

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
All Building Construction 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 3/1/72-2/28/75. :

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 March, 1980, he served the within notice of Determination by mail upon All Building Construction Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

All Building Construction Corp.
1440 Broadway
New York, NY 10018
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 March, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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AFFIDAVIT OF MAILING

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 March, 1980, he served the within notice of Determination by mail upon Matthew Rosenberg 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. Matthew Rosenberg
Anchin, Block & Anchin
270 Madison Ave.
New York, NY 10016

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 March, 1980.

Joanne Knapp

J. J. Vredenburg

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

March 28, 1980

All Building Construction Corp.
1440 Broadway
New York, NY 10018

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
Matthew Rosenberg
Anchin, Block & Anchin
270 Madison Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Raymond Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1978. Applicant appeared by Richard Hertz, President and by Matthew Rosenberg, CPA. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether the disallowance by the Audit Division of recorded nontaxable sales properly reflects applicant's tax liability.

II. Whether the acceptance of certificates of capital improvement exempts applicant from collecting or paying sales tax on repair sales or on installations of tangible personal property, when said sales were part of capital improvement contracts.

FINDINGS OF FACT

1. Applicant, All Building Construction Corp., filed New York State sales and use tax returns for the period March 1, 1972 through February 28, 1975.

2. On May 27, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, All Building Construction Corp., and Richard Hertz and Arthur Ritz, individually and as officers, for the period March 1, 1972 through February 28, 1975 in the amount of \$6,209.23, plus penalty and interest of \$2,880.70, for a total of \$9,089.93. The additional tax due was arrived at as the result of an audit of applicant's books and records for the period March 1, 1972 through February 28, 1975.

3. On audit, the Audit Division analyzed applicant's nontaxable sales for a one-month test period. This analysis resulted in a disallowance of four nontaxable sales on the grounds that these sales were taxable repair or installation jobs. The disallowed sales consisted of the following:

<u>INVOICE NO.</u>	<u>CUSTOMER</u>	<u>JOB</u>	<u>TOTAL AMOUNT</u>
4515	Associated Merchandising Corp.	564	\$ 2,164.00
4530	Associated Merchandising Corp.	564	41.46
4532	Banco Popular	494	321.52
4536	Harmonie Club	554	107.93
			<u>107.93</u>
		Disallowed Amount	<u>\$ 2,634.91</u>

The Audit Division used the disallowed taxable sales to arrive at an error rate of 1.07%, which it applied to reported nontaxable sales of \$9,647,092.00, resulting in additional taxable sales of \$103,224.00.

4. Applicant, a building contractor, disagreed with the findings and filed a timely protest requesting a hearing. The only issue in dispute is the disallowance of reported nontaxable sales.

5. Applicant contended that a one month test of its nontaxable sales was not representative of its total business operations, nor did the test accurately reflect its sales tax liability for the period March 1, 1972 through February 28, 1975.

6. Applicant conceded that the \$321.52 sale to Banco Popular was a fully taxable repair. It also contended that the three remaining nontaxable sales disallowed by the Audit Division were capital improvements to real property for which it had certificates of capital improvement. In conjunction with its contention, applicant introduced the three invoices covering the sales in issue. The work orders regarding Invoice Nos. 4515 and 4530 disclosed that the work for Associated Merchandising required the furnishing of labor and materials for room alterations. More specifically, the room alterations consisted of repainting walls, installing shelving, installing a door and the removal of a partition.

Invoice No. 4536 for Harmonie Club required that applicant would furnish and install wardrobe hooks and paint cabinets. Applicant secured capital improvement certificates from Associated Merchandising Corp. and Harmonie Club.

CONCLUSIONS OF LAW

A. That the one month test period audit conducted by the Audit Division did not lend adequate consideration to the applicant's business operations (applicant was a building contractor having gross sales for the three year audit period of \$9,826,195.00, of which approximately 97 percent represented nontaxable capital improvement jobs), nor did the

application of the resulting error rate correctly reflect the applicant's additional sales tax liability. Accordingly, such audit did not follow generally accepted procedures and tests consistent with the nature of applicant's business operations.

B. That the acceptance of certificates of capital improvement by applicant did not relieve applicant from sustaining the burden of proof imposed by section 1132(c) of the Tax Law in showing that the work done was, in fact, a nontaxable capital improvement; however, such issue is moot after considering the consequences of Conclusion of Law "A".

C. That the applicant conceded that the \$321.52 sale to Banco Popular was a taxable repair; therefore, the applicant is liable for the sales tax on this transaction.

D. That the application of All Building Construction Corp. is granted to the extent of reducing the additional sales tax due for the period March 1, 1972 through February 28, 1975 from \$6,209.23 to \$22.51 and that except as so granted, the application is in all other respects denied.

DATED: Albany, New York

MAR 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER