

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

R. W. Rudy Constr. 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 8/31/71 - 2/29/72. :

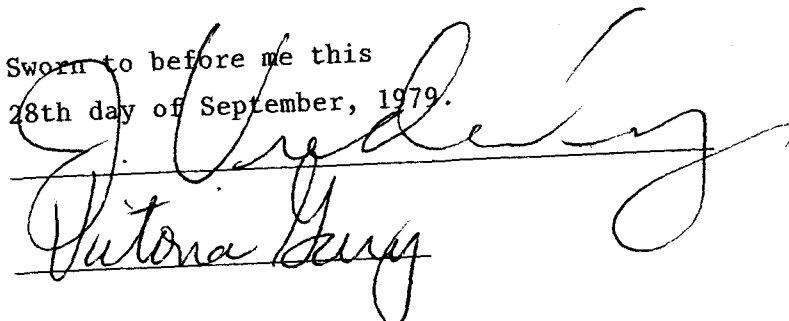
State of New York
County of Albany

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 R. W. Rudy Constr. Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

R. W. Rudy Constr. Co., Inc.
P.O. Box 173
Johnson City, NY 13790
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.


Victoria Gury

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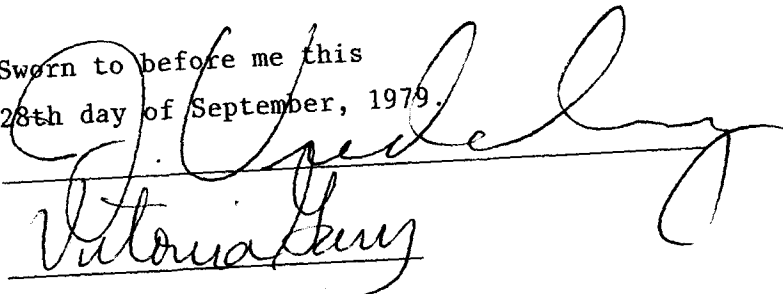
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Determination by mail upon Maurice O'Brien the representative of the petitioner in the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

Mr. Maurice O'Brien
Shaw, Esworthy, O'Brien & Crowley
123 Front St.
Binghamton, NY 13905

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.


Victoria G. [unclear]

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

R. W. Rudy Constr. Co., Inc.
P.O. Box 173
Johnson City, NY 13790


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 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
Maurice O'Brien
Shaw, Esworthy, O'Brien & Crowley
123 Front St.
Binghamton, NY 13905
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
R.W. RUDY 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 June 1, 1971 through Febru-	:	
ary 29, 1972.	:	

Applicant, R.W. Rudy Construction Co., Inc., P.O. Box 173, Johnson City, New York 13790, 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, 1971 through February 29, 1972 (File No. 11110).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 44 Hawley Street, Binghamton, New York, on September 28, 1978 at 10:45 A.M. Applicant appeared by Maurice O'Brien, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether applicant filed an application for credit or refund within the time limits prescribed in section 1139(a) of the Tax Law.

II. Whether applicant's construction contract with IBM Corp. was a pre-existing lump-sum contract, thereby entitling applicant to a credit or refund for increased sales taxes paid by it in the performance of said contract.

FINDINGS OF FACT

1. Applicant, R.W. Rudy Construction Co., Inc., a general contractor, claimed sales tax credits on New York state and local sales and use tax returns for the periods ending August 31, 1971, November 30, 1971 and February 29, 1972.

The credits claimed were based on the additional 1% sales tax which it paid after June 1, 1971, with respect to the following construction contracts:

<u>PERIOD</u>	<u>CONTRACT</u>	<u>AMOUNT</u>	<u>TOTAL</u>
6/1/71-8/31/71	IBM	\$223.58	
	Vestal Nursing Home	144.54	
	Mini Theatre	106.06	
	Fred Ballard-S.U.N.Y.	<u>27.43</u>	
			\$501.61
9/1/71-11/30/71	IBM	\$454.26	
	Vestal Nursing Home	<u>250.47</u>	
			\$704.73
12/1/71-2/29/72	IBM	\$ 57.95	
	Vestal Nursing Home	<u>\$110.28</u>	
			\$168.23

Said credits totaling \$1,374.57 were used by applicant to offset sales and use taxes owing for the above periods in the amount of \$1,319.33, which left a refund due of \$55.24.

2. On September 20, 1974, the Sales Tax Bureau denied the credit claim (with the exception of \$106.00 in tax paid on the Mini Theatre contract) by issuing a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for \$1,213.27, plus penalty and interest. (It should be noted that the notice was incorrect in that the amounts for the period November 30, 1971 and February 29, 1972 were interchanged, and also that the tax due of \$706.33 for the period ending November 30, 1971 should have been \$704.73.)

3. On June 19, 1975, applicant filed an Application for Credit or Refund of State and Local Sales and Use Tax (ST-137) in the amount of \$498.62. This claim was based on sales taxes paid in the performance of the Fred Ballard contract. This was in addition to the sales tax credit claimed on the sales tax return filed for the period ending August 31, 1971. The period covered by the claim was June 1, 1971 through November 30, 1971.

4. The Sales Tax Bureau stipulated that applicant's contract with Vestal Nursing Home was a pre-existing lump-sum contract and that applicant was entitled to the credit claimed on the returns for the periods ending August 31, 1971, November 30, 1971 and February 29, 1972 in the sum of \$505.29. The Sales Tax Bureau also stipulated that applicant was entitled to the credit claimed on the sales tax return for the period August 31, 1971 in the sum of \$27.43, in connection with the subcontract with Fred Ballard, since the prime contract was a time-and-material contract with the State University Construction Fund.

5. The Sales Tax Bureau contended that the application for credit filed on June 19, 1975 should be denied, since it was not filed within the three-year statute of limitations. Applicant contended that the statute of limitations does not commence until the date of the denial of the credit claim.

6. On March 23, 1971, applicant submitted a bid proposal to IBM Corp. The proposal states the following:

The Undersigned...hereby proposes to furnish all labor, materials, tools, equipment and sources required to perform all of the work in strict accordance with the Contract Documents...for: General Construction of Chemical Distribution Center...for the Base Bid Sum of 963,733.00 Dollars and if this proposal is accepted, will execute a formal contract in form to that bound in the Contract Documents to this effect....

As part of the proposal, applicant agreed that all Federal, State and local taxes, including but not limited to, sales, use and excise taxes that may be imposed on materials or services provided under the proposal, are included in the base bid sum, alternates and unit price.

The bid proposal could not be withdrawn for a period of 30 days.

7. On April 2, 1971, New York State enacted a law increasing the sales tax rate from 3% to 4% effective June 1, 1971.

8. On April 5, 1971, IBM Corp. accepted the bid proposal submitted by applicant and a formal contract was subsequently signed.

9. Applicant contended that the proposal submitted to IBM Corp. on March 23, 1971, was a legally binding contract and was irrevocably entered into prior to the enactment date of the tax increase.

CONCLUSIONS OF LAW

A. That a claim for credit or refund must be filed within three years of the date when the tax was payable, pursuant to section 1139(a) of the Tax Law.

Applicant's credit claim filed on June 19, 1975, covering taxes paid from June 1, 1971 through November 30, 1971 is beyond the three-year statute and, thus, is barred by the Sales Tax Law.

B. That section 1119(a) (3) of the Tax Law provides for a credit or refund for tax paid on the sale to or use by a contractor or subcontractor of tangible personal property, if that property is used solely in the performance of a pre-existing lump-sum or unit price construction contract.

The term "pre-existing lump-sum or unit price construction contract" means a contract for the construction of improvements to real property. Under said contract, the amount payable to the contractor or subcontractor is fixed without regard to the costs incurred by him in the performance thereof, and which (1) was irrevocably entered into prior to the date of the enactment of this article or the enactment of a law increasing the rate of tax imposed under this article, or (2) resulted from the acceptance by a governmental agency of a bid accompanied by a bond or other performance guaranty which was irrevocably submitted prior to such date.

C. That applicant's proposal dated March 23, 1971 was an irrevocable offer rather than an irrevocable contract. To constitute a contract, there must be an acceptance of the offer. Acceptance of the offer took place on April 5, 1971; therefore, said offer was not a pre-existing lump-sum contract within the meaning and intent of section 1119(a) of the Tax Law.

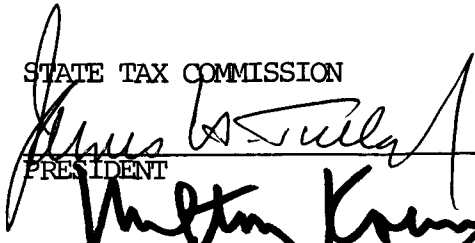
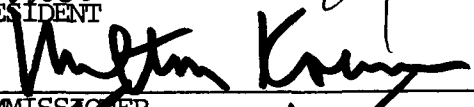
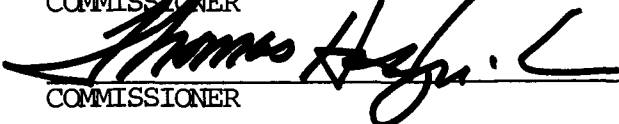
D. That the irrevocable offer was not submitted to the governmental agency and, therefore, it does not qualify under section 1119(a) of the Tax Law.

E. That the application of R.W. Rudy Construction Co., Inc. is granted to the extent indicated in Finding of Fact "4". The Sales Tax Bureau is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on September 20, 1974, as follows:

<u>PERIOD</u>	<u>TAX DUE</u>
August 31, 1971	\$205.56
November 30, 1971	454.26
February 29, 1972	<u>19.13</u>
TOTAL	\$678.95

Interest which is computed at the minimum statutory rate shall be added to the taxes due; however, 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