

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Empire Structural Products Inc. :
Douglas R. Bell, President : 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 6/1/69-2/29/72. :

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 November, 1980, he served the within notice of Decision by mail upon Empire Structural Products Inc., Douglas R. Bell, President, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Empire Structural Products Inc.
Douglas R. Bell, President
P.O. Box 8220
Rochester, NY 14617

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 November, 1980.

Deborah A Bank

J. Vredenburg

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

November 14, 1980

Empire Structural Products Inc.
Douglas R. Bell, President
P.O. Box 8220
Rochester, NY 14617

Dear Mr. Bell:

Please take notice of the Decision 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

Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
EMPIRE STRUCTURAL PRODUCTS, INC. : DECISION
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 June 1, 1969 :
through February 29, 1972. :
:

Petitioner, Empire Structural Products, Inc., c/o Douglas R. Bell, President, P.O. Box 8220, Rochester, New York 14617, filed a petition 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 June 1, 1969 through February 29, 1972 (File No. 12923).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on June 9, 1980 at 2:45 P.M. Petitioner appeared by Douglas R. Bell, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of additional taxes due from petitioner on the purchase of materials used in performing capital improvements, was correct.

FINDINGS OF FACT

1. Petitioner, Empire Structural Products Inc., was primarily engaged in furnishing and installing structural steel roof decking. Occasionally, petitioner furnished the material only. The business ceased operations in June 1973.

2. On June 23, 1972, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period June 1, 1969 through February 29, 1972 for taxes due of \$22,406.31, plus penalty and interest of \$4,590.90, for a total of \$26,997.21.

3. On audit, petitioner did not have complete books and records available for examination by the Audit Division. The Audit Division determined that petitioner's purchase invoices were incomplete since the cash disbursements journal showed material purchases substantially greater than the available purchase invoices. The Division reviewed the available purchase invoices and found that petitioner, with the exception of three purchases, failed to pay a sales or use tax on materials used in performing capital improvement contracts. Based on this review, the Audit Division concluded that petitioner did not pay any sales or use taxes on materials purchased during the entire audit period. Total material purchases of \$419,889.00 were obtained from Federal income tax returns filed for the fiscal years ending February 28, 1970 and February 28, 1971 and the cash disbursements journal for the period March 1, 1971 through December 31, 1971. Purchases for the months of January 1972 and February 1972 were estimated based on an average of previous monthly purchases. The additional taxes determined of \$22,406.31 reflects a credit for the taxes reported by petitioner on its sales tax returns filed.

4. Petitioners available purchase invoices totaled \$216,803.00 as compared to purchases of \$419,891.00 recorded in the cash disbursements journal. The totals from the cash disbursements journal agreed with purchases shown in the cost of goods sold section of the Federal income tax returns filed for 1970 and 1971.

5. Petitioner argued that material purchases shown on its Federal returns included purchases of labor. However, the Audit Division's transcript of said returns show separate amounts for merchandise purchases and subcontract labor.

6. Petitioner also argued that it performed work for tax exempt organizations. Petitioner testified that it executed lump sum contracts with its customers for the performance of capital improvement work, but failed to submit any evidence to show that it sold materials to exempt organizations prior to the installation of said materials.

7. Petitioner paid sales taxes of \$155.89 to its suppliers during the period at issue.

8. Petitioner issued a letter dated December 3, 1969, addressed to whom it may concern which stated "Under the New York State Sales Tax Law, contractors are obligated to prepay all taxes, however this is not so in my case. Empire Structural Products Inc. is not a contractor as it has no employees doing any construction, owns no equipment for construction and at times may act only as an agent for the purchase of construction materials. Therefore, upon an opinion from my accountant I do not have to prepay any sales taxes and you may use this letter as your authorization."

9. Reasonable cause does not exist for the abatement of penalty and interest.

CONCLUSIONS OF LAW

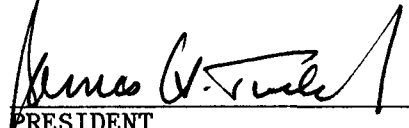
A. That the Audit Division, in the absence of adequate and complete books and records properly determined petitioner's additional tax liability from such information as was available, in accordance with section 1138(a) of the Tax Law. However, the Audit Division did not give consideration to the sales taxes paid by petitioner to suppliers as referred to in Finding of Fact "7". Accordingly, the additional taxes due are reduced to \$22,250.42.

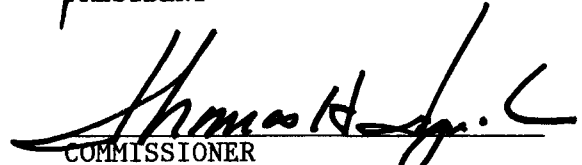
B. That the petition of Empire Structural Products, Inc. is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 23, 1972; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER