

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Oscar DeBree, Inc. :
Oscar DeBree Indiv. & as Officer : 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 9/1/67 - 2/28/68. :

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 22nd day of February, 1980, he served the within notice of Determination by mail upon Oscar DeBree, Inc., Oscar DeBree Indiv. & as Officer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Oscar DeBree, Inc.
Oscar DeBree Indiv. & as Officer
1200 Penfield Rd.
Rochester, NY 14625

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
22nd day of February, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Oscar DeBree, Inc. :
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Sirs Robert E. Brown
& Dennis J. Lumsden
100 Ebenezer Watts Bldg., 47 S. Fitzhugh St.
Rochester, NY

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Sworn to before me this
22nd day of February, 1980.

Joanne Knapp

[Signature]

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

February 22, 1980

Oscar DeBree, Inc.
Oscar DeBree Indiv. & as Officer
1200 Penfield Rd.
Rochester, NY 14625

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
Robert E. Brown
& Dennis J. Lumsden
100 Ebenezer Watts Bldg., 47 S. Fitzhugh St.
Rochester, NY
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
DeBree Excavation, Inc. :
& Oscar DeBree Indiv. & Officer : 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 12/1/67 - 2/28/72. :

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County of Albany

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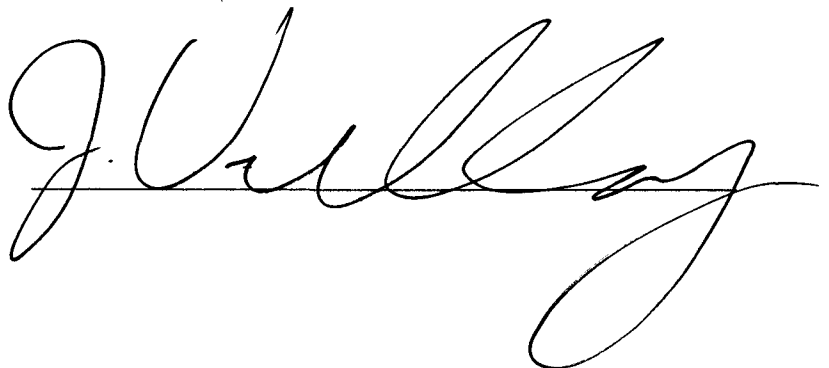
DeBree Excavation, Inc.
& Oscar DeBree Indiv. & Officer
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Rochester, NY 14625

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& Oscar DeBree Indiv. & Officer : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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J. Vredenburg

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STATE TAX COMMISSION
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& Oscar DeBree Indiv. & Officer
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STATE TAX COMMISSION

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Robert E. Brown
& Dennis J. Lumsden
100 Ebenezer Watts Bldg., 47 S. Fitzhugh St.
Rochester, NY
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Oscar DeBree, Individually & As Officer :
Phelps Equipment 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 6/1/66 - 5/31/72. :

State of New York
County of Albany

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Oscar DeBree, Individually & As Officer
Phelps Equipment Corp.
1200 Penfield Rd.
Rochester, NY 14625

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.

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Joanne Knapp

[Signature]

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Oscar DeBree, Individually & As Officer :
Phelps Equipment Corp. : AFFIDAVIT OF MAILING
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STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 22, 1980

Oscar DeBree, Individually & As Officer
Phelps Equipment Corp.
1200 Penfield Rd.
Rochester, NY 14625

Dear Mr. DeBree:

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:

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Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert E. Brown
& Dennis J. Lumsden
100 Ebenezer Watts Bldg., 47 S. Fitzhugh St.
Rochester, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Applications	:	
	:	
of	:	
	:	
OSCAR DeBREE, INC. and OSCAR DeBREE	:	
Individually and as an Officer	:	
and	:	DETERMINATION
DeBREE EXCAVATION, INC. and OSCAR DeBREE,	:	
Individually and as an Officer	:	
and	:	
PHELPS EQUIPMENT CORP. and OSCAR DeBREE,	:	
Individually and as an Officer	:	
	:	
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Periods September 1, 1967 through	:	
February 28, 1968, December 1, 1967	:	
through February 28, 1972 and June 1,	:	
1966 through May 31, 1972.	:	

Applicants, Oscar DeBree, Inc., DeBree Excavation, Inc., Phelps Equipment Corp. and Oscar DeBree, individually and as an officer of all three corporations, located at 1200 Penfield Road, Rochester, New York 14625, filed applications for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 1967 through February 28, 1968, December 1, 1967 through February 28, 1972 and June 1, 1966 through May 31, 1972 (File Nos. 01901, 01903 and 01904).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on November 13, 1974, May 20, 1975 and October 16, 1975. Applicants appeared by Robert E. Brown and Dennis J. Lumsden, Esqs. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Solomon Sies and Alexander Weiss, Esqs., of counsel).

ISSUES

I. Whether the audit procedure utilized by the Sales Tax Bureau in the audit of DeBree Excavation, Inc. was correct.

II. Whether applicant Oscar DeBree, individually and as an officer of each corporation, was properly held personally liable for additional taxes owed by applicants Oscar DeBree, Inc., DeBree Excavation, Inc., and Phelps Equipment Corp.

III. Whether Phelps Equipment Corp. engaged in the sale or rental of equipment subject to tax.

FINDINGS OF FACT

1. As the result of audits, the Sales Tax Bureau issued the following notices of determination and demand for payment of sales and use taxes due:

(a) Notice Number 90,748,738, issued May 16, 1972 to Oscar DeBree, Inc. and Oscar DeBree, individually and as an officer. The notice asserted a sales and use tax deficiency for the period September 1, 1967 through February 28, 1968 of \$17,682.05, including penalty and interest.

(b) Notice Number 90,748,911, issued June 13, 1972 to DeBree Excavation, Inc. and Oscar DeBree, individually and as an officer. The notice asserted a sales and use tax deficiency for the period December 1, 1967 through February 28, 1972 of \$109,869.82, including penalty and interest.

(c) Notice Number 90,748,602, issued April 20, 1972 to Phelps Equipment Corp. and Oscar DeBree, individually and as an officer. The notice asserted a sales and use tax deficiency for the period June 1, 1966 through May 31, 1972 of \$56,780.79, including penalty and interest.

2. As the result of a stipulation by both parties, the tax deficiency of

applicant Oscar DeBree, Inc. was determined to be \$700.00 exclusive of penalty and interest.

3. The deficiency assessed against applicant DeBree Excavation, Inc. was, during the formal hearing, modified by the Sales Tax Bureau to \$23,212.31, exclusive of penalty and interest, based on a margin of error of 24.8 percent. Applicant DeBree Excavation, Inc. had taxable sales for 1968 of \$98,317.00, uncollectible bad debts of \$9,518.00, and gross sales as per journal of \$395,321.00, thus giving a margin of error of 22.46 percent.

4. Applicant Oscar DeBree was president and sole shareholder of Oscar DeBree, Inc., DeBree Excavation, Inc. and Phelps Equipment Corp. during the periods covered by the audits herein at issue. Oscar DeBree, Inc. and DeBree Excavation, Inc. were in the business of excavating, trucking and grading. They also sold sand, gravel, fill dirt, top soil and crushed stone. Phelps Equipment Corp. purchased or rented equipment utilized in this type of operation, though the corporation did not itself engage in these operations. Phelps Equipment Corp. paid the sales tax due on these purchases or rentals. Phelps Equipment Corp., on the basis of a verbal understanding with DeBree Excavation, Inc., allowed DeBree Excavation, Inc. to use the equipment in its operations. DeBree Excavation, Inc. provided Phelps Equipment Corp. with the money necessary to meet its payment on the equipment.

5. Phelps Equipment Corp. purchased or rented equipment for the purpose of resale.

6. Applicant Oscar DeBree acted in good faith and on the advice of his accountant.

CONCLUSIONS OF LAW

A. That applicant, Oscar DeBree, was a responsible officer of Oscar DeBree, Inc., DeBree Excavation, Inc. and Phelps Equipment Corp. within the

meaning and intent of section 1131(1) of the Tax Law; that applicant Oscar DeBree was properly held personally liable for the tax deficiencies of applicants Oscar DeBree, Inc., DeBree Excavation, Inc. and Phelps Equipment Corp. in accordance with the meaning and intent of section 1133(a) of the Tax Law.

B. That the assessment issued May 16, 1972 to applicant Oscar DeBree, Inc. is reduced to \$700.00, exclusive of penalty and interest, as per Finding of Fact No. "2".

C. That the assessment issued June 13, 1972 to applicant DeBree Excavation, Inc. is reduced to \$21,021.06 exclusive of penalty and interest, as per Finding of Fact No. "3".

D. That the use of the Phelps Equipment Corp. vehicles by DeBree Excavation, Inc. constituted a rental or lease by Phelps Equipment Corp., within the meaning and intent of section 1101(b)(5) of the Tax Law. The assessment issued April 20, 1972 to applicant Phelps Equipment Corp. is sustained, except that Phelps Equipment Corp. is entitled to a credit for the tax paid on the rental of equipment or on the original purchase of the equipment, inasmuch as section 1101(b)(4) exempts purchases for resale.

E. That the interest in excess of the minimum interest and the penalty imposed pursuant to section 1145(a) of the Tax Law are cancelled.

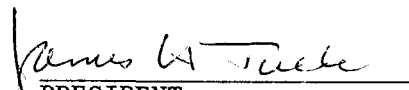
F. That the applications of Oscar DeBree, Inc., DeBree Excavation, Inc., Phelps Equipment Corp. and Oscar DeBree, individually and as an officer of each corporation, are granted to the extent indicated in Conclusions of Law "B", "C", "D" and "E" above. The Audit Division is hereby directed to modify accordingly the notices of determination and demand for payment of sales and use taxes due issued May 16, 1972, June 13, 1972 and April 20, 1972.

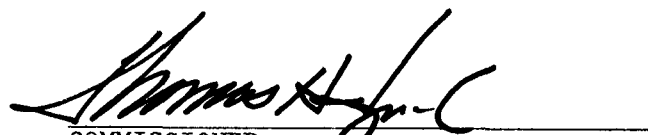
Except as so granted, the applications are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 22 1980


PRESIDENT


COMMISSIONER

COMMISSIONER