

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Hayes & Buri, 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 1974 9/1/71 - 5/31/74. :

State of New York
County of Albany

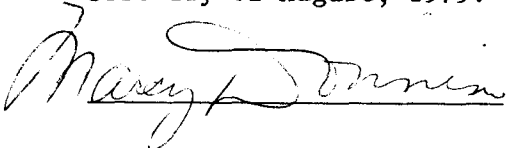
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Determination by mail upon Hayes & Buri, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

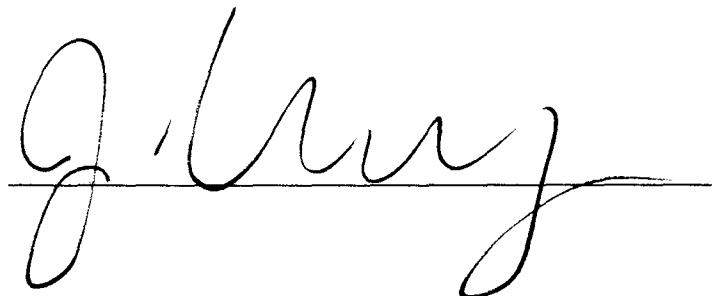
Hayes & Buri, Inc.
117 South St.
Lockport, NY 14094

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
31st day of August, 1979.


Mary P. Dornan



STATE OF NEW YORK
STATE TAX COMMISSION

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of
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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 31st day of August, 1979, he served the within notice of Determination by mail upon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

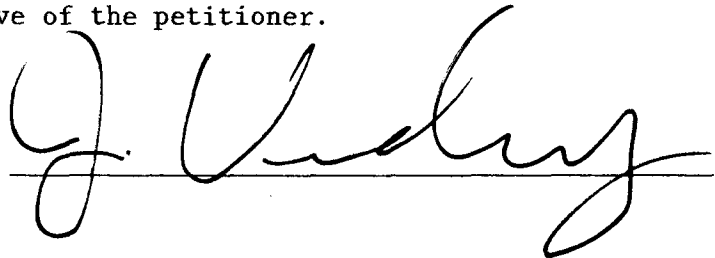
Sirs
Swift, Peters & McLaughlin, CPA's
450 Bewley Building
Lockport, NY 14094

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
31st day of August, 1979.


Nancy P. Donnan


Jay Vredenburg



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 31, 1979

Hayes & Buri, Inc.
117 South St.
Lockport, NY 14094

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,

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

cc: Petitioner's Representative
Swift, Peters & McLaughlin, CPA's
450 Bewley Building
Lockport, NY 14094
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
HAYES AND BURI, 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 September 1, 1971 through :
May 31, 1974. :

Applicant, Hayes and Buri, Inc., 117 South Street, Lockport, New York 14094, 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 September 1, 1971 through May 31, 1974 (File No. 10875).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on July 17, 1978 at 2:45 P.M. Applicant appeared by Lyle Swift, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether applicant is liable for sales or compensating use tax on the purchase of materials used in capital improvement work for exempt organizations.

II. Whether the margin of error computed by the Sales Tax Bureau and application thereof accurately reflected applicant's use tax liability on expense purchases.

III. Whether applicant is entitled to a credit for tax paid on materials incorporated into real property for exempt organizations.

FINDINGS OF FACT

1. Applicant, Hayes and Buri, Inc., filed New York state and local sales and use tax returns for the period September 1, 1971 through May 31, 1974.

2. On October 15, 1975 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 \$3,562.37, plus penalty and interest of \$1,455.58, for a total of \$5,017.95.

3. During the period at issue, applicant was a sheet metal fabricator and contractor, performing mainly heating and duct work for both commercial enterprises and exempt organizations.

4. On audit, the Sales Tax Bureau examined sales invoices and contractual agreements relating to capital improvement work performed by applicant during the audit period. It was determined that applicant failed to pay sales or use tax on materials purchased and used on 24 capital improvement jobs. The cost of the materials

purchased and used on these jobs totaled \$53,880.00. The Sales Tax Bureau took the position that the contracts for the jobs at issue were lump-sum contracts and that as such, applicant was the consumer of the materials purchased and used; therefore, applicant was liable for tax on such materials in the amount of \$3,771.60.

The audit also disclosed use tax due of \$733.32 on the purchase of various expense items. This result was based on a one-year sample of purchase invoices. For the test period, the Sales Tax Bureau found purchases subject to use tax totaling \$3,564.00. A margin of error was computed by dividing this amount by gross sales for the same year. The margin of error was then applied to gross sales for the audit period to determine total purchases subject to use tax and the tax due.

The Sales Tax Bureau allowed a credit of \$942.55 for tax erroneously paid on materials that were resold to a customer who issued a proper exemption certificate to applicant.

5. Applicant contested only 7 of the 24 jobs found taxable on audit. Applicant argued that the 7 contracts were with exempt organizations and that it was not liable for tax on the materials purchased for those contracts. Applicant also contended that said contracts contained separate amounts for labor and materials and that such a breakdown met the qualifications of a time-and-material contract.

6. Applicant was a subcontractor on 5 of the 7 jobs at issue and the prime contractor on the remaining 2 jobs. Applicant secured Contractor Exempt Purchase Certificates (ST-120.1) for 2 of the subcontracts, indicating that the prime contract was a time-and-material contract for an exempt organization. Applicant did not submit any documentary evidence to show that the other 3 subcontracts were exempt. Applicant's remaining jobs were prime contracts with the New York State Air National Guard and with the United Auto Workers. Applicant failed to show that the contracts for these jobs were time-and-material contracts.

7. With respect to the use tax assessed on expense purchases, applicant contended that the use tax liability would be more accurate by using the cost of materials rather than gross sales as a base in computing the margin of error. Applicant recomputed the tax using this method which showed tax due of \$702.82.

8. Applicant claimed that it was entitled to additional credits that were not allowed by the Sales Tax Bureau as part of the audit. This claim was based on tax paid on materials used in capital improvement work for exempt organizations. The Sales Tax Bureau disallowed the credits since the materials were used in the performance of lump-sum contracts. Applicant failed to submit any documentary evidence to disprove the position taken by the Sales Tax Bureau.

CONCLUSIONS OF LAW

A. That where applicant acted as a subcontractor for capital improvement work to be performed for an exempt organization, it was liable for tax on the materials purchased and used, unless the prime contractor has issued a Contractor's Exempt Purchase Certificate (ST-120.1), indicating that the prime contract executed by the exempt organization is a time-and-material contract, pursuant to section 1115(a)(15) of the Tax Law.

B. That in accordance with Conclusion of Law "A", applicant had 2 such certificates; therefore, tax in the amount of \$758.36, is canceled.

C. That applicant failed to prove that its prime contracts with exempt organizations were time-and-material contracts; therefore, it is liable for tax on materials purchased and used for said contracts.

D. That the audit procedures used by the Sales Tax Bureau to compute the margin of error were proper, as authorized in section 1138(a) of the Tax Law. That the application of the margin of error accurately reflected applicant's use tax liability on expense purchases. Applicant's alternative method showed similar results, further establishing the accuracy of the Sales Tax Bureau's procedures.

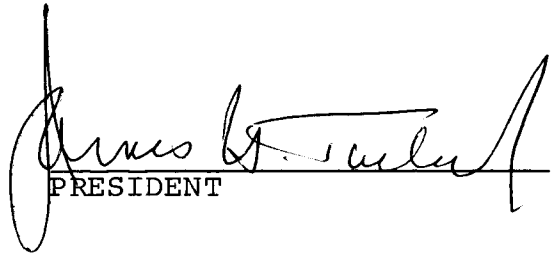
E. That applicant failed to document its claim for additional credits; therefore, said credits are not allowed.

F. That the application of Hayes and Buri, Inc. is granted to the extent indicated in Conclusion of Law "B"; 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 issued October 15, 1975; and that, except as so granted, the application is in all other respects denied.

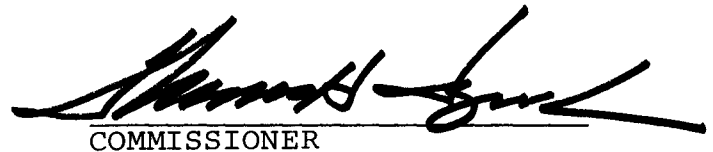
DATED: Albany, New York

STATE TAX COMMISSION

AUG 31 1979


PRESIDENT


COMMISSIONER


COMMISSIONER