

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Long Island Building Supply 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 6/1/72 - 11/30/75. :

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

Long Island Building Supply Corp.
2717 Oceanside Rd.
Oceanside, NY 11572

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 :
Long Island Building Supply Corp. :
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for Redetermination of a Deficiency or a Revision :
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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 Laurence Stevens 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. Laurence Stevens
M. S. Scheiber & Company, CPA's
271 Madison Ave.
New York, 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 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

Long Island Building Supply Corp.
2717 Oceanside Rd.
Oceanside, NY 11572

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
Laurence Stevens
M. S. Scheiber & Company, CPA's
271 Madison Ave.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
LONG ISLAND BUILDING SUPPLY 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 Period June 1, 1972 through	:	
November 30, 1975.	:	

Applicant, Long Island Building Supply Corp., 2717 Oceanside Road, Oceanside, New York 11572, 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, 1972 through November 30, 1975 (File No. 16547).

A formal hearing was commenced before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1978 at 9:15 A.M. Applicant appeared by M. S. Schreiber & Company (Stanley Ross, CPA). The Audit Division appeared by Peter Crotty, Esq., (Laurence Stevens, Esq., of counsel).

The formal hearing was continued and was concluded before Frank A. Romano, Hearing Officer, at the same location on September 26, 1978 at 9:15 A.M. Applicant appeared by M. S. Schreiber & Company (Stanley Ross, CPA). The Audit Division appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUE

Whether applicant is liable for additional sales and use taxes assessed pursuant to audit.

FINDINGS OF FACT

1. Applicant, Long Island Building Supply Corp., timely filed New York State and local sales and use tax returns for the period June 1, 1972 through

November 30, 1975, and remitted sales tax in the amounts reflected thereon.

2. On August 25, 1976, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to applicant, Long Island Building Supply Corp., for \$25,220.53 in sales and use taxes, plus \$10,724.48 in penalties and interest, making a total of \$35,945.01 due and owing for the aforesaid period.

3. The aforesaid notice of determination was also issued to Joseph Chinman, Harvey Scher, Lance Chinman and Richard Zeisler, individually and as officers of Long Island Building Supply Corp., assessing the sum of \$35,945.01, computed as aforesaid, against them on the grounds that, as officers of Long Island Building Supply Corp., they were persons required to collect sales and use taxes pursuant to section 1131(1) of the Tax Law and were personally liable for such additional taxes assessed against said corporation pursuant to section 1133(a) of the Tax Law.

4. A timely application for revision of the aforesaid determination and request for hearing was filed on behalf of applicant, Long Island Building Supply Corp., and its aforesaid officers.

5. On or about May 17, 1978, applicant, Long Island Building Supply Corp., was noticed for formal hearing. None of the officers against whom the August 25, 1976 notice of determination had been issued appeared at the formal hearing, no issue was presented with respect to said officers, and no evidence was elicited for or against them. Accordingly, there is no issue to be determined with respect to said officers in this proceeding.

6. For the periods in question, applicant, Long Island Building Supply Corp., a New York corporation, was a distributor of roofing, siding and insulation materials and maintained its principal place of business at 2717 Oceanside Road, Oceanside, New York.

7. The State's auditor visited applicant's place of business and, for the test period of August, 1974, examined the fixed assets account in the general ledger and corresponding purchase invoices, the sales tax payable account in the general ledger, New York State sales tax returns, and the sales and general journals, all for the periods ended August 31, 1972 to February 28, 1975.

8. In the course of his field audit, the auditor determined that a discrepancy existed between the gross sales in the sales journal and the amount of sales reported by applicant on its New York State sales tax returns. This discrepancy was adjusted by applicant by an entry debiting applicant's sales tax payable account and crediting applicant's miscellaneous income account with a corresponding explanation in applicant's general journal writing off or offsetting sales taxes as a result of handling and service charges, called a "restocking charge". The auditor then examined about 325 invoices for the one-month test period, of which approximately 16 were credit invoices or receipts. In most instances, the credit invoices failed to reflect that the sales tax collected was specifically adjusted or refunded on account of materials returned to applicant. The auditor was told by applicant's accountant and/or bookkeeper that the sales tax was offset by a restocking charge debited against applicant's customers in the amount of 7 percent of the sales price, a percentage which, in some instances (dependent on geographical locales within the State), equalled the State and local sales tax. The auditor further determined that, in some instances, applicant did not apply the restocking charge against certain customers.

9. Subsequent to the completion of the aforesaid field audit, the auditor attempted to update said audit to include the quarters ended May 31, 1975,

August 31, 1975 and November 30, 1975, but applicant's accountant and bookkeeper both refused him access to applicant's books and records for that purpose. Accordingly, the auditor updated the audit to include the aforesaid three quarters based on the books and records reviewed during the prior field audit.

10. Applicant, Long Island Building Supply Corp., did not contest the test period per se, but contended that:

(i) the auditor erroneously included the restocking charge made to said applicant's customers for returned merchandise originally sold (which sales were then cancelled or voided) and, consequently, sales tax collected was not being retained;

(ii) the auditor was inexperienced and unqualified;

(iii) the auditor made erroneous computations based on incorrect figures taken from said applicant's books and records;

(iv) the auditor erroneously overestimated said applicant's returns for the quarters ended May 31, 1975, August 31, 1975 and November 30, 1975; and

(v) penalties should not be assessed against said applicant because it did not attempt to omit sales or avoid paying the proper sales tax due and owing to the State.

11. Both parties stipulated that the \$4,458.86 assessed for disallowed bad debts was due and owing. It was also stipulated that of the \$675.10 assessed for disallowed exempt sales \$400.00 was due and owing.

CONCLUSIONS OF LAW

A. That applicant, Long Island Building Supply 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 applicant, Long Island Building Supply Corp., was required to collect sales tax on the purchase price at the time of the sale pursuant to section 1132(a) of the Tax Law.

C. That applicant, Long Island Building Supply Corp., was required to remit the sales tax collected when the New York State sales tax return was timely filed pursuant to section 1137(a) of the Tax Law.

D. That, pursuant to section 1138(a) of the Tax Law, additional sales and use tax was determined to be due from the best available information for the periods ended August 31, 1972 to November 30, 1975, both inclusive, and such determination was properly supported by field audit procedures and based on substantial findings of fact in the course of such field audit.

E. That applicant, Long Island Building Supply Corp., either failed to maintain adequate and accurate records for the periods ended May 31, 1975, August 31, 1975 and November 30, 1975 or failed and refused to make such records available to the State's auditor and consequently, exactness will not be required in determining said applicant's sales and use tax liability for said periods.

F. That applicant, Long Island Building Supply Corp., failed to sustain its burden of disproving the audit findings that additional sales and use taxes are due and owing, both as to the issue of:

(i) the amount claimed by said applicant to be a restocking charge rather than retained sales tax on returned merchandise and

(ii) the accuracy and procedures employed in the field audit.

G. That applicant, Long Island Building Supply Corp., apparently relied on the advice and counsel of its tax representatives and their bona fide

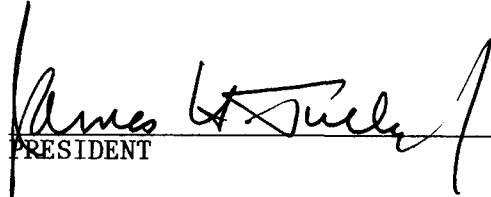
opinion that applicant was reporting and paying sales and use taxes in accordance with the applicable provisions of the Tax Law; and therefore, said applicant's delay in making demand tax payments is excusable.

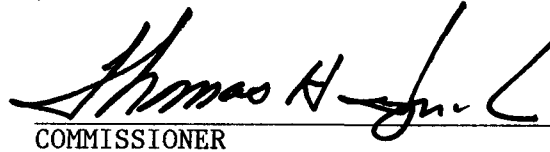
H. That the application of Long Island Building Supply Corp. is granted to the extent indicated in Finding of Fact "11" above and that penalty and interest in excess of the minimum allowed by section 1145(a) of the Tax Law is waived; that the Audit Division is to accordingly modify the notice of determination issued against applicant on August 25, 1976 and; that, except as so granted, the application is in all other respects denied.

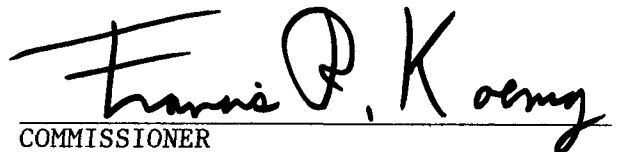
DATED: Albany, New York

STATE TAX COMMISSION

MAY 16 1980


PRESIDENT


COMMISSIONER


COMMISSIONER