

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

O.T. COOKINGHAM EQUIPMENT, 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 ~~XXXXXX~~ Period(x)
March 1, 1972 through February 28, 1975.

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 5th day of April, 1978, ~~she~~ served the within
Notice of Determination by ~~(certified)~~ mail upon O.T. Cookingham
Equipment, Inc. (~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: O.T. Cookingham Equipment, Inc.
P.O. Box 160
Red Hook, New York 12571

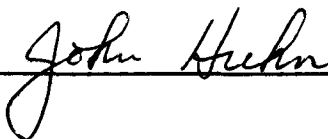
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~(representative of the)~~
~~XXXXXX~~ 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

5th day of April, 1978





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STATE TAX COMMISSION

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O.T. COOKINGHAM EQUIPMENT, INC.

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Tax Law for the ~~Year(s)~~ Period ~~(x)~~
March 1, 1972 through February 28, 1975.

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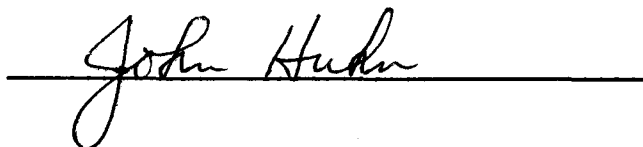
John Huhn, being duly sworn, deposes and says that
~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 5th day of April, 1978, ~~he~~ served the within
Notice of Determination by ~~(certified)~~ mail upon Charles S. Ronder &
Charles D. Conway (representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Charles S. Ronder & Charles D. Conway, Esqs.
The Ronder Building
103-111 Hurley Avenue
Kingston, New York 12401
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

5th day of April, 1978.







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

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

April 5, 1978

O.T. Coaxingham Equipment, Inc.
P.O. Box 160
Red Hook, New York 12571

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 Chyrywaty
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

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 June 7, 1977 at 9:00 A.M. Applicant appeared by Charles S. Ronder and Charles D. Conway, Esq's. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether applicant exclusively leased out its heavy construction equipment.

II. Whether the audit of applicant's books and records by the Sales Tax Bureau and the results therefrom, were correct.

FINDINGS OF FACT

1. Applicant, O.T. Cookingham Equipment, Inc. (hereinafter "Cookingham"), filed New York state and local sales and use tax returns for the period March 1, 1972 through February 28, 1975.

2. On December 19, 1975 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 for the period March 1, 1972 through February 28, 1975, imposing additional taxes due in the amount of \$12,258.60, plus penalty and interest.

3. During the period at issue, applicant was engaged in the business of leasing heavy construction equipment. The applicant primarily leased equipment to its sister corporation, Pin Oak Construction (sic); however, equipment was also made available to the general public. The applicant and Pin Oak Construction maintained the same offices and had the same bookkeeper. (Applicant used the term "sister corporation", but did not further explain the relationship between the corporations.)

4. Cookingham had no employees during the period at issue; consequently, if a customer requested an equipment operator, Cookingham would arrange for an employee from Pin Oak Construction

to operate the equipment. In these cases, the applicant would send an itemized bill to the customer for both the equipment and the operator. On being paid, the applicant would remit the charge for the operator to Pin Oak Construction.

5. On audit, the Sales Tax Bureau's auditor found that for certain rentals where the applicant arranged for an employee from Pin Oak Construction to operate the equipment, the applicant accepted a Certificate of Capital Improvement from the customer and did not charge sales tax. The auditor therefore concluded that the applicant did not exclusively lease out its equipment, but rather (in some instances) used the equipment with an operator from Pin Oak Construction to perform capital improvements to real property. The auditor determined that applicant's purchases of equipment, parts, repairs, gasoline and oil were not acquired exclusively for resale and were, therefore, subject to tax.

6. The auditor examined equipment purchases, as well as gasoline and oil purchases for the entire audit period and determined taxes due on said purchases to be \$4,277.24 and \$1,960.60, respectively. Parts and repair purchases were examined for the months of July, 1972, March, 1973, September, 1974 and January, 1975. The auditor found that \$32,079.00 or 72% of parts and repair purchases for the test period were taxable. This percentage was applied to parts and repair purchases for the entire audit period in order to determine the additional taxes due on said purchases of \$6,020.76. Of the \$32,079.00 in taxable purchases for the test period, \$29,125.00 of it represented only two purchases.

7. The applicant contended that in all cases, it leased its equipment to others. It also contended that the bookkeeper had erroneously accepted Certificates of Capital Improvement and, consequently, did not charge sales tax on the rentals.

CONCLUSIONS OF LAW

A. That applicant, O.T. Cookingham Equipment, Inc., did not exclusively lease out its equipment. Rather, on those occasions where it a) arranged for a driver from Pin Oak Construction, b) billed the customer for the entire charge, c) obtained a Certificate of Capital Improvement and d) did not charge the sales tax, applicant was using its equipment to perform capital improvement work. Therefore, the equipment used by applicant was subject to sales and use taxes in the amount of \$4,277.24.

B. That the auditor's computation of additional taxes due on all gasoline and oil purchases did not give consideration to the majority of such purchases which were made for resale. Ten percent of the gasoline and oil purchases were used in a taxable manner. Therefore, the sales and use taxes due in the amount of \$1,960.60 are reduced to \$196.06.

C. That the auditor's computation of additional taxes due on purchases of parts and repairs did not lend adequate consideration to the nature of those purchases. The taxable purchases of parts and repairs in the amount of \$32,079.00 consisted of recurring purchases of \$29,125.00; therefore, the projected tax due of

\$6,020.76 on parts and repair purchases is erroneous. The margin of error on parts and repair purchases is reduced from 72% to 6%; therefore, the nonrecurring purchases in the amounts of \$22,500.00 and \$6,625.00 are subject to sales and use taxes for the periods ending May 31, 1973 and November 30, 1973, respectively.

C. That the applicant at all times acted in good faith; therefore, the penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the application of O.T. Cookingham Equipment, Inc. is granted to the extent indicated in Conclusions of Law "B", "C" and "D"; that the Sales Tax Bureau is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 19, 1975 and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
April 5, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER