

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

J. HARRY MC NALLY MASON CORP.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Sales and Use Taxes
Taxes under Article(s) 28 & 29 of the
Tax Law for the ~~Year(s)~~ ~~XX~~ Period(s)
October 1, 1966 through September 30, 1967


State of New York
County of Albany

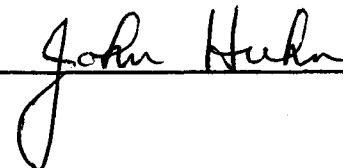
John Huhn, being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 25 day of May, 1978, he served the within
Notice of Determination by ~~(certified)~~ mail upon J. Harry McNally
Mason Corp. ~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: J. Harry McNally Mason Corp.
1560 Broadway
New York, New York 10036
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

25th day of May, 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

May 25, 1978

**J. Harry McFally Mason Corp.
1560 Broadway
New York, New York 10036**

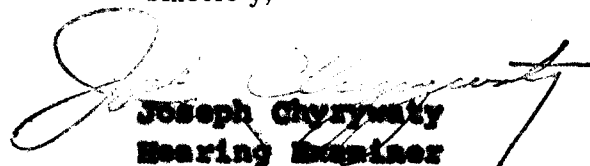
Gentlemen:

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 Chrymasty
Hearing Examiner

~~XXXXX Petitioner's Representative~~

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
J. HARRY MC NALLY MASON CORP. : 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 October 1, 1966 through :
September 30, 1967. :

Applicant, J. Harry McNally Mason Corp., 1560 Broadway,
New York, New York 10036, 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 October 1, 1966
through September 30, 1967 (File No. 15020).

A small claims hearing was held before William Valcarcel,
Hearing Officer, at the offices of the State Tax Commission, Two
World Trade Center, New York, New York, on August 31, 1977 at 1:15 P.M.
Applicant appeared by Emanuel Jacobs and James V. Martin. The
Sales Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron,
Esq., of counsel).

ISSUE

Whether a subcontract agreement constituted a pre-existing
lump-sum contract, in accordance with section 1119(a)(3) of the
Tax Law.

FINDINGS OF FACT

1. Applicant, J. Harry McNally Mason Corp., is a masonry construction firm.

2. Turner Construction Company (Turner) entered into a contract with the United States of America through the General Services Administration for the construction of certain Federal buildings in New York City. Subsequently, applicant J. Harry McNally Mason Corp., entered into subcontract agreements with Turner Construction Company to provide masonry services.

3. On April 10, 1968, the applicant filed a claim for refund of sales tax paid during the period October 1, 1966 through September 30, 1967, due to an increase in the sales tax rate. Said refund was claimed on the grounds that certain purchases of tangible personal property were used in a pre-existing lump-sum construction contract.

4. On September 23, 1968, the Sales Tax Bureau granted the refund claim of \$5,015.20 and issued a "Refund Voucher for State and Local Sales and Use Tax" (ST-136). However, the refund of \$5,015.20 was never paid to applicant, since the Sales Tax Bureau was waiting for a determination from the State Tax Commission on whether the contract between Turner Construction Company and the General Services Administration constituted a pre-existing lump-sum contract, in accordance with section 1119(a)(3) of the Tax Law.

5. On April 7, 1976, applicant was notified by the Sales Tax Bureau that their refund claim was denied on the basis that their

subcontract agreement did not qualify as a pre-existing lump-sum contract, because the prime contract contained a tax escalation clause which made the amount payable variable according to tax cost actually incurred.

6. The prime contract and the subcontract agreements were not submitted into evidence at the small claims hearing of August 31, 1977.

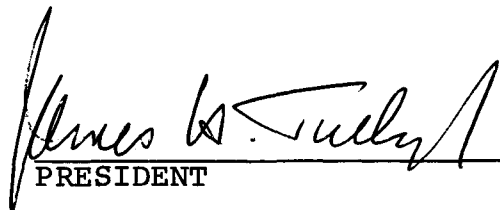
CONCLUSIONS OF LAW

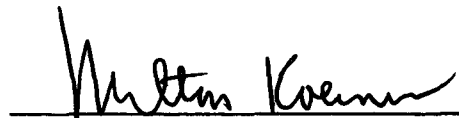
A. That applicant, J. Harry McNally Mason Corp., did not sustain the burden of proof required to establish that the subcontract agreement for masonry services constituted a pre-existing lump-sum contract in accordance with the meaning and intent of section 1119(a)(3) of the Tax Law.

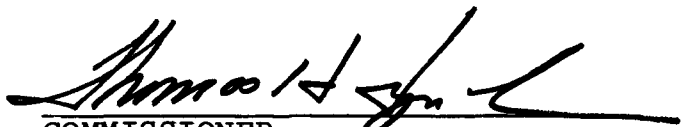
B. That the application of J. Harry McNally Mason Corp. is denied.

DATED: Albany, New York
May 25, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER