

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Bigelow Linoleum :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 of the Tax Law
for the Period 6/1/72 - 5/31/75. :

State of New York
County of Albany

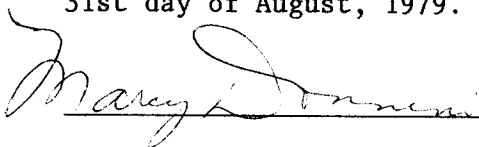
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Determination by mail upon Bigelow Linoleum, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

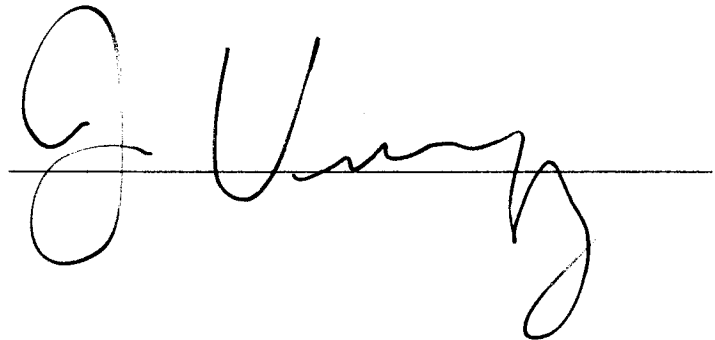
Bigelow Linoleum
Box 246, Lake Rd.
Barker, NY 14012

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of August, 1979.


Mary Donnen



STATE OF NEW YORK
STATE TAX COMMISSION

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of

Bigelow Linoleum :

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for Redetermination of a Deficiency or a Revision :

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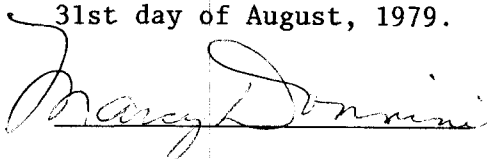
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Determination by mail upon Richard Southard the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

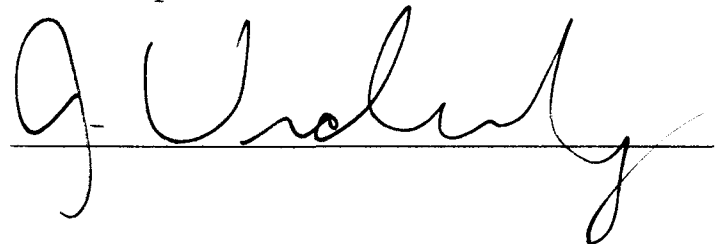
Mr. Richard Southard
Harris & Southard, Attorneys
300 Bewley Bldg.
Lockport, NY 14094

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
31st day of August, 1979.


Nancy Donnini


Jay Vredenburg



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

STATE TAX COMMISSION
JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 31, 1979

Bigelow Linoleum
Box 246, Lake Rd.
Barker, NY 14012

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,

cc: Petitioner's Representative
Richard Southard
Harris & Southard, Attorneys
300 Bewley Bldg.
Lockport, NY 14094
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
CHARLES BIGELOW d/b/a	:	DETERMINATION
BIGELOW LINOLEUM	:	
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 June 1, 1972	:	
through May 31, 1975.	:	

Applicant, Charles Bigelow, d/b/a Bigelow Linoleum, Lake Road, Barker, New York 14012, 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 June 1, 1972 through May 31, 1975 (File No. 10997).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on July 21, 1978 at 9:15 A.M. Applicant appeared by Richard Southard, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether applicant, as the customer in a retail sale, is liable for the sales tax that was not collected by the seller.

II. Whether the penalty and interest in excess of the minimum statutory rate imposed by the Sales Tax Bureau should be cancelled.

FINDINGS OF FACT

1. Applicant, Charles Bigelow d/b/a Bigelow Linoleum, filed New York state and local sales and use tax returns for the period June 1, 1972 through May 31, 1975.
2. On September 17, 1975 as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for \$3,117.24, plus penalty and interest of \$886.41, for a total of \$4,003.65.
3. During the period in issue, applicant was a retailer and installer of floor coverings. The major portion of applicant's business was installing floor covering for other contractors, pursuant to lump-sum capital improvement contracts.
4. The audit conducted by the Sales Tax Bureau distinguished the two business operations. Sales' invoices for the retail store operation were examined for the period June 1, 1974 through August 31, 1974. Based on this examination, it was determined that applicant collected and remitted the proper amount of tax due on retail sales for the audit period. With respect to the capital improvement work, purchases of materials were reviewed for 1974. It was found that certain suppliers did not bill sales tax to applicant during this period; therefore, the auditor reviewed material purchases from said suppliers for the entire audit period and found that materials totaling \$44,532.00 were purchased without the payment of tax. The auditor then assessed applicant additional tax of \$3,117.24 on said purchases.

5. Applicant contended that a large percentage of the purchases for which it was held liable on audit were from one vendor, and that this vendor, through a computer error, categorized applicant as being exempt; thus it failed to collect sales tax. Applicant maintains that no form of exemption certificate was given to the vendor and that as a result, the vendor is the responsible party.

6. Applicant acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i) of the Tax Law states, in pertinent part, that

"... a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures ... or otherwise adding to, altering, improving ... real property, property or land ... is deemed to be a retail sale ..."

B. That section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in the Tax Law.

C. That section 1133(b) of the Tax Law states

"Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations, and remedies provided, such tax shall be payable by the customer directly to the tax commission ..."

D. That in accordance with Conclusions of Law "A", "B" and "C", supra, applicant is liable for tax on retail purchases when the seller has failed to collect the same.

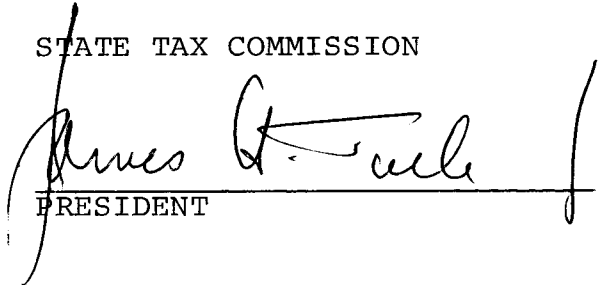
E. That the penalties and the interest in excess of the minimum statutory rate imposed by the Sales Tax Bureau, pursuant to section 1145(a) of the Tax Law, are cancelled.

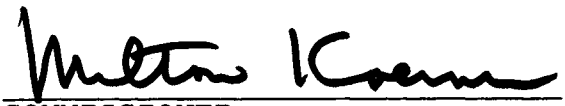
F. That the application of Charles Bigelow d/b/a Bigelow Linoleum is granted to the extent indicated in Conclusion of Law "E"; that the Sales Tax Bureau is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 17, 1975; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

AUG 31 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER