

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Manfred E. Demenus 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 Years 1973 - 1975. :

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 Manfred E. Demenus Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Manfred E. Demenus Corp.
65-09 Fresh Meadow Lane
Flushing, NY 11365

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 Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Manfred E. Demenus Corp. :
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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 S. Michael Weisberg 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. S. Michael Weisberg
2 W. 86th St.
New York, NY 10024

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

J. Vredenburg

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

November 26, 1979

Manfred E. Demenus Corp.
65-09 Fresh Meadow Lane
Flushing, NY 11365

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 & 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:

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
S. Michael Weisberg
2 W. 86th St.
New York, NY 10024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
MANFRED E. DEMENUS CORP.	:	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 August 1973 through May 1975.	:	

Applicant, Manfred E. Demenus Corp., 65-09 Fresh Meadow Lane, Flushing, New York 11365, 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 August 1973 through May 1975 (File No. 14140).

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 March 20, 1979 at 10:45 A.M. Applicant appeared by S. Michael Weisberg, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether applicant is entitled to a refund of sales taxes paid on the purchase of tangible personal property used in the performance of lump-sum capital improvement contracts for exempt organizations.

FINDINGS OF FACT

1. Applicant, Manfred E. Demenus Corp., a plumbing contractor, filed the following applications for credit or refund of State and local sales and use tax:

<u>Date Filed</u>	<u>Periods Covered</u>	<u>Amount</u>	<u>Project</u>
June 30, 1975	Aug. 1973 - May 1975	\$6,663.00	City Line I Housing
July 21, 1975	Feb. 1974 - May 1975	662.35	Colonial Dames of America
Aug. 13, 1975	Mar. 1973 - Jan. 1974	368.01	Franciscan Monastery
Sept. 24, 1975	Nov. 1974 - May 1975	118.83	Jehovah's Witnesses' Church

The aforesaid refund claims totaling \$7,812.19 were based on sales taxes paid on plumbing materials used in the performance of construction contracts for exempt organizations.

2. On January 21, 1976, the Sales Tax Bureau denied \$7,693.36 of the refund claims. The City Line I Housing and Franciscan Monastery contracts were denied on the grounds that the contracts specifically instruct the subcontractor to pay all sales taxes. The contract with Colonial Dames of America was disallowed because it was a lump-sum contract and thereby the contractor was liable for the sales tax on materials.

The Sales Tax Bureau granted the refund claim in the amount of \$118.83 with respect to the Jehovah's Witnesses' Church contract.

3. Applicant applied for a revision of the partial denial of the refund claims.

4. On July 11, 1973, applicant entered into a subcontract agreement with Sears, Exum & Gibson Construction, Inc., the general contractor, to perform plumbing work at the City Line I Housing Project for the lump-sum amount of \$167,000.00.

Section 31 of said agreement entitled "Payroll and Sales Taxes" stated in pertinent part that "All sales and use taxes are included in the contract price and are to be paid by the Subcontractor".

5. On June 20, 1974, Sears, Exum & Gibson Construction, Inc. issued a Contractor Exempt Purchase Certificate to the applicant regarding the aforementioned contract. Said certificate did not indicate the reason why the purchase was exempt from the tax. A letter accompanying said certificate stated:

The enclosed tax exempt certificate is forwarded to you so that it may be passed on to your suppliers, so that a sales tax savings can be passed on from you to the General Contractor. Your total sales tax savings will be deducted from your contract amount, thereby reducing it by that amount.

6. On February 2, 1974, applicant executed a contract with the Colonial Dames of America to furnish labor and material for the installation of two bathrooms and a boiler for the sum of \$15,575.00.

On January 1, 1975, the Colonial Dames of America issued an Exempt Organization Certificate to applicant.

7. On November 2, 1972, applicant entered into a sub-contract agreement with Elite Associates, Inc. Applicant agreed to furnish all materials and labor to complete the plumbing work at the Franciscan Monastery and Cultural Center for \$46,500.00. Section 4 of said contract contained the following provision: "The Sub-contractor shall pay all sales taxes, old age benefit and unemployment compensation taxes upon the material and labor furnished under this contract, as required by...the State in which this work is performed."

Applicant received a Contractor Exempt Purchase Certificate from Elite Associates, Inc. Said certificate was undated and did not indicate the reason why the purchase was exempt from tax.

8. Applicant included sales tax in the contract amounts set forth in Findings of Fact #4, 6 and 7. However, applicant contended that the general contractors and the project owner deducted such amount from the final contract payment.

9. Applicant did not submit any evidence to show that the exempt organization for which work was performed actually received the benefit of a sales tax exemption.

CONCLUSIONS OF LAW

A. That the contracts described in Findings of Fact #4, 6 and 7 were lump-sum capital improvement contracts, and as such, applicant was the ultimate consumer of the tangible personal property purchased and used in the performance of said contracts. Applicant was correct in paying sales tax on its purchases

in accordance with the provisions of section 1101(b)(4) of the Tax Law.

That the Contractor Exempt Purchase Certificates received by applicant for the City Line I Housing and Franciscan Monastery contracts failed to prove that the prime contracts with said organizations were time and material and thereby exempt the subcontract, irrespective of its contractual form. That neither the exempt organizations nor the general contractors issued an exemption certificate to the applicant when the contracts were bid on or executed and therefore, sales tax was included in the contract amounts. Furthermore, the City Line I Housing and Franciscan Monastery contracts expressly provide that applicant shall pay all sales taxes. That there was no intent by either of the parties to the contracts to exempt the construction materials from sales tax. That applicant failed to establish that the exempt organization was the true beneficiary of a sales tax exemption.

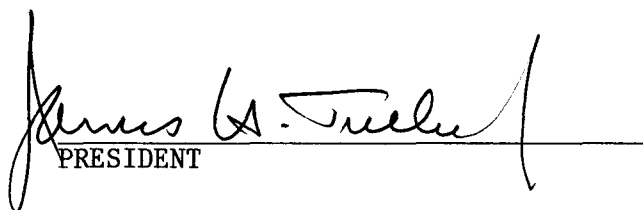
B. That since the sales tax was not "erroneously, illegally, or unconstitutionally" paid by applicant within the meaning and intent of section 1139(a) of the Tax Law, applicant is not entitled to a refund.

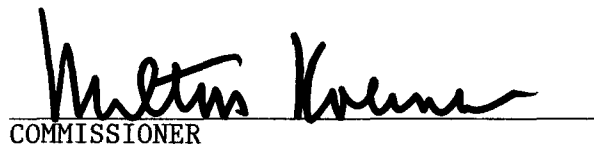
C. That the application of Manfred E. Demenus Corp. is denied and the partial refund denial by the Sales Tax Bureau is sustained.

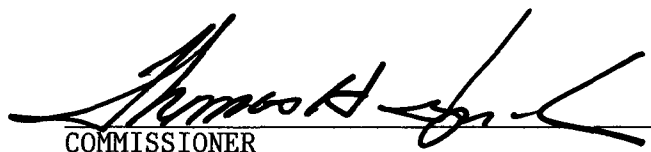
DATED: Albany, New York

NOV 26 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER