

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
County Excavation Co., Inc. :
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 9/1/69 - 8/31/72. :

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 14th day of March, 1980, he served the within notice of Determination by mail upon County Excavation Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

County Excavation Co., Inc.
271 Wolf Rd.
Latham, NY 12110

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
14th day of March, 1980.

Joanne Knapp

[Signature]

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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 14th day of March, 1980, he served the within notice of Determination by mail upon John M. Cholakis 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. John M. Cholakis
Tabner, Carlson, Daffner & Farrell
90 State St.
Albany, 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 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
14th day of March, 1980.

Joanne Knapp

J. Vredenburg

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

March 14, 1980

County Excavation Co., Inc.
271 Wolf Rd.
Latham, NY 12110

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
John M. Cholakis
Tabner, Carlson, Daffner & Farrell
90 State St.
Albany, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application
of
COUNTY EXCAVATION COMPANY, INC.
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 September 1, 1969 through
August 31, 1972.

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DETERMINATION

Applicant, County Excavation Company, Inc., 271 Wolf Road, Latham, New York 12110, filed an application for revision of a determination or for a refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1969 through August 31, 1972 (File No. 01444).

A formal hearing was held before Louis M. Klein, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on February 18, 1977 at 1:30 P.M. and was continued on March 8, 1977 at 1:15 P.M. Applicant appeared by Tabner, Carlson, Daffner & Farrell, Esqs. (John M. Cholakakis, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Marilyn Kaltenborn, Esq., of counsel).

ISSUES

I. Whether receipts from the sale of tangible personal property to applicant, a contractor, for use in improving real property of an organization described in section 1116(a) of the Tax Law are subject to sales or use tax under Articles 28 and 29 of the Tax Law.

II. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued by the Sales Tax Bureau properly asserts sales or use tax due from applicant.

FINDINGS OF FACT

1. On October 3, 1973, 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 to County Excavating Company, Inc. for tax due of \$66,228.70, plus penalty and interest of \$16,932.29, for a total of \$83,160.99.

2. Applicant is a contractor that installs water pipes, storm sewers and sanitary sewers. Of this work, 90 percent is performed for municipalities which are organizations described in section 1116(a) of the Tax Law.

3. On audit, the auditor determined that ten contracts entered into by applicant during the period September 1, 1970 through August 31, 1972 were lump-sum contracts and that applicant was liable for use tax on materials used in the performance of said contracts.

4. Applicant has offered four contracts as examples of contracts applicant has entered into with municipalities. The compensation to applicant under these contracts was based on unit prices for work done, e.g. "XYZ" dollars per foot of "XYZ" pipe installed. The total compensation which applicant received was predicated on the actual number of units installed.

5. The Sales Tax Bureau concedes that three of the submitted contracts were time-and-material contracts, pursuant to which the municipalities involved received title to the materials before they became a part of real property.

CONCLUSIONS OF LAW

A. That the three contracts (Exhibits 'A', 'B' and 'C') which the Sales Tax Bureau conceded were time-and-material contracts, qualify for the exemption provided by section 1115(a)(15) of the Tax Law.

B. That applicant failed to provide credible evidence that the remaining contracts were not lump-sum contracts. As determined by the Sales Tax Bureau, the contracts are lump-sum contracts and do not qualify for the exemption

afforded by section 1115(a)(15) of the Tax Law.

C. That applicant has failed to show that the determination was excessive.

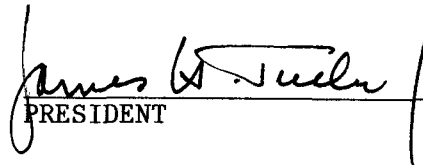
D. That the Audit Division is directed to determine the amount of purchases which were made in the performance of the contracts admitted into evidence as Exhibits 'A', 'B' and 'C', and to adjust accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

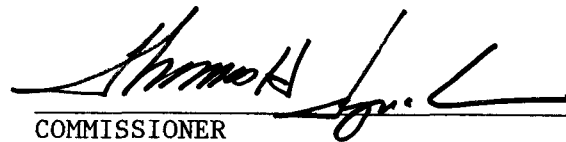
E. That, except as provided in Conclusion of Law "D", the application of County Excavation Company, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is otherwise sustained.

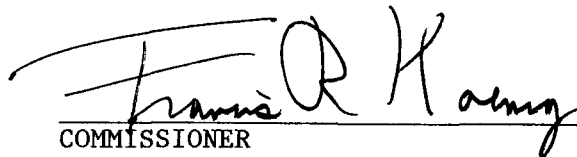
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1980


PRESIDENT


COMMISSIONER


COMMISSIONER