fund omitted 1,000 cubic yards of Type A granular material which resulted in a \$10,000.00 credit to it at the \$10.00 per cubic yard allowance for deductions as set forth in Schedule 1 of the Contract.

14. The above items related to both work and materials whereas some of the Contract Change Orders do not relate to the addition or deletion of material, but only relate to the addition of work, i.e., Contract Change Order Nos. 3,4 and 6.

15. The taxpayer commenced work in March, 1971, and physically completed all work in December 1971.

16. The taxpayer paid \$1,480,751.00 under the contract. Of this amount, \$9,670.00 was for materials furnished, all of which materials were incorporated into the work and were exempted from sales tax because of the exempt status of the Fund.

17. Taxpayer did, however, pay sales tax with respect to the rental of heavy construction equipment used to perform the construction work and for fuel, oil and repair parts it purchased for said equipment.

18. Effective June 1, 1971, Tax Law §1105 was amended to increase the sales tax for 3% to 4%.

19. Section 4.01 of the construction contract provides that taxpayer receive a total of \$1,498,000.00 for the work and materials to be furnished thereunder "as increased or decreased by additions or deductions from the work covered by the Contract".

20. Section 4.05 provides that the "unit prices" set forth on Schedule 1, the attached thereto shall determine the value of omitted and/or extra work and "in the case of extra work, such unit prices shall be deemed to include all profit, overhead, and expenses of whatsoever kind and nature of the Contractor, his subcontractors and sub-subcontractors and the Contractor agrees that he shall make no claim for any profit, overhead, expense or percentage override in connection therewith".

21. The Sales Tax Bureau denied the refund asserting that the contract was a time-and-material contract and could not be deemed a qualified preexisting contract at the time of the tax increase.

CONCLUSIONS OF LAW

A. The taxpayer's contract was for construction of improvement to real property under which the amount payable to the contractor was fixed without regard to the costs incurred by him and was irrevocably entered into prior to the date of the enactment of a law increasing the rate of sales tax.

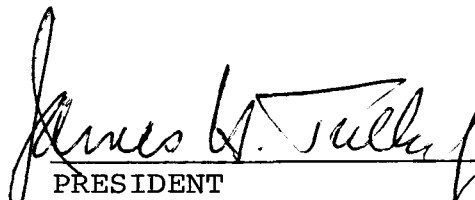
The claimed refund was for taxes on the sale or use of tangible personal property used solely in the performance of a preexisting unit price construction contract. Under section 1119(a)(3) of the Tax Law the taxpayer is entitled to a refund of taxes paid due to the sales tax increases on such a preexisting construction contract.

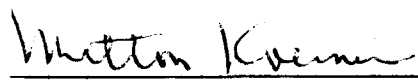
B. The taxpayer's refund claim is granted.

C. Pursuant to the Tax Law, interest shall be added to the total amount due until paid.

DATED: Albany, New York
August 19, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-26 (4-76) 25M

STATE OF NEW YORK

Department of Taxation and Finance

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

S

William Pastore, Esq.
Norton, Sacks, Molineaux &
Pastore, Esqs.
230 Park Avenue
New York, New York 10017





STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU

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Inquiries concerning the computation of tax
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Very truly yours,

Paul B. Coburn
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Supervising Tax
Hearing Officer

Enc.

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Taxing Bureau's Representative:

STATE OF NEW YORK

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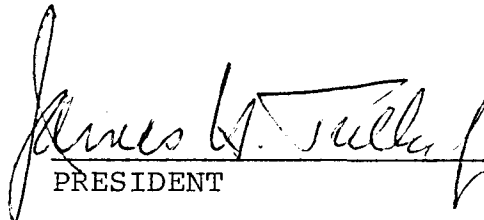
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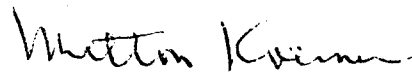
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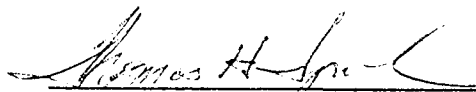
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