

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Central Asphalt, Inc. :

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 6/1/71-8/31/74. :

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 26th day of November, 1979, he served the within notice of Determination by mail upon Central Asphalt, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Central Asphalt, Inc.
400 East Third St.
Watkins Glen, NY 14891

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
26th day of November, 1979.

Joanne Krapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
Central Asphalt, Inc. :
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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 26th day of November, 1979, he served the within notice of Determination by mail upon William H. Helferich 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. William H. Helferich
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604

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
26th day of November, 1979.

Joanne Knapp

Jay Vredenburg

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

November 26, 1979

Central Asphalt, Inc.
400 East Third St.
Watkins Glen, NY 14891

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) 1139 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William H. Helferich
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604
Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 24, 1978 at 3:30 P.M. Applicant appeared by Harter, Secrest and Emery, Esqs. (William H. Helferich, III, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Barry Bresler, Esq., of counsel).

ISSUES

I. Whether applicant's purchase of a mix-paver was exempt from the imposition of sales tax under section 1115(a)(12) of the Tax Law.

II. Whether applicant's purchase of oil used in its mix-paver was exempt from the imposition of sales and use tax, pursuant to section 1115(a)(15) of the Tax Law.

FINDINGS OF FACT

1. On March 24, 1975 pursuant to an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, Central Asphalt, Inc., in the amount of \$50,566.56, plus penalty and interest of \$15,688.04, for a total of \$66,254.60, for the periods June 1, 1971 through August 31, 1974. Applicant had a credit dated February 24, 1976 for the period June 1, 1969 to August 31, 1972, which was applied to the above assessment (#90,756,075).

2. On August 9, 1973, applicant purchased a Midland Mix-Paver for \$66,156.00, to be used in its business of furnishing and applying liquid asphalt. No sales tax was paid thereon. The mix-paver was transported to job sites by trailer and placed on the roadbed. Stone dumped into its hopper was mixed with oil to produce a cold-mix paving material. The cold mix would at times be windrowed at the desired location or at a specified thickness (up to 9 inches thick and from 8 to 12 feet wide) at the rear of the machine by the use of an accessory called a screed. This accessory was manufactured by the Blaw-Knox Company and was attached to the mix-paver. The screed spread out and leveled the mix; then a roller would compact the mix onto the roadway. An operator was in charge of the mixing of the stone and oil and another employee operated the screed, an integral part of the mix-paver. The oil and emulsion that was used in the process was manufactured at applicant's plants. The calculations used to compute the cost of the oil which was used were taken from applicant's bid sheets.

Applicant infrequently mixed just stone and oil in the mix-paver and dumped the material into a pile when such material was needed at driveways.

Bid requirements on jobs taken by applicant from various counties in New York did not separate labor and material costs.

CONCLUSIONS OF LAW

A. That during the periods at issue, section 1115(a) (12) of the Tax Law provided an exemption for machinery or equipment used directly and exclusively in the production of tangible personal property (This section was amended to read "directly and predominately" effective September 1, 1974). This exemption is not available to applicant, for the purchase of mix-paver, since in addition to mixing the components, the machine (through the screed) applied the cold mix to the surface at a predetermined depth and width, and also leveled it; therefore, applicant was liable for the sales tax on the purchase of the mix-paver.


B. That during the periods at issue section 1115(a) (15) of the Tax Law provided for an exemption for tangible personal property sold to a contractor and then used in improving or repairing the real property of an exempt organization. This exemption was not available, unless the tangible personal property was to become an integral part of the real property and was to be resold to the exempt organization before it became a part of the real property. (This section was also amended effective September 1, 1974). In view of the fact that the bids let by the municipalities were for lump sum contracts (total materials and labor), the requirements of section 1115(a) (15) were not met; therefore, applicant is liable for sales tax on the oil used in the mix-paver, in the performance of capital improvements to real property. Matter of Sweet Associates -v- Gallman 36 AD2d 95, aff'd 29 NY2d 902.

C. That the application of Central Asphalt, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 24, 1975 is sustained.

DATED: Albany, New York

NOV 26 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER