

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Wilber Piping 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 Period 3/1/67 - 5/31/70. :

State of New York
County of Albany

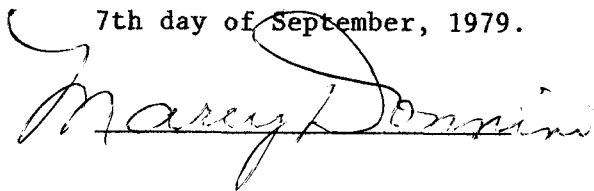
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 7th day of September, 1979, he served the within notice of Determination by mail upon Wilber Piping Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

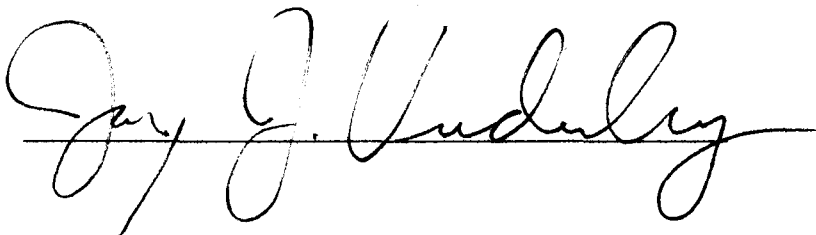
Wilber Piping Corp.
58 Hudson Ave.
Delmar, NY 12054

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
7th day of September, 1979.


Mary J. Dominici


Jay Vredenburg

STATE OF NEW YORK
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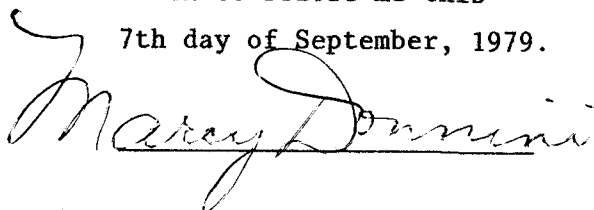
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 7th day of September, 1979, he served the within notice of Determination by mail upon Leonard Senzon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

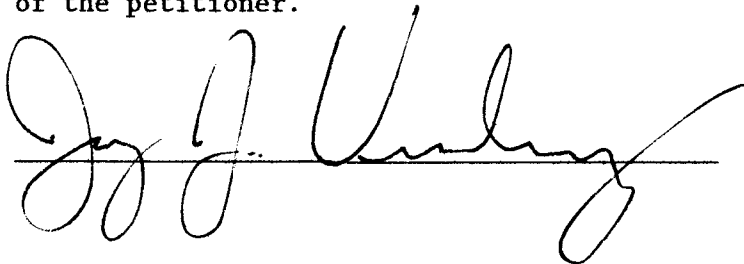
Mr. Leonard Senzon
DiFabio & Couch
4 Automation Ln. Computer Pk.
Albany, NY 12205

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
7th day of September, 1979.


Mary Dominici


Jay Vredenburg

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 7, 1979

Wilber Piping Corp.
58 Hudson Ave.
Delmar, NY 12054

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
Leonard Senzon
DiFabio & Couch
4 Automation Ln. Computer Pk.
Albany, NY 12205
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on August 16, 1978 at 2:45 P.M. Applicant appeared by Leonard J. Senzon, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Barry Bresler and Harry Kadish, Esqs., of counsel).

ISSUE

Whether applicant is liable for tax on the purchase of materials used in the performance of capital improvement contracts for exempt organizations.

FINDINGS OF FACT

1. On March 10, 1971 as the result of an audit, the Sales Tax Bureau issued a Notice and Demand for Payment of Sales and Use Taxes Due against applicant, pursuant to a signed Consent to Fixing of Tax Not Previously Determined and Assessed (Form ST-580). Said Notice was issued for \$8,549.36, plus penalty and interest, for the period March 1, 1967 through May 31, 1970.

2. Applicant was a contractor engaged mainly in building construction for New York State, for political subdivisions, and for other exempt organizations.

3. On audit, the Sales Tax Bureau determined that applicant did not pay sales or use tax on materials purchased in the amount of \$324,212.12. Said materials were used in the performance of capital improvement work for exempt organizations.

The Sales Tax Bureau took the position that since the contracts were not time-and-material contracts, applicant was the consumer of the materials purchased and was, therefore, liable for tax on such materials in the amount of \$8,549.36.

4. On June 21, 1971, applicant filed an Application for Credit or Refund of State and Local Sales or Use Tax (Form ST-137) for \$9,895.63. The amount of the refund claim represented the tax, penalties and interest paid on the aforementioned Notice.

5. On June 20, 1975, the Sales Tax Bureau denied the refund claim, in part, in the amount of \$8,743.25. The denial was based on the Department of Audit and Control's determination that, with one exception, the contracts were not tax exempt.

6. Applicant contended that tax was not included in its bid price to an exempt organization, and that it was the intent of the contracting parties that sales tax be excluded. Applicant argued that the intent of the parties and not the contractual form, should determine the tax exemption.

7. Applicant did not submit any of the contracts at issue.

CONCLUSIONS OF LAW

A. That applicant made purchases of tangible personal property but did not resell said items to the exempt organization as tangible personal property pursuant to a time-and-material contract.

B. That applicant was the consumer of the materials purchased and, therefore, was liable for the tax on such materials.

C. That the application of Wilber Piping Corp. is denied and the refund denial made by the Sales Tax Bureau on June 20, 1975 is sustained.

DATED: Albany, New York

SEP 7 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER