

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Frank M. & Sons, Inc. Flower :

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 3/1/71-5/31/74. :

AFFIDAVIT OF MAILING

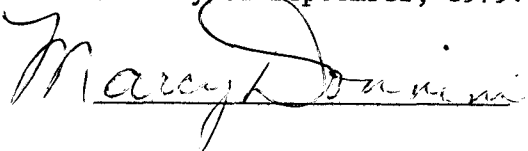
State of New York  
County of Albany

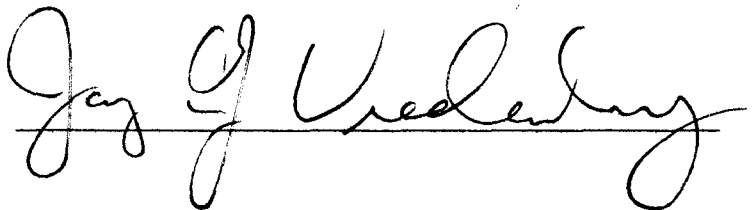
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 7th day of September, 1979, he served the within notice of Determination by mail upon Frank M. & Sons, Inc. Flower, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank M. & Sons, Inc. Flower  
Ludlam Ave.  
Bayville, NY 11709  
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  
7th day of September, 1979.

  
Mary J. Dominici

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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of

Frank M. & Sons, Inc. Flower :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

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Sales & Use Tax :

under Article 28 of the Tax Law

for the Period 3/1/71-5/31/74. :

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 7th day of September, 1979, he served the within notice of Determination by mail upon Edward C. Keller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

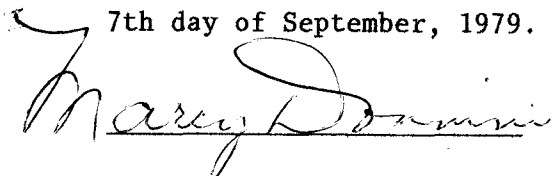
Mr. Edward C. Keller  
5 Highland Rd.  
Glen Cove, NY 11542

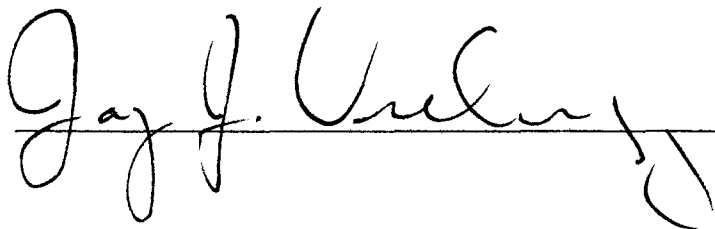
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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

7th day of September, 1979.

  
Mary Dominici

  
Jay Vredenburg

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

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

September 7, 1979

Frank M. & Sons, Inc. Flower  
Ludlam Ave.  
Bayville, NY 11709

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  
Edward C. Keller  
5 Highland Rd.  
Glen Cove, NY 11542  
Taxing Bureau's Representative



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
FRANK M. FLOWER & SONS, 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 March 1, 1971 through May 31,	:	
1974.	:	

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Applicant, Frank M. Flower & Sons, Inc., Ludlam Avenue, Bayville, New York, 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 March 1, 1971 through May 31, 1974 (File No. 12845).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 19, 1978 at 1:15 P.M. Applicant appeared by E. F. Henderson, Esq., Robert Eberbach, CPA and Edward Keller, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Robert Felix, Esq., of counsel).

ISSUE

Whether applicant's business activities of growing and selling oysters constitutes manufacturing (mining or extracting) or whether it constitutes farming.

FINDINGS OF FACT

1. Applicant, Frank M. Flower & Sons, Inc., filed New York state and local sales and use tax returns for the period March 1, 1971 through May 31, 1974.
2. 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 dated January 28, 1975 against applicant in the amount of \$1,393.80, plus penalty and interest, for the period March 1, 1971 through May 31, 1974.
3. On May 6, 1974, applicant signed a "Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law" (ST-578), extending until June 30, 1975 the date that tax may be determined for the taxable period March 1, 1971 through February 28, 1974.
4. In the course of its audit, the Sales Tax Bureau's Auditor considered applicant's business operations to be that of mining or extracting and as such, held applicant liable for sales and use tax on purchases used in said operation, pursuant to section 1115(a)(12) of the Tax Law. The Auditor also found taxes due on other purchases which are not at issue here.
5. Applicant is engaged in breeding and raising oysters under artificial conditions. This is a process of scientific cultivation under controlled greenhouse conditions. The first stage of the development process is spawning. Spawning takes place in a laboratory

where fertilization is controlled. The fertilized eggs are then mixed with water and put into tanks where the oyster larvae develop and grow. In the next stage of the process, it attaches itself to any hard surface, example: oyster and clam shells or wood. When this happens, the larvae start to grow their own shells. At this point, the larvae are called seedlings. The final stage of growth occurs after the seedling drops off the hard surface. The seedlings are then placed in oyster beds in the harbor and left to mature before they are harvested.

6. Applicant contended that the operation described herein is farming and that "mining or extracting" is not the proper classification for his business, since the only thing taken from the harbor is that which was put there by him as part of the growing process.

#### CONCLUSIONS OF LAW

A. That Treasury Regulation Section 1.175-3 defines the business of farming to include fish farms. This section further defines a fish farm as an area where fish are grown or raised, as opposed to merely caught or harvested; that is, an area where they are artificially fed, protected and cared for.

B. That Webster's New Collegiate Dictionary defines "farm" inter alia, as "a tract of water reserved for the artificial cultivation of some aquatic life form."

C. That applicant is engaged in farming within the meaning and intent of section 1115(a)(6) of the Tax Law and, therefore, qualified for the exemptions pursuant to that section.

D. That any taxes which applicant was held liable for, pursuant to section 1115(a)(12) of the Tax Law, are canceled.

E. That the application of Frank M. Flowers & Sons, Inc. is granted to the extent of reducing the additional sales or use taxes due for the period March 1, 1971 through May 31, 1974, so as to conform with Conclusion of Law "D"; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated January 28, 1975 and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

SEP 7 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER