

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Aberthaw-Cowper :
Joint Venture : 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 12/1/69-5/31/73. :

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 18th day of July, 1980, he served the within notice of Determination by mail upon Aberthaw-Cowper, Joint Venture, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Aberthaw-Cowper
Joint Venture
One Marine Midland Center
Buffalo, NY 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of July, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Aberthaw-Cowper :
Joint Venture : 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 12/1/69-5/31/73. :

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 18th day of July, 1980, he served the within notice of Determination by mail upon Richard N. Weinstein the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard N. Weinstein
Saperston, Wiltse, Day & Wilson
815 Liberty Bank Bldg.
Buffalo, NY 14202

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
18th day of July, 1980.

Leborah A. Bank

J. Vredenburg

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

July 18, 1980

Aberthaw-Cowper
Joint Venture
One Marine Midland Center
Buffalo, NY 14203

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:

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
Richard N. Weinstein
Saperston, Wiltse, Day & Wilson
815 Liberty Bank Bldg.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
ABERTHAW-COWPER - JOINT VENTURE	:	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 December 1, 1969 through May 31,	:	
1973.	:	

Applicant, Aberthaw-Cowper - Joint Venture, 1 Marine Midland Center, Buffalo, New York 14203, 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 December 1, 1969 through May 31, 1973 (File No. 10955).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 10, 1977 at 2:45 P.M. Applicant appeared by Saperston, Day & Radler (Richard N. Weinstein, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether applicant, Aberthaw-Cowper - Joint Venture, is permitted to amend its perfected petition.

II. Whether applicant, Aberthaw-Cowper - Joint Venture, is liable for sales and use taxes on equipment used by applicant but belonging to John W. Cowper Company, Inc.

III. Whether applicant, Aberthaw-Cowper - Joint Venture, is liable for sales and use taxes on the total contract price as set forth in an agreement between applicant and Beer Precast Concrete Limited.

IV. Whether applicant, Aberthaw-Cowper - Joint Venture, is liable for sales and use taxes incident to the rental of trailers used to transport metal decking.

V. Whether certain window cleaning equipment constituted a capital improvement to the realty now known as the Marine Midland Center.

FINDINGS OF FACT

1. On July 11, 1974, as the result of a field audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Aberthaw-Cowper - Joint Venture, assessing additional tax due plus penalty and interest in the amount of \$201,650.43 for the period December 1, 1969 through May 31, 1973.

2. Applicant, Aberthaw-Cowper - Joint Venture, executed consents extending the period for assessment of sales and use taxes for the period December 1, 1969 through November 30, 1972 to December 20, 1974.

3. Applicant, Aberthaw-Cowper - Joint Venture, timely filed on September 10, 1974, its application for Review of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1969 through May 31, 1973.

4. Applicant, at the commencement of the hearing, submitted an Amended Petition as was given to counsel for the Sales Tax Bureau on March 9, 1977 and moved to amend the perfected petition for the purpose of clarifying the issues and to conform to the proof applicant intended to offer.

5. Applicant, Aberthaw-Cowper, was a joint venture entered into by Aberthaw Construction and John W. Cowper Company for the purpose of constructing the Marine Midland Center in Buffalo, New York.

6. John W. Cowper Company ("Cowper") owned certain equipment used by applicant on the construction of the Marine Midland Center and said equipment

constituted a contribution to the joint venture by Cowper and not a rental of equipment by Cowper to applicant.

7. Applicant made no payments to Cowper for the use of such equipment nor was any exchange effected for consideration in kind.

8. Applicant entered into a contract with Beer Precast Concrete Limited ("Beer Precast") for the purchase of certain materials and the delivery thereof for the Marine Midland Center. The total contract price included a portion thereof for a phase of work never made nor delivered, a different portion for custom's duties paid and \$70,000.00 as and for the then 5 percent New York State Sales Tax.

9. Applicant paid Beer Precast the necessary funds to cover all materials manufactured and delivered, the cartage and taxes, the custom's duties and the \$70,000.00 in New York State Sales Tax.

10. Beer Precast acknowledged payment to it by applicant of the \$70,000.00 for New York State Sales Tax as well as its expectation as a vendor to make payments thereof, though no present intention of payment thereon by Beer Precast was demonstrated.

11. Applicant, through its contract, paid \$160,646.31 as United States Customs Duty.

12. Beer Precast is a Canadian Company but its representative resided in New York throughout the period involved herein and solicited other contracts.

13. No attempt has been made against Beer Precast for collection of the sales tax claimed herein.

14. Applicant was assessed for sales taxes properly due and owing from Beer Precast as a vendor solely because applicant was a consumer under section 1133(b) of the Tax Law.

15. Applicant contracted with H. H. Robertson Company ("Robertson") for the purchase of metal decking and Robertson was to arrange for and effect the transportation and delivery to applicant of the purchased metal decking.

16. Applicant did not participate at all in the arrangements for transportation but was under contract to compensate Robertson for said transportation costs. Applicant paid said freight invoices.

17. Robertson owned no trucks and rented trailers for freight delivery to applicant but applicant in no way participated in that rental transaction of said trailers. Said trailers were not used for any long-term storage but merely shuttled from destination to job site as work progressed and always within one to three days of arrival at no extra cost.

18. Applicant contracted for the architectural and engineering design and manufacture, delivery and installation of a unique mechanical apparatus for window washing on the Marine Center.

19. Applicant's subcontractor, Mayco Crane, arranged for and effected the design, manufacture, delivery and installation of the window washing equipment.

20. The window washing equipment, of which each part is integral, was individually designed for the Marine Center and permanently affixed to said building.

21. The equipment could not be feasibly dismantled and installed in different locations without resulting in substantial destruction of the equipment.

22. The equipment involved is more than simply scaffolding. The particularities of design and installation were required because of the height, shape and size of the Marine Center and its close proximity to Lake Erie and the winds and storms crossing said lake known for the havoc frequently endured in western New York.

23. The Marine Center is an exclusive office building renting for amounts far in excess of other buildings in this area. The capability of cleaning windows in such a dangerous weather zone is far more important to rental income production than would be storm windows which might be placed over the existing windows of triple thickness themselves.

24. The equipment substantially adds to the value of the building and prolongs the useful life of the windows on the building.

25. The window washing equipment installed at the Marine Center constitutes a permanent addition to real property, and, as such, qualifies as a capital improvement, as was intended by the owner and applicant, as contractor.

26. Portions of the window washing equipment could be removed for maintenance or repair, but disassembly of the system would be nearly impossible if not impossible without considerable damage to the equipment and/or the building, and neither the whole system, much less a portion thereof, could be incorporated into use on a different building.

CONCLUSIONS OF LAW

A. That the Amended Petition is permitted and accepted as part of the pleadings herein in that it conforms the proof and in no way works a prejudice on the Sales Tax Bureau since the entire assessment was already in dispute.

B. That applicant, Aberthaw-Cowper, received certain equipment from John W. Cowper Company as its contribution to the joint venture or partnership. No consideration was exchanged or paid, and no lease or sale incident thereto occurred nor can one be inferred, and accordingly, no sales or use tax can be imposed on such a transaction since such affairs fall within the parameters of the exclusion set forth at section 1101(b)(4)(ii)(E) of the Tax Law.

C. That applicant, Aberthaw-Cowper, as a joint venture, is to be treated

as a partnership for tax purposes (R. C. Glock and Company v. Tankel, 12 AD2d 339), and such contributions are not taxable. Applicant satisfied its burden of proof in this regard.

D. That applicant, Aberthaw-Cowper - Joint Venture, is not liable for sales and use taxes incident to its purchases from Beer Precast Concrete Limited, since sales taxes were paid by applicant to Beer Precast. Section 1133(b) of the Tax Law which permits collection of sales and use taxes from a purchaser states that said section is only applicable "where any customer has failed to pay a tax imposed by this article" and was intended to prevent a customer from avoiding payment of sales taxes. Applicant clearly satisfied its burden of proof that it paid sales tax to Beer Precast and that Beer Precast acknowledged such collection of tax funds relative to the materials actually sold to applicant. Applicant is clearly not liable for sales taxes on those materials included in Phase 1(b) of the contract since said goods were never manufactured by Beer Precast nor delivered to or bought by applicant. The case of Application of Edward L. Nezelek, Inc., State Tax Commission, August 1, 1972, is distinguished because no proof of payment of sales tax was included nor did the contract include payment of sales tax.

E. That applicant, Aberthaw-Cowper, is not liable for sales taxes on monies paid to Beer Precast for United States Customs duties since applicant, as consumer, was liable for the payment of said duties directly though handled through a customs broker. These duties are excise taxes to applicant and were paid, and applicant satisfied its burden of proof in this regard (Babb v. US, 78 S Ct 1137; Corrigan v. US, 25 CJS Section 97; Ersking v. US, 84 F. 2d 690).

F. That applicant, Aberthaw-Cowper, is not liable for sales and use taxes to charges made by H. H. Robertson Company for freight transportation of metal decking since no retail sale of tangible property took place as defined

in section 1105(a) of the Tax Law nor did applicant engage itself in a lease, a rental or license to use. Applicant satisfied its burden of proof that it did not rent trailers but merely paid freight charges no differently than if train or vehicles owned by H. H. Robertson Company were used. Applicant paid for basic freight transport and not for storage or local trans-shipping, and the use of the word "rental" in invoices to applicant caused the undue confusion though what was really paid for is exempt from sales tax under section 1101(b)(3) of the Tax Law. The sales tax, as a special tax, is to be strictly construed in favor of applicant, and the facts call for exclusion from tax rather than inclusion (Bathrick Enterprises, Inc. v. Murphy, 277 NYS 2d 869; Good Humor Corp. v. McGoldrick, 289 NY 452).

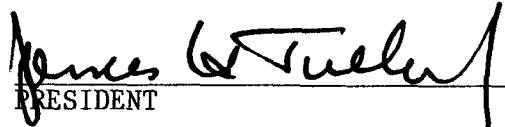
G. That applicant, Aberthaw-Cowper, sold to the owner of the Marine Center certain installed window washing equipment which constituted a capital improvement to realty and so qualified by reason of its unique and sophisticated design, the added value to the realty, the likelihood of prolonged life of the building or portions thereof, i.e. windows, its permanent attachment and installation to the building, the difficulty of removal or probability of extensive damage to the equipment and/or the building incident to removal or disassembly of said equipment, the impossibility of incorporating said equipment in other structures for a like use and the building owner and contractor intended such equipment to constitute a capital improvement. Applicant clearly satisfied its burden of proof that said equipment was a capital improvement.

H. That applicant, Aberthaw-Cowper, at all times acted on the advice of its attorneys or accountants and for that reason is not liable for negligence penalty nor interest above the minimum rate prescribed by section 1145(a) of the Tax Law.

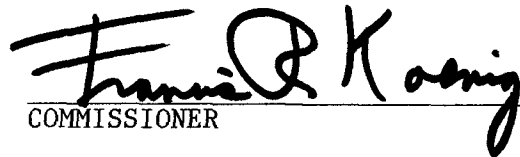
I. That the application of Aberthaw-Cowper - Joint Venture is granted and the Audit Division is hereby directed to amend the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on July 11, 1974 in accordance with the conclusions herein.

DATED: Albany, New York
JUL 1 8 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER