

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Frangella Bros., Inc. :

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 8/1/65-11/30/66. :

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 16th day of May, 1980, he served the within notice of Determination by mail upon Frangella Bros., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frangella Bros., Inc.  
P.O. Box 158  
Ravena, 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Frangella Bros., Inc. :

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under Article 28&29 of the Tax Law  
for the Period 8/1/65-11/30/66. :

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 16th day of May, 1980, he served the within notice of Determination by mail upon E. David Duncan 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. E. David Duncan  
Lyons & Duncan  
100 State St.  
Albany, NY 12207

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  
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 16, 1980

Frangella Bros., Inc.  
P.O. Box 158  
Ravena, NY

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  
E. David Duncan  
Lyons & Duncan  
100 State St.  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application

of

FRANGELLA BROTHERS, 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 August 1, 1965 to November 30,  
1966.

Applicant, Frangella Brothers, Inc., P.O. Box 158, Ravena, New York, 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 August 1, 1965 to November 30, 1966 (File No. 01460).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on April 6, 1978 at 9:30 A.M. and was continued on October 30, 1978 at 9:00 A.M. Applicant appeared by Lyons & Duncan (E. David Duncan, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (James J. Morris, Esq. and Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether trucks and repair parts purchased by applicant, are tangible personal property for use or consumption directly and exclusively in the production for sale of tangible personal property on a farm, and are exempt as provided by section 1115(a)(6) of the Tax Law from the sales and use taxes imposed by Articles 28 and 29 of the Tax Law.

II. Whether the hearing officer should be disqualified from conducting

this hearing in favor of an independent, outside hearing officer.

III. Whether this matter should be dismissed without hearing in that applicant has been unduly prejudiced by the delay in the hearing of this matter.

#### FINDINGS OF FACT

1. On July 19, 1968, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Frangella Brothers, Inc. for taxes due of \$806.11, plus penalty and interest of \$101.87, for a total of \$907.98.

2. At the hearing, applicant conceded liability for all items except for a use tax of \$580.10, determined to be due on purchases of some of its trucks and truck parts in the amount of \$28,996.58.

3. Applicant is a commercial grower of mushrooms. It operated on three separate parcels of land all located within a radius of five miles. These parcels of land consisted of an area containing growing buildings, an area from which topsoil was obtained and an area from which sand was obtained.

4. Applicant used its trucks to transport topsoil and sand from their respective areas to the growing building area over private and public roads. Applicant also used its trucks to haul horse manure from race tracks to the growing building area. The topsoil, sand and manure were stored in the vicinity of the growing buildings until needed.

5. Applicant then combined the manure, sand and topsoil to create a medium for the growth of mushrooms. After this mixture was sterilized, applicant planted mushroom spores which it had trucked to the growing buildings in its own trucks. Then applicant harvested the mushrooms for shipment to food

stores or to a canning facility. Applicant also used some of its vehicles to transport workers from place to place, to transport supervisors and to transport the mushrooms to market. Finally, once the medium was exhausted, it was removed from the growing buildings and trucked away in applicant's trucks.

6. None of applicant's trucks were assigned to one particular task consistently. Some of the trucks had farm plates, while the remaining trucks had commercial plates.

7. Applicant purchased these trucks and repair parts without paying sales or use tax on them.

8. At the hearing, applicant orally made a motion that the State Tax Commission disqualify the hearing officer from conducting this hearing in favor of an independent, outside hearing officer. Applicant also orally made a motion that this matter be dismissed without hearing in that applicant is unable to fully present its evidence due to unnecessary delay by the Department of Taxation and Finance.

#### CONCLUSIONS OF LAW

A. That applicant's production process did not begin until it had received the topsoil, sand and manure in its growing area.

B. That applicant did not purchase trucks and repair parts for use or consumption directly and exclusively in the production for sale of tangible personal property on a farm as required by section 1115(a)(6) of the Tax Law ("exclusively" amended to read "predominantly" effective September 1, 1974).

C. That the State Tax Commission's Rules of Practice and Procedure, (20 NYCRR §601.10) do not provide for oral motions at a formal hearing.

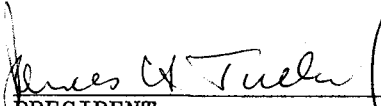
D. That the application of Frangella Brothers, Inc. is denied and the

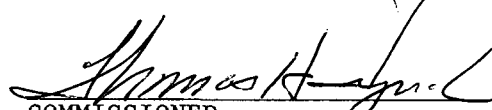
Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained.

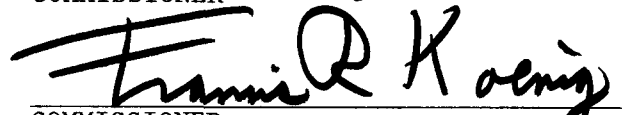
DATED: Albany, New York

**MAY 16 1980**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER