

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Certified Fence Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Sales & Use Tax :  
under Article 28 & 29 of the Tax Law  
for the Period 6/1/72 - 8/31/75. :

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 17th day of August, 1979, he served the within notice of Decision by mail upon Certified Fence Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Certified Fence Corp.  
1680 Utica Ave.  
Brooklyn, NY 11234

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  
17th day of August, 1979.

Victoria Lang

Jay J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Certified Fence Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Sales & Use Tax :  
under Article 28 & 29 of the Tax Law :  
for the Period 6/1/72 - 8/31/75. :

State of New York  
County of Albany

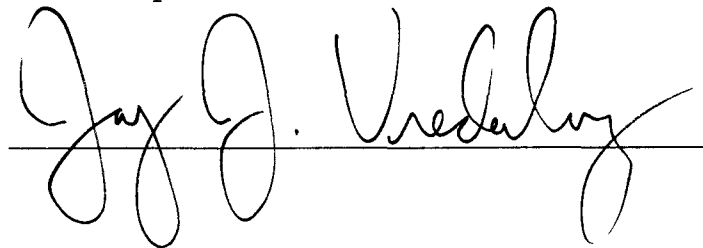
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1979, he served the within notice of Decision by mail upon Milton Hertzberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Milton Hertzberg  
254-11 58th Ave.  
Little Neck, NY 11362

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  
17th day of August, 1979.

  
\_\_\_\_\_



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 17, 1979

Certified Fence Corp.  
1680 Utica Ave.  
Brooklyn, NY 11234

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 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,

A handwritten signature in cursive script, appearing to read "John J. Sollecito".

cc: Petitioner's Representative  
Milton Hertzberg  
254-11 58th Ave.  
Little Neck, NY 11362  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application	:	
of	:	
CERTIFIED FENCE CORP.	:	DECISION
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 August 31, 1975.	:	
	:	

---

Applicant, Certified Fence Corp., 1680 Utica Avenue, Brooklyn, New York 11234, 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 August 31, 1975 (File No. 14894).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1978 at 9:15 A.M. Applicant appeared by Milton H. Hertzberg, PA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau's determination of additional taxes due, based on a disallowance of construction contracts with exempt organizations, was correct.

FINDINGS OF FACT

1. Applicant, Certified Fence Corp., filed New York state and local sales and use tax returns for the period June 1, 1972 through August 31, 1975.

2. On April 21, 1976 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 the period June 1, 1972 through August 31, 1975 in the amount of \$2,390.59, plus penalty and interest of \$1,023.57, for a total due of \$3,414.16.

3. During the period at issue, applicant furnished and installed chain link fencing, wood fencing, guard rails and playground equipment.

4. The Sales Tax Bureau's auditor examined construction contracts with exempt organizations for two test periods. The first test was for the period September 1, 1974 through November 30, 1974, which was subsequent to the amendment of section 1115(a)(15) of the Tax Law, by Ch. 513, Laws of 1974, regarding capital improvement contracts with exempt organizations. The Sales Tax Bureau verified that the correct amount of use tax had been accrued by applicant during this period.

5. The second test period was for the period March 1, 1974 through May 31, 1974, a period prior to the amendment of the Tax Law. This test disclosed that applicant did not accrue use tax on materials used on various contracts involving exempt organizations. There were eight (8) contracts at issue. Applicant was the prime contractor on the following five (5) contracts:

1. NYS Urban Development (Lionel Hampton House)
2. Villa Maria Academy
3. St. Ann's Church
4. Church of Moral Advice
5. River Plaza Housing Co.

Applicant acted as a subcontractor on the remaining three contracts. The Sales Tax Bureau interpreted the contracts at issue to be lump sum and that, as such, applicant was the consumer of the materials purchased; therefore, applicant was liable for tax on such materials.

6. The Sales Tax Bureau determined that for the test period, these contracts represented 52.33% of applicant's total capital improvement work with exempt organizations. It was also determined that the cost of materials incorporated into capital improvement work was 28.75% of the contract amount. These percentages were used to compute additional materials subject to use tax for the period June 1, 1972 through August 31, 1974 of \$33,037.00, and tax due of \$2,343.66.

The audit also disclosed use tax due of \$46.93 on the purchase of tools and supplies, which tax is not at issue here.

7. Applicant contended that the prime contracts it had with exempt organizations were time and material contracts and that as such, the materials purchased for and used in fulfilling those contracts were exempt from tax. In regard to the subcontracts, applicant contended that according to Tax Facts For Contractors and Fabricators (ST 219.2) issued by the Sales Tax Bureau, the subcontract on its own is irrelevant. It is the responsibility of the Sales Tax Bureau to obtain the prime contract before holding the subcontractor liable for taxes.

8. The prime contracts with NYS Urban Development, Villa Maria Academy, St. Ann's Church and the Church of Moral Advice had separate amounts for materials and for labor. Sales tax was not included as part of the contract price, thus the exempt organizations were the true beneficiaries of the pricing. Applicant's contract with River Plaza Housing Co. was for repair work and, therefore, was not subject to tax.

9. With regard to the three transactions in which applicant acted as subcontractor, it failed to submit documentary evidence indicating that the prime contracts qualified for exemption.

#### CONCLUSIONS OF LAW

A. That where the evidence indicates that at the time of the execution of the contract a) the contracting parties were aware of the exempt status of the

organization, b) the parties intended to exclude taxes on purchases for the performance of the contract and c) no sales tax was charged the exempt institution, no sales tax is applicable. (Sweet Associates v. Gallman 29 NY2d 902.)

B. That the materials purchased and used by applicant in the contracts for the organizations listed in Finding of Fact "8" are not subject to sales and compensating use taxes, in accordance with the meaning and intent of section 1116 of the Tax Law. (Sweet Associates, Inc. v. Gallman, 29 NY2d 902.)

C. That applicant failed to sustain the burden of proof that the transactions on which it acted as subcontractor were exempt from sales and use tax.

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 April 21, 1976, by deleting the tax imposed on the purchase of materials as described in Conclusion of Law "B", and that the test period results be adjusted accordingly.

E. That the application of Certified Fence Corp. is granted to the extent indicated in Conclusion of Law "D" and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

AUG 17 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER