

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Caristo 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 1967 - 1975. :

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 25th day of July, 1980, he served the within notice of Determination by mail upon Caristo Construction Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Caristo Construction Corp.  
26 Court St.  
Brooklyn, NY

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  
25th day of July, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Caristo Construction Corp. :  
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 1967 - 1975. :

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 25th day of July, 1980, he served the within notice of Determination by mail upon Gerard W. Cunningham 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. Gerard W. Cunningham  
Lee, Meagher, Cunningham & Lee  
26 Court St.  
Brooklyn, NY 11242

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  
25th day of July, 1980.

Deborah A. Bank

J. Vredenburg

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

July 25, 1980

Caristo Construction Corp.  
26 Court St.  
Brooklyn, NY

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:

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  
Gerard W. Cunningham  
Lee, Meagher, Cunningham & Lee  
26 Court St.  
Brooklyn, NY 11242  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
CARISTO CONSTRUCTION CORPORATION	:	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 1967 through 1975.	:	

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Applicant, Caristo Construction Corporation, 26 Court Street, Brooklyn, 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 1967 through 1975 (File No. 19813).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 29, 1979 at 2:45 P.M. Applicant appeared by Gerald W. Cunningham, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (Samuel Freund, 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 erroneously paid sales tax on debris removal services.

FINDINGS OF FACT

1. On February 3, 1977, applicant, Caristo Construction Corporation, filed an application for credit or refund for sales taxes of \$22,838.89. The amount of the refund claim represents sales taxes paid to various carters for removing debris from construction sites for the years 1967 through 1975. The application was filed based on applicant's position that debris removal services

which are a constituent part of a capital improvement are therefore not subject to sales tax.

2. On June 3, 1977, the Audit Division denied \$16,757.14 of applicant's refund claim on the grounds that the application was not timely with respect to sales taxes paid prior to December 1, 1973. The remaining \$6,081.15 was denied based on 20 NYCRR 527.7(b)(2) which provided that "All services of...debris removal are taxable, whether from inside or outside of a building, a construction site or vacant land."

3. Applicant was a general contractor engaged in new building construction. Applicant hired various carters to remove debris from its construction sites and paid sales tax to such carters for the services rendered.

4. On February 28, 1975, in response to a request from the law offices of Lee, Meagher, Cunningham and Lee, for a ruling regarding the application of sales tax on debris removal services, counsel for the Department of Taxation and Finance issued a letter which stated, in pertinent part, the following:

"That the receipts from the service of removal of debris resulting from the construction of a capital improvement are not subject to sales tax since such service is a constituent part of the services performed in adding to or improving real property."

5. Applicant continued to pay sales tax to carters after the date of issuance of the aforementioned letter.

#### 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 to the Tax Commission, pursuant to section 1139(a) of the Tax Law. That applicant's refund claim filed on February 3, 1977, covering sales tax paid prior to December 1, 1973 is beyond the three-year statute and thus is barred in accordance with the meaning and intent of section 1139(a) of the Tax Law.

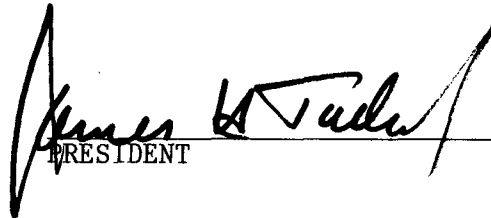
B. That section 1105(c)(5) of the Tax Law imposes a sales tax on services of maintaining, servicing or repairing real property...whether the services are performed in or outside of a building; that the removal of debris from a construction site constitutes a service within the meaning and intent of said section of the Tax Law. The policy of the State Tax Commission with respect to section 1105(c)(5) of the Tax Law is evidenced by subsequent clarification in 20 NYCRR 527.7(b)(2) effective September 1, 1976. Accordingly, applicant properly paid sales tax on debris removal services and is not entitled to a refund.

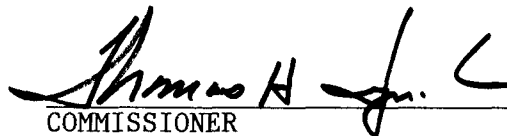
C. That the application of Caristo Construction Corporation is denied and the refund denial issued June 3, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 25 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER