

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

HEXAM GARDENS CONSTRUCTION CO., 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) :
August 1, 1965 through February 28, 1969

State of New York
County of Albany

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 24th day of April, 1978, he served the within

Notice of Determination by ~~(certified)~~ mail upon Hexam Gardens

Construction Co, Inc. ~~(representative of)~~ the petitioner in the within proceeding,

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

as follows: Hexam Gardens Construction Co., Inc.
100 Cordell Road
Schenectady, New York 12304

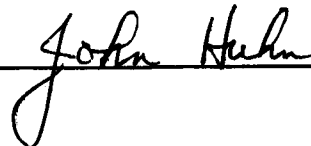
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

24th day of April, 1978





STATE OF NEW YORK
STATE TAX COMMISSION

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of
HEXAM GARDENS CONSTRUCTION CO., INC.

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For a Redetermination of a Deficiency or :
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August 1, 1965 through February 28, 1969

State of New York
County of Albany

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 24th day of April , 1978, he served the within
Notice of Determination by ~~(certified)~~ mail upon Leonard J. Senzon, Esq.
Mary Anne Tommaney, Esq.

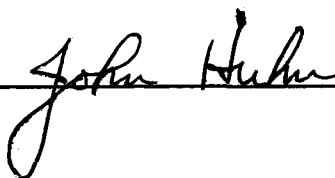
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Leonard J. Senzon, Esq.
Mary Anne Tommaney, Esq.
c/o DiFabio & Couch
4 Automation Lane-Computer Park
Albany, NY 12205
and by depositing same enclosed 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

24th day of April , 1978.





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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 24, 1978

Hexam Gardens Construction Co., Inc.
100 Cordell Rd.
Schenectady, New York 12304

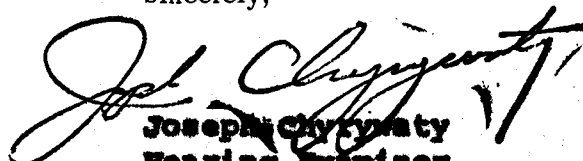
Gentlemen:

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 and 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 Chrymasty
Hearing Examiner

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
HEXAM GARDENS CONSTRUCTION CO., 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 August 1, 1965 through	:	
February 28, 1969.	:	

Applicant, Hexam Gardens Construction Co., Inc., 100 Cordell Road, Schenectady, New York 12304, filed an application 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 August 1, 1965 through February 28, 1969 (File No. 04169).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on July 19, 1977 at 10:45 A.M. Applicant appeared by Robert A. Lupe, president and by Leonard J. Senzon, Esq. and Mary Anne Tommaney, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUE

Whether applicant was liable for sales or use tax on the purchase of materials used in the performance of construction contracts which were entered into prior to the enactment of the Sales and Use Tax Law.

FINDINGS OF FACT

1. As the result of a field audit, Sales Tax Bureau contended that additional tax was due for the period August 1, 1965 through February 28, 1969 based upon additional taxable purchases made by applicant.

A Notice of Determination and for Payment of Sales and Use Taxes Due was issued against applicant on September 30, 1969 in the sum of \$5,181.85, which amount was reduced to \$5,135.33 on December 18, 1970 by the Sales Tax Bureau.

2. Applicant agreed to the validity of the audit findings for the period September 1, 1966 through February 28, 1969 and said period is not at issue. The amount remaining in controversy is \$1,229.65, plus penalty and interest.

3. Applicant, Hexam Gardens Construction Co., Inc., was a construction firm owned by Wade and Rose Lupe. Prior to enactment of the Sales and Use Tax Law, applicant entered into oral agreements to construct three buildings for Wade and Rose Lupe. Based on construction costs (which did not include sales and use tax), Wade and Rose Lupe submitted bids for lease of the buildings to governmental agencies. The governmental agencies accepted the lease bids which were for fixed rental amounts for ten and twenty-year periods. The leases also required that performance bonds be furnished.

4. Applicant did not submit documentary or other satisfactory evidence to show that oral contracts with Wade and Rose Lupe for construction of the buildings were for a fixed price without regard to costs incurred.

5. Materials were purchased for the three buildings during the period August 1, 1965 through August 31, 1966.

CONCLUSIONS OF LAW

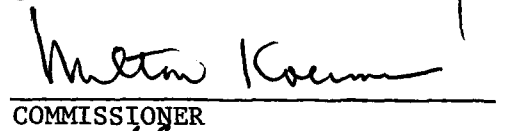
A. That applicant, Hexam Gardens Construction Co., Inc., was not exempt from sales and use tax on the purchase of materials for use in the performance of construction contracts which were entered into before enactment of the Sales and Use Tax Law, in accordance with the meaning and intent of section 1119 of the Tax Law.

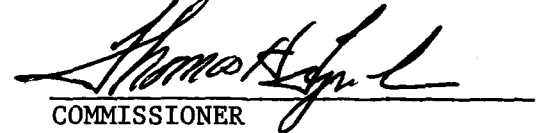
B. That the application of Hexam Gardens Construction Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 30, 1969 is sustained.

DATED: Albany, New York
April 24, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER