

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Jasper Construction Co., 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 6/1/70-8/31/75. :

State of New York  
County of Albany

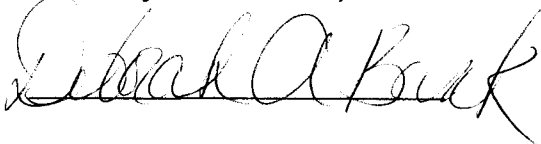
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of October, 1980, he served the within notice of Determination by mail upon Jasper Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

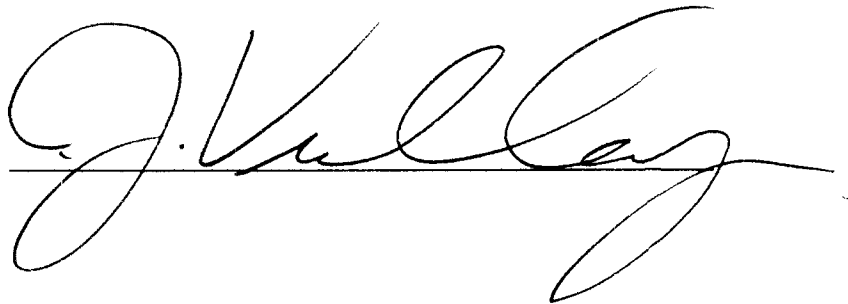
Jasper Construction Co., Inc.  
375 Portion Rd.  
Lake Ronkonkoma, NY 11779

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.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Jasper Construction Co., Inc. :

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for Redetermination of a Deficiency or a Revision :  
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Sales & Use Tax :  
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for the Period 6/1/70-8/31/75. :

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 17th day of October, 1980, he served the within notice of Determination by mail upon Terence F. Gaffney 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. Terence F. Gaffney  
394 Old Country Rd.  
Garden City, NY 11530

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.

Dorothy A. Berk

Jay Vredenburg

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

October 17, 1980

Jasper Construction Co., Inc.  
375 Portion Rd.  
Lake Ronkonkoma, NY 11779

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  
Terence F. Gaffney  
394 Old Country Rd.  
Garden City, NY 11530  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
JASPER CONSTRUCTION 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 June 1, 1970 through August 31,	:	
1975.	:	

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Applicant, Jasper Construction Co., Inc., 375 Portion Road, Lake Ronkonkoma, New York 11779, 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 June 1, 1970 through August 31, 1975 (File No. 15259).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 27, 1979 at 10:45 A.M. Applicant appeared by Terence F. Gaffney, Esq. The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUES

I. Whether the applicant was properly assessed a use tax on purchases of materials used in the fulfillment of contracts with municipalities.

II. Whether the transactions prior to May 25, 1973 were barred by the statute of limitations as set forth in section 1147(b) of the Tax Law.

FINDINGS OF FACT

1. On June 14, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Jasper Construction Co., Inc. for the period June 1, 1970 through August 31, 1975 in the amount of \$17,543.25 tax plus penalties and interest.

2. Applicant filed a timely protest to the aforesaid notice.

3. The Audit Division based the above notice on a field audit of the applicant's books and records. A review of available contracts disclosed them to be lump sum. The Division proceeded to examine purchase invoices for the periods September 1 through November 30, 1972; March 1 through May 31, 1973; and December 1, 1973 through February 28, 1974. These periods were chosen because they appeared to be representative of all periods under audit. Applicant offered no disagreement to the test periods used.

Upon examination of the purchase invoices, the Audit Division determined that 16.747 percent of the total purchases examined were subject to a use tax. These taxable purchases were materials on which no tax was paid or were not substantiated as sub-contracts. The Division applied the 16.747 percent to the total purchases for the period September 1, 1972 through August 31, 1975. For the period June 1, 1970 through August 31, 1972, it used the average purchases subject to use tax of the subsequent quarters due to the applicant's refusal to present books and records for this period.

It was the Audit Division's position that since the applicant's contracts were lump sum, the applicant was the ultimate consumer of these materials and the use tax was due on any purchases where no tax was paid. Further, it took the position that since no returns were filed or tax paid by the applicant, the statute of limitations did not apply.

4. Applicant issued Contractor Exempt Purchase Certificates for the purchase of some of its material. Since applicant was not registered with the Audit Division, it noted the certificate of authority identification number as "municipality".

5. Applicant argued that despite the fact that its contracts were lump sum, title to all the material passed to the municipality when the materials

were delivered to the job site and payment was received. In support of its application, it quoted Article 6, Progress Payments, and Article 9, Payments and Completion, from a standard contract form used in its business operation. The Articles specified that payments were to be made to the contractor on a monthly basis for a percentage of work completed and for material, free of any liens, stored at the construction site.

6. Applicant contended that the audit results were improper since verification was not made that the tax may have been paid by the supplier from whom the materials were purchased. It offered no evidence to show that any of the materials taxed by the Audit Division were in fact sub-contracts.

7. In support of its application, applicant cited Sweet Associates v. Gallman. It offered no evidence, however, to show that the price of the contract was reduced by the amount of the tax exemption afforded exempt organizations, that the municipality was the beneficiary of any tax exemption, or that in fact a time and material contract existed for the periods prior to September 1, 1974.

8. Applicant contended that section 1115(a)(15) of the Tax Law was ignored in the performance of the audit. Applicant failed to submit any contracts entered into after September 1, 1974.

9. Applicant contended that the statute of limitations does apply since it was not required to collect tax or to file a certificate of registration pursuant to section 1134 of the Tax Law.

10. Applicant offered no evidence to show that reasonable cause existed for not paying over the tax asserted due.

#### CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i) of the Tax Law states that a sale of any tangible personal property to a contractor...for use or consumption in erecting

structures or buildings, or building on, or otherwise adding to...real property, property or land,...is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed; that the purchase of materials by Jasper Construction Co., Inc. were retail sales in accordance with this section.

B. That section 1115(a)(14) of the Tax Law effective September 1, 1969 and later amended by Ch. 221, Laws 1971 to section 1115(a)(15) provides that:

"Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property (i) is to become an integral component part of such structure, building or real property and (ii) is to be resold to such organization as tangible personal property before it has become a part of such structure, building or real property."

That the applicant has not produced any evidence to show that the tangible personal property used in the performance of its contracts was resold to an exempt organization before it became part of the structure, building or real property.

That section 1115(a)(15) of the Tax Law was amended September 1, 1974 eliminating sub-paragraph (ii); however, applicant did not submit any contracts entered into after the date of this amendment.

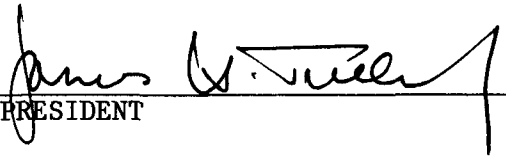
C. That section 1133(b) of the Tax Law provides that where any customer has failed to pay tax imposed by this Article, it shall be the duty of the customer to pay the tax to the Tax Commission within 20 days of the date the tax was required to be paid; that applicant filed no tax returns, therefore, the statute of limitations provided by section 1147(b) does not apply, and the tax due may be assessed at any time.

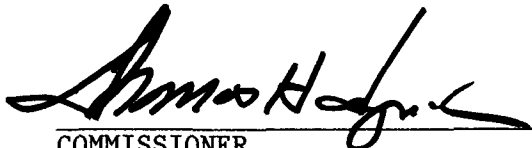
D. That the application of Jasper Construction Co., Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 14, 1976 is sustained with applicable penalties and interest thereon.

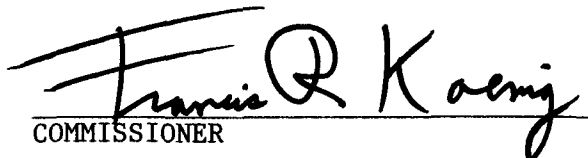
DATED: Albany, New York

STATE TAX COMMISSION

OCT 17 1980

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER