

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Eden Kirker 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 9/1/72-8/31/75. :

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

Eden Kirker Co., Inc.
345 Harrison
Paramus, NJ 07652

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
Eden Kirker Co., Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 9/1/72-8/31/75. :

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 22nd day of February, 1980, he served the within notice of Determination by mail upon Paul Banks the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

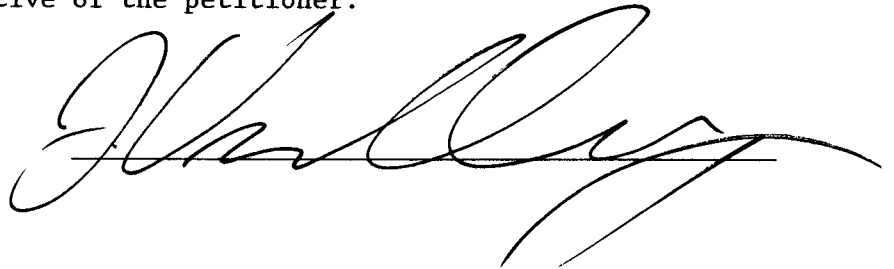
Mr. Paul Banks
30 E. 42nd St.
New York, NY 10017

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
22nd day of February, 1980.

Joanne Knapp



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

February 22, 1980

Eden Kirker Co., Inc.
345 Harrison
Paramus, NJ 07652

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
Paul Banks
30 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
EDEN KIRKER CO., INC.	:	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 September 1, 1972 through	:	
August 31, 1975.	:	

Applicant, Eden Kirker Co., Inc., with offices located at 345 Harrison, Paramus, New Jersey 07652, 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 September 1, 1972 through August 31, 1975 (File No. 15409).

A formal hearing was held befor Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 10, 1977 at 10:30 A.M. and was continued before him at the same offices on October 27, 1977 at 2:00 P.M. Applicant appeared by Paul Banks, CPA. The Audit Division appeared by Peter Crotty, Esq. (James J. Morris, Esq., of counsel).

ISSUES

I. Whether, within the meaning of Section 1105(c)(5) of the Tax Law, the services performed by applicant for Cities Service Company at 60 Wall Street and 70 Pine Street, New York City, constituted the maintaining, servicing or repairing of real property subject to tax or were services adding to or improving such real property by a capital improvement not subject to tax.

II. Whether, as claimed by applicant, it has been subjected to "double jeopardy".

FINDINGS OF FACT

1. On April 14, 1976, as a result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, Eden Kirker Co., Inc. for \$36,053.65 plus penalty and interest of \$12,986.71, a total of \$49,040.36 for the period September 1, 1972 through August 31, 1975.

2. Prior thereto, on or about September 8, 1975, applicant signed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law. Said consent provided that taxes for the period September 1, 1972 through August 31, 1975 could be determined on or before September 19, 1976.

3. Applicant timely applied for a hearing to review the aforesaid determination, issued April 14, 1976.

4. During the aforesaid audited period on or about September 1, 1972 through August 31, 1975, Cities Service Company or a subsidiary acting for it was the owner of the buildings known as and by street numbers 60 Wall Street and 70 Pine Street, New York City.

5. During the aforesaid period, Cities Service Company moved its offices to Tulsa, Oklahoma and, in connection with said move, vacated ten floors in the aforesaid buildings located at 60 Wall Street and 70 Pine Street, New York City.

6. It was the intention of Cities Service Company, in connection with its move to Tulsa, Oklahoma and the vacating of the said ten floors at 60 Wall Street and 70 Pine Street, New York City, to lease the space on said floors so vacated by Cities Service Company, to tenants, pursuant to leases for terms of five to ten years.

7. To accomplish the said intention, Cities Service Company or a subsidiary acting for it engaged applicant and another contractor to perform the following services with respect to the said ten floors in the aforesaid buildings.

A. Applicant was engaged to perform and did perform the following services:

(a) The demolition of the existing walls, ceilings, partitions and corridors on the said ten floors.

(b) The removal from said buildings of the debris resulting from said demolition, so as to clear the said floors and prepare them for the construction of new installations required to accommodate the needs of new tenants.

(c) To construct part of the new walls, ceilings, partitions, corridors and such other installations as might be needed to accommodate the needs of new tenants pursuant to leases for terms of five to ten years.

B. The other contractor, also referred to as the "main contractor", was engaged to construct the balance of the new intallations aforesaid, not constructed by applicant.

8. Cities Service Company or a subsidiary acting for it furnished applicant with capital improvement certificates in connection with Cities Service Company's engagement of applicant's services as aforesaid.

9. (a) For the aforesaid audit period, namely September 1, 1972 through August 31, 1975, applicant reported in its Sales Tax returns that the gross sales for said period were the sum of \$520,568.00 and that the amount of taxable sales thereof was the sum of \$82,593.00.

(b) After audit, the Audit Division determined that applicant's gross sales for said period were the sum of \$562,512.00 and that the amount of taxable sales thereof was also the sum of \$562,512.00.

(c) The Audit Division also determined, in connection with its aforesaid field audit, that applicant's claim for credit for the sales taxes paid to suppliers of materials used by applicant in connection with the aforesaid services rendered by applicant, should be allowed.

10. Applicant's charges to Cities Service Company for demolition and debris removal services rendered as aforesaid, are not separable from applicant's charges for the construction services rendered by Cities Service Company.

CONCLUSIONS OF LAW

A. That applicant had the burden of proving that the services rendered during the period at issue with respect to the ten floors vacated by Cities Service Company at 60 Wall Street and 70 Pine Street, New York City, were services that added to or improved such real property by capital improvement.

B. That the applicable rule of law, as stated in People et al 100 Park Avenue v. Boyland, 144 NYS2d 88, affirmed 309 NY 685, is that:

"Unless a contrary intention is expressed, the law will presume that where installations are made for the purpose of conducting the business for which premises are leased, such installations are not permanent annexations to the freehold, but are made for the sole use and enjoyment of the tenant during the term of his lease, and not for the purpose of enhancing the value of the landlord's estate."

C. That applicant has not sustained the burden of proof necessary to rebut the presumption stated in People ex rel. 100 Park Avenue v. Boyland, cited above.

D. That applicant has failed to sustain the burden of proof that the installations made by applicant and another contractor as aforesaid during the period at issue on the ten floors vacated by Cities Service Company at 60 Wall Street and 70 Pine Street, New York City, were capital improvements.

E. That the record does not sustain a finding that the installations made as aforesaid during the period at issue by applicant and another contractor could not be removed without injury to the real property aforesaid.

F. That the record does not sustain a finding that the services rendered by applicant, as aforesaid, complied with the general rules, set forth on the back of the certificate or certificates of capital improvement furnished to applicant by Cities Service Company or a subsidiary acting for it, to determine a capital improvement to real property.

G. That applicant's claim to have been subjected to "double jeopardy" is not supported by the record and is not a basis for granting the application, regardless of whether "double jeopardy" is considered in its literal sense or as a misnomer for another claim. The Audit Division made a proper determination based on an authorized and appropriate field audit within the statutory period of time set forth in Section 1147(c) of the Tax Law as extended by the consent aforesaid, signed by applicant on or about September 8, 1975.


H. That the application of Eden Kirker Co., Inc., is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 14, 1976 is sustained.

DATED: Albany, New York

FEB 22 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER