

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Cell-San Construction Co., 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 3/1/74 - 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 28th day of September, 1979, he served the within notice of Determination by mail upon Cell-San Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cell-San Construction Co., Inc.

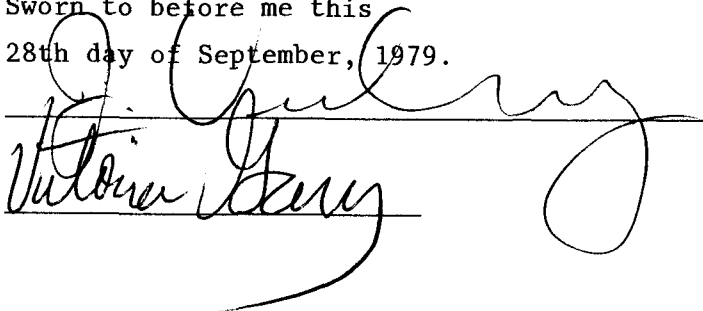
5809 16th Ave.

Brooklyn, NY 11204

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
28th day of September, 1979.



Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Cell-San Construction Co., Inc.

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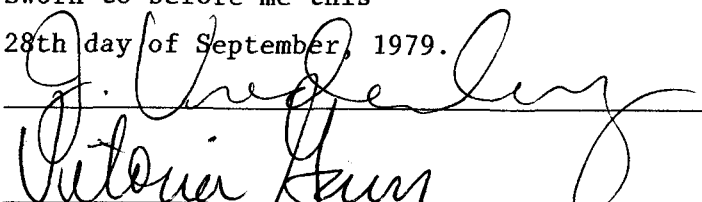
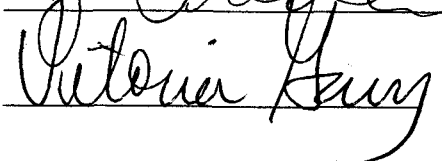
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by mail upon Emanuel A. Paolicelli the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Emanuel A. Paolicelli
153 77th St.
Brooklyn, NY

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
28th day of September, 1979.

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Cell-San Construction Co., Inc.
5809 16th Ave.
Brooklyn, NY 11204

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
Emanuel A. Paolicelli
153 77th St.
Brooklyn, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
CELL-SAN CONSTRUCTION CO., 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, 1974 through	:	
August 31, 1974.	:	
	:	

Applicant, Cell-San Construction Co., Inc., 5809 16th Avenue, Brooklyn, New York 11204, 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, 1974 through August 31, 1974 (File No. 14167).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 12, 1978. Applicant appeared by its president, Emanuel A. Paolicelli. The Sales Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the supplemental assessment issued against applicant for the period March 1, 1974 through August 31, 1974 was proper and correct.

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

FINDINGS OF FACT

1. A Sales Tax Bureau auditor examined applicant's books and records for the period December 1, 1971 through August 31, 1974. The auditor found additional tax due of \$1,196.20, plus interest of \$98.91, for a total due of \$1,295.11. On December 27, 1974, applicant signed a Consent to Fixing of Tax

Not Previously Determined and Assessed (ST-580) and paid the amount due of \$1,295.11.

2. A subsequent review of the auditor's field audit report by the Sales Tax Bureau revealed that a contract with the Neighborhood Council Housing Department, which the auditor had considered a time-and-material contract, was a lump-sum contract. (The Sales Tax Law in effect for the audit period provided that purchases of materials for use in performing a time-and-material contract with an exempt organization were exempt from tax. Section 1115(a)(15) of the Tax Law.) As a lump-sum contract, applicant was liable for tax on materials purchased for use in fulfilling the contract.

3. On discovering the error, the Sales Tax Bureau again reviewed applicant's purchases for the test period June 1, 1974 through August 31, 1974. The auditor found that 83.34% of the purchases made were for the Neighborhood Council Housing Department project. This percentage was applied to applicant's purchases for the entire audit period, resulting in an additional tax deficiency of \$7,283.77.

4. On February 26, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Cell-San Construction Co., Inc. for tax due of \$7,283.77, plus penalty and interest.

The aforementioned Notice was revised as a result of a conference held by the Sales Tax Bureau on October 1, 1975, to reflect a tax due of \$6,272.10. A Notice of Assessment Review was sent to applicant on October 23, 1975, which indicated the adjusted tax, plus penalty and interest.

5. Applicant contended that the Neighborhood Council Housing Department was exempt from payment of sales taxes; therefore, sales or use taxes were not due on the materials which applicant purchased for use or consumption in the capital improvement project.

6. Applicant acted in good faith at all times.

CONCLUSIONS OF LAW

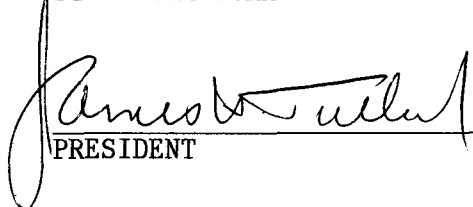
A. That under section 1101(b)(4)(i) of the Tax Law, a contractor must pay sales tax on purchases of materials for use or consumption in erecting structures or buildings. At the time applicant entered into the contract with the Neighborhood Council Housing Department, a contractor was liable for the tax on materials used or consumed in lump-sum capital improvement contracts with exempt organizations; therefore, the tax determined to be due by the Sales Tax Bureau is proper and correct.

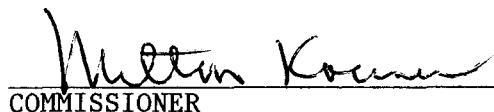
B. That the application of Cell-San Construction Co., Inc. is granted to the extent that the penalty, as well as the interest in excess of the minimum statutory rate, are cancelled; that the Sales Tax Bureau is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on February 26, 1975 and revised on October 23, 1975 by the Notice of Assessment Review; and that, except as so granted, the application is in all other respects denied.

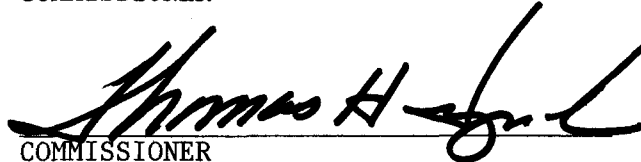
DATED: Albany, New York

SEP 28 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER