

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Frankel Berger 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 5/31/72-8/31/74. :

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 21st day of March, 1980, he served the within notice of Determination by mail upon Frankel Berger Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

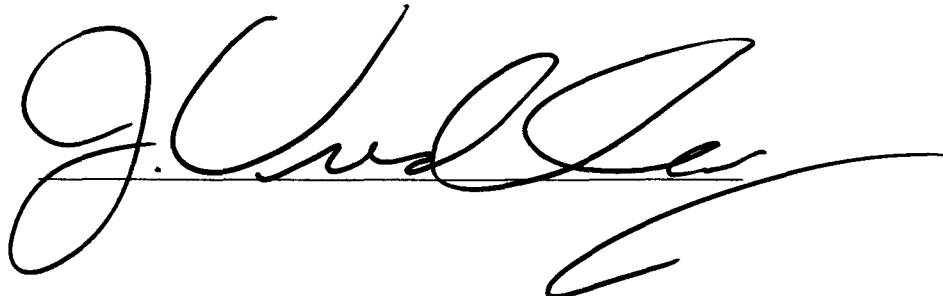
Frankel Berger Corp.
32 Richardson St.
Brooklyn, NY 11211

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
21st day of March, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Frankel Berger Corp. :
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 5/31/72-8/31/74. :

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 21st day of March, 1980, he served the within notice of Determination by mail upon Julian M. Ganak 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. Julian M. Ganak
16 Court St.
Brooklyn, NY 11241

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
21st day of March, 1980.

Joanne Knapp

J. Vredenburg

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

March 21, 1980

Frankel Berger Corp.
32 Richardson St.
Brooklyn, NY 11211

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
Julian M. Ganak
16 Court St.
Brooklyn, NY 11241
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
FRANKEL BERGER CORP. : 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 Periods ended May 31, :
1972 through August 31, 1974. :
:

Applicant, Frankel Berger Corp., 32 Richardson Street, Brooklyn, New York 11211, 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 periods ended May 31, 1972 through August 31, 1974 (File No. 14458).

A formal hearing was held before Frank Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1978 at 2:45 P.M. Applicant appeared by Julian M. Ganak, Registered Public Accountant. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Laurence Stevens, Esq. of counsel).

ISSUE

Whether applicant is liable for additional taxes assessed pursuant to audit for the periods ended May 31, 1972 through August 31, 1974, both inclusive, with respect to the furnishing of materials to tax exempt organizations under "lump-sum" contracts or purchase orders.

FINDINGS OF FACT

1. Applicant, Frankel Berger Corp., timely filed New York State and local sales and use tax returns for the periods ended May 31, 1972 through August 31, 1974, both inclusive.

2. On January 28, 1976, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to applicant, for \$4,131.91, plus \$1,760.47 in penalties and interest, making a total of \$5,892.38 due and owing for the periods ended May 31, 1972 through August 31, 1974, both inclusive.

3. By letter dated April 19, 1976, applicant, Frankel Berger Corp., protested the aforesaid notice of determination and said letter shall be deemed to be the perfected petition or application of said applicant pursuant to section 1138 of the Tax Law and section 601.5 of the Rules of Practice and Procedure of the State Tax Commission.

4. For the periods in question, applicant, Frankel Berger Corp., was a New York corporation engaged in the installation and servicing of heating and air conditioning units in buildings owned or leased by both exempt and nonexempt organizations. There is, however, no issue raised in this proceeding with respect to nonexempt organizations.

5. In the course of applicant's business dealings with the exempt organizations, applicant would furnish or provide materials necessary for the installation and/or servicing of heating and air conditioning units pursuant to "lump-sum" contracts or purchase orders.

6. In or about December, 1975, a field audit report was filed, claiming a deficiency in sales and use taxes against applicant in the amount of \$4,131.91, based on a test period of March, April and May, 1974. Applicant contested the validity of the test period, by reason of the cyclical nature of its business. Accordingly, applicant would not consent to any particular test period proposed by the auditor but, rather, insisted that applicant's books and records be examined for the entire audit period of approximately three years.

7. The auditor for the Sales Tax Bureau visited applicant's place of business and examined its general ledger, cash receipts and disbursements books, purchase and sales journals, New York State sales tax returns, Federal income tax returns and sales and purchase invoices.

8. The auditor determined that, for the test period, applicant reported \$58,528.80 in nontaxable sales, of which \$15,133.30 (or 25.9 percent) were pursuant to lump-sum capital improvement contracts with exempt organizations. Of that amount, a percentage of 41.93 percent was found to be invoiced for materials. The auditor then applied the percentage of 25.9 percent to the sum of \$537,148.00, which sum represented said applicant's reported nontaxable sales for the entire audit period. The resultant sum, \$139,121.00, representing the monetary amount of capital improvements made during the entire audit period pursuant to lump-sum contracts with exempt organizations, was then multiplied by 41.93 percent to obtain the cost of materials (i.e., \$58,333.00) subject to use taxes.

9. Applicant offered substantial evidence to show that, while there was no miscalculation in the percentages which resulted from the test period or in projecting such percentages over the entire audit period, the test period was not a fair and representative sampling of said applicant's business practices. For the periods in question, applicant's nontaxable or exempt sales totalled \$537,148.00, as determined by the auditor. However, based on a review and examination of the actual invoice and purchase orders of applicant for the entire audit period, the monetary amount of capital improvements made pursuant to lump-sum contracts was \$65,092.00 (or 12.12 percent). The actual cost of materials was \$14,803.70 for the entire audit period.

CONCLUSIONS OF LAW

A. That applicant, Frankel Berger Corp., was a vendor as defined in section 1101(b)(8) of the Tax Law and was subject to the sales and use taxes imposed by Articles 28 and 29 of the Tax Law.

B. That, pursuant to former section 1115(a)(15) of the Tax Law, the materials furnished by applicant, Frankel Berger Corp., for use in the erection or construction of a building or structure of an exempt organization, or in the altering or improving of such building or structure, were so furnished pursuant to "lump-sum" contracts, under which such materials are fully taxable.

C. That an assessment of additional taxes based on a field audit generally stands, unless applicant can show it to be erroneous.

D. That applicant, Frankel Berger Corp., has sustained its burden of disproving the determination of the Sales Tax Bureau that additional tax is due and owing as assessed and that additional tax shall only be computed on the sum of \$14,803.70, which sum represents said applicant's actual cost of materials furnished by said applicant pursuant to lump-sum capital improvements contracts during the period in question.

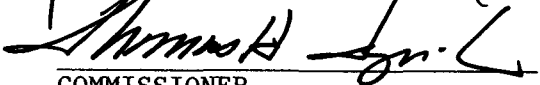
E. That the application of Frankel Berger Corp. is granted to the extent set forth in Conclusion of Law "D", supra. The Audit Division is hereby directed to modify accordingly the notice of determination issued on January 28, 1976 against said applicant; and that, except as so granted, the application is in all other respects denied.

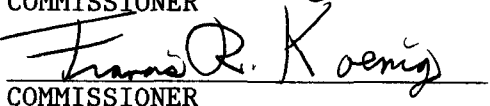
DATED: Albany, New York

MAR 21 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER