STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Louis J. Fascia :
d/b/a Louis J. Fascia Floor Covering Co. 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 12/1/72-11/30/74. :

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 17th day of October, 1980, he served the within notice of Decision by mail upon Louis J. Fascia, d/b/a Louis J. Fascia Floor Covering Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis J. Fascia
d/b/a Louis J. Fascia Floor Covering Co.
502 Broadway
Mechanicville, NY 12118

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
17th day of October, 1980.

Deborah A Bank

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of	:	
Louis J. Fascia	:	
d/b/a Louis J. Fascia Floor Covering Co.		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 12/1/72-11/30/74.	:	

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 17th day of October, 1980, he served the within notice of Decision by mail upon John H. Dennis 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 H. Dennis
90 State St.
Albany, NY 12118

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
17th day of October, 1980.

Deborah A Bank

J. Vredenburg

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

October 17, 1980

Louis J. Fascia
d/b/a Louis J. Fascia Floor Covering Co.
502 Broadway
Mechanicville, NY 12118

Dear Mr. Fascia:

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
John H. Dennis
90 State St.
Albany, NY 12118
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LOUIS J. FASCIA d/b/a LOUIS J. FASCIA FLOOR COVERING CO.	:	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 December 1, 1972 through November 30, 1974.	: : :	

Petitioner, Louis J. Fascia d/b/a Louis J. Fascia Floor Covering Co., 502 Broadway, Mechanicville, New York 12118, 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 December 1, 1972 through November 30, 1974 (File No. 15079).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on May 23, 1979 at 2:45 P.M. and continued on January 22, 1980 at 1:00 P.M. Petitioner appeared by John H. Dennis, Esq. The Audit Division appeared by Peter Crotty and Ralph J. Vecchio, Esqs. (J. Ellen Purcell and Harry Kadish, Esqs., of counsel).

ISSUES

I. Whether an agreement entered into between petitioner and the Sales Tax Bureau negated any tax liability subsequently determined.

II. Whether the results of a field audit performed were correct.

FINDINGS OF FACT

1. On March 17, 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 Louis J. Fascia Floor Covering Co. for the period December 1, 1972 through November 30, 1974 in the amount of $4,178.50 tax plus penalties and interest. The period December 1, 1974 through November 30, 1975 was included in the field audit; however, no tax was determined due.

2. On audit, the Division found that petitioner was not paying tax on materials purchased and consumed in capital improvements to real property pursuant to section 1101(b)(4) of the Tax Law for the period December 1, 1972 through November 30, 1974. It also found that petitioner was erroneously charging sales tax on capital improvements to real property. Because all erroneous sales tax collections were remitted to the Sales Tax Bureau, the Audit Division proceeded to review only those sales where no sales tax was charged. Based on Federal tax returns filed, the Audit Division determined that 71 percent of petitioner's sales was cost of materials. It applied this percentage to the exempt sales made to determine the cost of materials used in capital improvement jobs and the use tax due thereon.

3. On November 6, 1974, petitioner was informed of a refund issued to one of petitioner's customers by the Sales Tax Bureau for tax which petitioner erroneously charged. The Bureau requested reimbursement for the refund issued along with petitioner's signature agreeing to the following:

> "In any contract where a sales tax was erroneously collected by Louis J. Fascia Floor Covering Co. and our customer makes application to the Sales Tax Bureau and receives a refund of erroneously collected tax plus interest (I) (We) consent to an assessment by the Bureau for such total amount notwithstanding any statute of limitation which might otherwise bar assessment."

Petitioner signed the agreement and remitted the amount refunded to the customer.

4. Petitioner contended that his signature on the agreement barred any assessment of tax other than the amount that is refunded to a customer. In support of his application, he referred to a portion of the letter referring to the agreement which read as follows:

> "In recognizing the misunderstanding that exists in the building industry over the application of this provision of the Tax Law, the Sales Tax Bureau will not require you to pay tax on your purchases of materials for past periods, if you agree to the following:
>
> 1. Amend your method of billing customers in the future so that no sales tax will be charged on capital improvements,
>
> 2. Reimburse the Sales Tax Bureau for the full amount of any tax and interest which must be refunded because of refund claims made by your customers."

Petitioner complied with all aspects of the agreement.

5. Petitioner contended that the cost of materials used in the audit results were not verified by actual purchase invoices. He offered no evidence to show that the cost of materials determined by the Sales Tax Bureau was incorrect.

CONCLUSIONS OF LAW

A. That the agreement entered into by petitioner and the Sales Tax Bureau pertained only to those purchases which were used in capital improvements to real property where sales tax had been erroneously collected on such capital improvements. That the Audit Division did not tax any purchases of this nature in the performance of its audit. That the Audit Division taxed only those purchases (used in capital improvement work) on which no tax was paid to petitioner's supplier and on which no tax was collected from the petitioner's customer.

[illegible]

B. That the materials purchased by petitioner were retail sales as defined by section 1101(b)(4) of the Tax Law and that such purchases are subject to the imposition of sales tax within the meaning and intent of section 1105(a) of the Tax Law. That the Audit Division properly held such purchases subject to tax.

C. That the audit performed by the Audit Division was proper and in accordance with section 1138(a) of the Tax Law.

D. That petitioner acted in good faith as evidenced by the fact that no tax liability was found subsequent to the agreement; and that the penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due as noted in Conclusion "D" above; and that, except as so granted, the petition of Louis J. Fascia d/b/a Louis J. Fascia Floor Covering Co. is in all other respects denied.

DATED: Albany, New York
OCT 17 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

OCT 17 1980