

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

SIEGFRIED CONSTRUCTION CO., INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Sales & Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the ~~XXXXX~~ or Period(s)
March 1, 1970 - February 28, 1973

State of New York
County of Albany

Anthony Kadela

, 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 23rd day of May, 1979, he served the within

Notice of Determination by ~~certified~~ mail upon Siegfried Construction
Co., Inc. ~~(XXXXXXXXXXXX)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

Siegfried Construction Co., Inc.
3980 Sheridan Drive
Buffalo, New York

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~~
~~XXXXXX~~ 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

23rd day of May, 1979

Marilyn J. Papineau

Anthony Kadela

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

SIEGFRIED CONSTRUCTION CO., INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of **Sales & Use** :
Taxes under Article(s) **28 & 29** of the :
Tax Law for the ~~XXXXXX~~ or Period(s) :
March 1, 1970 - February 28, 1973

State of New York
County of **Albany**

Anthony Kadela, being duly sworn, deposes and says that

~~She~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 23rd day of **May**, 1979, ~~she~~ served the within

Notice of Determination by ~~XXXXXX~~ mail upon **Paul R. Comeau and**

David E. Manch (representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows:

Hodgson, Russ, Andrews, Woods & Goodyear
ATTN: Paul R. Comeau & David E. Manch
1800 One M & T Plaza
Buffalo, New York 14203

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

23rd day of **May**, 1979

Marilyn J. Papineau

Anthony Kadela



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

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

May 23, 1979

Siegfried Construction Co., Inc.
3980 Sheridan Drive
Buffalo, New York

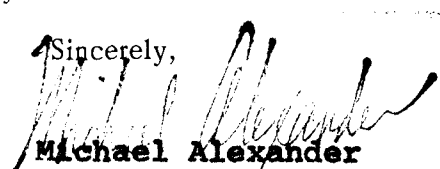
Gentlemen:

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,


Michael Alexander
Supervising Tax Hearing Officer

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
SIEGFRIED 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, 1970 through	:	
February 28, 1973.	:	

Applicant, Siegfried Construction Co., Inc., 3980 Sheridan Drive, Buffalo, New York, 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, 1970 through February 28, 1973 (File No. 01563).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 28, 1976 at 9:15 A.M. Applicant appeared by Paul R. Comeau, Esq. and David E. Manch, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether certain contracts entered into by applicant constituted pre-existing lump sum or unit price construction contracts, within the meaning of section 1119(a) (3) of the Tax Law, thereby entitling applicant to a credit or refund for increased sales taxes paid by it in the performance of said contracts.

II. Whether the penalties imposed pursuant to section 1145 of the Tax Law and interest in excess of the minimum statutory rate should be waived.

FINDINGS OF FACT

1. Applicant, Siegfried Construction Co., Inc., a general contractor, claimed sales tax credits of \$54,423.93 on sales tax returns filed for the period March 1, 1970 through February 28, 1973. Credits totaling \$31,378.02 were used to offset sales and use taxes owing for the aforementioned period. Subsequently, on May 30, 1973, applicant filed an Application for Credit or Refund of State and Local Sales or Use Tax (Form ST-139) for \$54,421.39. Said application indicated credits previously claimed of \$31,304.93 and a claim for refund of \$23,116.46. (It should be noted that the amounts differ because of errors in the periods ending August 31, 1971 and November 30, 1971 of \$2.54 and \$70.55, respectively.)

The credits and refund claimed were based on increased state and local sales taxes paid on materials, tools, supplies and equipment rentals used solely in the performance of pre-existing construction contracts.

2. On December 10, 1974 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 in the amount of \$8,821.72, plus penalty and interest of \$3,476.94, for a total of \$12,298.66, for the period March 1, 1970 through February 28, 1973.

3. On audit, the Sales Tax Bureau examined all construction contracts that were pertinent to the credit and refund claim. The \$31,867.63 in credit and/or refund claimed was disallowed. Since applicant had previously taken credits totaling \$31,378.02, the Sales Tax Bureau deducted the approved credits or refund of \$22,556.30 from this amount, leaving additional tax due of \$8,821.72.

The Sales Tax Bureau disallowed the credits or refund, asserting that certain contracts were "time and material" or "cost-plus" contracts and could

not be deemed a qualified pre-existing lump sum contract.

4. The following twelve contracts are at issue:

	<u>DATE</u>	<u>CONTRACT #</u>	<u>OWNER</u>
1.	5/31/67	4949	Buffalo General Hospital
2.	11/12/70	7060	State University Construction Fund
3.	7/31/69	6976	J.C. Penny Co., Inc.
4.	5/12/70	7037	Buffalo Evening News
5.	5/11/70	7050	Buffalo Evening News
6.	5/12/70	7040	Buffalo Evening News
7.	3/14/70	7059	Buffalo Waterfront Homes Site Two- NYS Urban Development Corp.
8.	3/19/69	6934	Institute of the Sisters of St. Joseph
9.	3/27/69	6927	S.M. Flickinger Co., Inc.
10.	6/8/70	7016	Buffalo Waterfront Homes, Inc.- NYS Urban Development Corp.
11.	12/15/70	7100	Buffalo Savings Bank
12.	7/1/70	7041	Binghamton Gateway Corp.

Counsel for the Sales Tax Bureau stipulated that the above contracts were:

- (a) for the construction of improvements to real property;
- (b) irrevocably entered into prior to the enactment date of a law increasing the state or local sales tax rate;
- (c) the credit or refund claimed was for taxes paid on tangible personal property used solely in the performance of said contracts.

5. On May 31, 1967, applicant entered into a construction contract with Buffalo General Hospital (#4949). The contract sum contained separate lump sum amounts for labor and for materials. Said contract did not contain provisions for the passage of title to the materials to the exempt organization prior to installation.

6. On November 12, 1970, applicant entered into a construction contract with State University Construction Fund (#7060). Section 4.01 of the contract provided for the sale of all materials and supplies for a specific lump sum amount and for

the passage of title to the Fund prior to installation. It also provided that the sale was separate from the specified lump sum amount charged for labor.

7. Applicant's contracts (#7037 and #7040) with the Buffalo Evening News, dated May 12, 1970, provided for the applicant to be reimbursed the actual cost of work, plus a 10% fee.

8. On September 14, 1971, applicant entered into a construction contract with Buffalo Waterfront Home Site Two, Inc. (#7059), a project of the New York State Urban Development Corp. Article 3 entitled "The Contract Price" included the following provisions:

The Owner shall, for the performance and completion of the Work...pay the Contractor the lesser of (a) the Contract Price as defined in this Article 3 or (b) the Total Cost of the Work (including the Contractor's Fee)... The 'Contract Price' shall be the total of...in payment for the materials to be furnished under the contract, and...in payment for the work and labor to be performed and completed under the contract and for the Contractor's Fee, both amounts together totaling....

Applicant received the total cost of the work, plus the contractor's fee.

9. The remaining contracts at issue (#6976, #7050, #6934, #6927, #7100 and #7041) were in the contractual form of "Cost of the Work plus a fee with a Guaranteed Maximum Cost." Said contracts were drawn on "Standard Form of Agreement Between Owner and Contractor", published by The American Institute of Architects. Article 6 of the contract contained the following provisions:

(6.1) The owner agrees to reimburse the contractor for the cost of the work as defined in Article 9. Such reimbursement shall be in addition to the Contractor's Fee stipulated in Article 7.

(6.2) The maximum cost to the owner, including the cost of the work and the contractor's fee, is guaranteed not to exceed the sum of...such guaranteed maximum cost shall be increased or decreased for changes in the work as provided in Article 8.

Article 9 defined "Cost of the Work" to mean costs necessarily incurred in the proper performance of the work and paid for by the contractor.

10. On June 8, 1970, applicant entered into a construction contract with Buffalo Waterfront Houses, Inc. (#7016). Article 3, The Contract Price, provides that "The owner shall pay the contractor for the materials embraced by this contract the sum of...and (separately and apart from such sum) for the work and labor embraced by this contract, the sum of..." The contract also contained a clause for the transfer of title to the materials to the exempt organization prior to the installation of such materials.

11. Applicant acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1119(a) of the Tax Law defines the term "pre-existing lump sum or unit price construction contract" for the purpose of clause (3) thereof, as a contract for the construction of improvements to real property, under which the amount payable to the contractor or subcontractor is fixed, without regard to the costs incurred by him in the performance thereof.

B. That applicant's contracts described in Findings of Fact "5", "6" and "10" are "pre-existing lump sum or unit price construction" contracts, within the meaning and intent of section 1119(a) (3) of the Tax Law; that the determining factor is that the amount payable to applicant was fixed without regard to the costs which it incurred. (Matter of Tri-Delta Construction Corporation, State Tax Commission, August 19, 1976). Accordingly, applicant is entitled to a credit or refund for the increased sales taxes paid in the performance of said contracts in the amount of \$1,770.30.

C. That applicant's contracts described in Findings of Facts "7", "8" and "9" are not "pre-existing lump sum or unit price construction" contracts, within the

meaning and intent of section 1119(a) (3) of the Tax Law, in that applicant was reimbursed by the owner for the actual costs incurred, which would include the amount of sales tax paid; therefore, the amount payable was not fixed with regard to the costs which it incurred, irrespective of a guaranteed maximum cost.

D. That the penalties imposed pursuant to section 1145 of the Tax Law and the interest in excess of the minimum statutory rate are cancelled.

E. That the application of Siegfried Construction Co., Inc. is granted to the extent indicated in Conclusions of Law "B" and "D", above; 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 December 10, 1974 and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

May 23, 1979

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER


COMMISSIONER