

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Modern Supplier's, 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 6/1/72 -5/31/75. :

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 14th day of November, 1980, he served the within notice of Determination by mail upon Modern Supplier's, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Modern Supplier's, Inc.
1090 Leggett Ave.
Bronx, NY 10459

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
14th day of November, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Modern Supplier's, Inc. :

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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 6/1/72 -5/31/75. :

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 14th day of November, 1980, he served the within notice of Determination by mail upon Isidor Tiktinsky the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

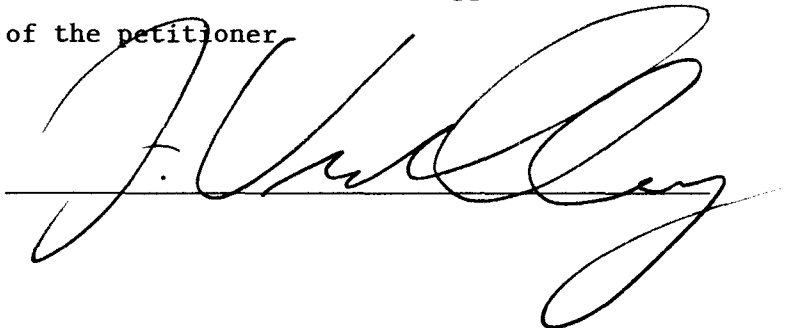
Mr. Isidor Tiktinsky
521 Fifth Ave.
New York, NY 10017

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
14th day of November, 1980.

Reston A Bank



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

November 14, 1980

Modern Supplier's, Inc.
1090 Leggett Ave.
Bronx, NY 10459

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
Isidor Tiktinsky
521 Fifth Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application :
of :
MODERN SUPPLIERS, 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, 1972 through May 31, :
1975. :

Applicant, Modern Suppliers, Inc., 1090 Leggett Avenue, Bronx, New York 10459, 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 May 31, 1975 (File No. 16954).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 16, 1979 at 1:15 P.M. and continued on November 26, 1979 at 1:15 P.M. Applicant appeared by Isidor Tiktinsky, CPA. The Audit Division appeared by Ralph Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether applicant was required to collect sales tax on sales of tangible personal property to contractors who issued exemption certificates covering the items purchased.

FINDINGS OF FACT

1. On September 17, 1976, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, Modern Suppliers, Inc., for the period June 1, 1972 through May 31, 1975 for tax due of \$22,381.38, plus penalty and interest of \$10,425.62, for a total of \$32,807.00.

2. Applicant executed a consent extending the time within which to issue an assessment of sales and use taxes for the period in issue, to September 19, 1976.

3. Applicant is engaged in the retail sale of construction materials and supplies.

4. On audit, the Audit Division reviewed sales invoices for December, 1974 and disallowed 16.40 percent of applicant's reported nontaxable sales. Said sales were disallowed on the basis that certain exemption certificates on file were not properly executed and that Contractor Exempt Purchase Certificates were not applicable to sales of tangible personal property that did not become an integral component part of real property being erected. The Audit Division applied the 16.40 percent disallowance to reported nontaxable sales for the audit period to determine taxable sales of \$304,641.80 and tax due thereon of \$22,381.38.

5. The Audit Division stipulated that based on further documentation provided by applicant at a pre-hearing conference, the additional sales taxes due be adjusted to \$6,946.60. The remaining sales at issue represent: (I) Sales made to contractors who issued a Contractor Exempt Purchase Certificate to applicant for purchases of items which the Audit Division deemed did not become a component part of real property. (II) Sales made to Rao Electrical Equipment Co., Inc. which Rao claimed were exempt based on the type of work it performed for Long Island Lighting Co.. Rao did not issue an exemption certificate to the applicant in the form prescribed by the tax commission.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that it shall be presumed that all receipts for property or services...are subject to tax until the contrary is established, and the burden of proving that any receipt...

is not taxable shall be upon the person required to collect tax. Unless a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under section 1115. Where such a certificate has been furnished to the vendor, the burden of proving that the receipt...is not taxable shall be solely upon the customer.

B. That a Contractor Exempt Purchase Certificate is an exemption certificate within the meaning and intent of section 1132(c) of the Tax Law. That applicant accepted such certificates in good faith and was not under a duty to investigate or police its customers. American Cyanamid and Chemical Corp. v. Joseph, 308 N.Y. 259.

The liability for misuse of an exemption certificate rests with the purchaser; therefore, applicant was not required to collect sales tax on those transactions in which the contractor issued a properly completed exemption certificate.

C. That applicant failed to sustain its burden of proof required by section 1132(c) of the Tax Law with respect to its sales to Rao Electrical Equipment Co., Inc.; therefore, applicant is liable for the sales tax imposed on said sales pursuant to section 1133(a) of the Tax Law.

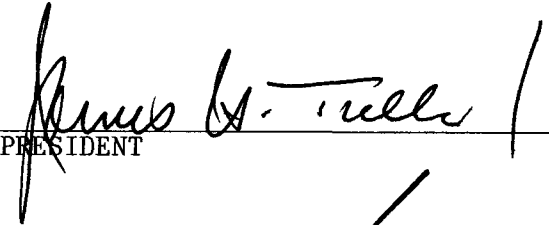
D. That the application of Modern Suppliers, Inc. is granted to the extent of reducing the disallowed nontaxable sales to \$24,705.70 so as to conform with Conclusions of Law "B and "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales

and Use Taxes Due issued September 17, 1976; and that, except as so granted, the application is in all other respects denied.

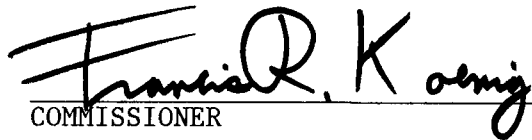
DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1980


PRESIDENT


COMMISSIONER


COMMISSIONER