

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Carl A. Morse, 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 9/1/72 - 5/31/76. :

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 18th day of June, 1980, he served the within notice of Determination by mail upon Carl A. Morse, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

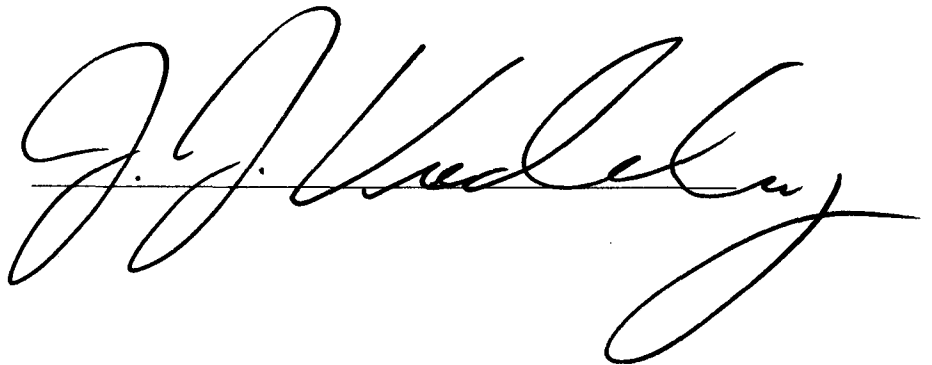
Carl A. Morse, Inc.
1133 Ave. of the Americas
New York, NY 10036

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
18th day of June, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Carl A. Morse, Inc. :

for Redetermination of a Deficiency or a Revision :
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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 18th day of June, 1980, he served the within notice of Determination by mail upon Leonard R. Berson 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. Leonard R. Berson
Savrin & Berson
60 E. 42nd St.
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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 18, 1980

Carl A. Morse, Inc.
1133 Ave. of the Americas
New York, NY 10036

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
Leonard R. Berson
Savrin & Berson
60 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
CARL A. MORSE, INC.	:	DETERMINATION
for Review of a Determination or for	:	
Refund of Sales and Use Tax under	:	
Articles 28 and 29 of the Tax Law for	:	
the Period September 1, 1972 through	:	
May 31, 1976.	:	

Applicant, Carl A. Morse, Inc., 1133 Avenue of the Americas, New York, New York 10036, filed an application for revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period September 1, 1972 through May 31, 1976 (File No. 17746).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1979 at 9:30 A.M. Applicant appeared by Savrin and Berson, Esqs. (Leonard R. Berson and Louis Savrin, Esqs., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether construction work done by sub-contractors and billed to the applicant general contractor as winter protection, temporary heat, temporary lighting and temporary plumbing, is work which, as an integral part of the construction process, is exempt from sales tax as a capital improvement.

FINDINGS OF FACT

1. On December 2, 1976, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Tax Due against applicant, Carl A. Morse, Inc. (hereinafter "Morse"), for the period September 1, 1972 through May 31, 1976 in the amount of \$186,480.55,

plus penalty and interest of \$87,148.99, for a total due of \$273,629.54.

2. On October 20, 1976 the applicant executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law to and including June 20, 1977.

3. On December 12, 1977 applicant paid sales tax of \$11,516.58, plus minimum interest of \$3,337.66, on items on which applicant agreed sales tax had been due and unpaid. Applicant also paid \$40,864.73 under protest, to cover sales tax of \$31,642.63, plus minimum interest of \$9,222.10.

4. Applicant timely filed an application for refund of the \$40,864.73 paid plus interest from the date of payment.

5. Applicant is engaged in the business of construction management, primarily as the overall contractor in high-rise building construction in New York and elsewhere. The tax assessed is based on an audit covering a four-year period and particularly related to eight new construction projects and one extensive building renovation project. All the transactions at issue occurred during the construction process.

6. Job cost ledgers, paid bills for job costs, contracts with sub-contractors, sales tax returns and general ledgers were examined by the Audit Division auditor and found to be accurate. Tests were made of Morse's job costs for the months of June, 1973, September, 1974 and March, 1975. The auditor deemed taxable job costs of \$188,214.00 out of total costs of \$6,161,108.00 tested or 3.05487 percent. The auditor applied this percent to total job costs of \$83,333,787.00 for the whole audit period, resulting in projected taxable job costs of \$2,545,739.00. These taxable costs included tangible personal property which remained personal property after incorporation into the building, billings from suppliers for materials, and temporary heat, light and plumbing. Applicant and the Audit Division remained in disagreement only as to \$31,642.63 sales

tax due on temporary plumbing, temporary electric, temporary heat and labor utilized in winter protection.

7. According to the uncontradicted testimony at the hearing, the services furnished by the sub-contractors were defined as follows:

Winter protection meant the labor costs incurred by the concrete sub-contractor Dic-Underhill who had a contract with Morse to do all work and supply all materials for the superstructure concrete and the labor required for winter protection. This was the labor cost billed to Morse for the enclosure and protection of concrete from freezing while it was poured and during setting when the temperature was below fifty degrees.

Temporary heat was supplied by Raisler Corp. as part of the hearing, ventilating and air-conditioning (HVAC) work at the Celanese Building at 1201 Sixth Avenue. The invoices show billing for labor costs of watchmen whose duty it was to watch temperature gauges and equipment. They made no repairs. Steam for heating was purchased by Morse directly from Con Edison company and on which sales tax was paid. It was not included in the temporary heat billing.

Temporary electric or temporary light and power, according to applicant, meant the furnishing of light and electrical facilities throughout the building by the electrical sub-contractor so that the various trades might have light, communication and power facilities necessary for them to perform their work and operate their tools.

Temporary plumbing meant the supplying of water throughout the building by the plumbing sub-contractor for the use of all trades, the furnishing of water to each floor for the mixing of plaster and for sanitary facilities for all workmen.

8. Material and equipment installed and used for temporary heat, temporary electricity and temporary plumbing were all removed when the permanent installations

were complete. Winter protection, including salamanders for burning coke and tarpaulins to enclose the building were removed when the temperature was high enough to obviate the necessity for winter protection. On coke and other supplies purchased, applicant paid sales tax in the agreed portion of the tax deficiency.

9. None of the construction work at issue was performed for any exempt organization.

10. The labor costs billed to Morse by the several sub-contractors for winter protection, temporary heat, temporary electric and temporary plumbing were for payroll covering workmen who served exclusively as watchmen over the work of their respective trades. None of these watchmen made any installation of personal property which became part of the constructed building.

CONCLUSIONS OF LAW

A. That the sale of tangible personal property to a contractor, sub-contractor or repairman for use or consumption in erecting structures or buildings is deemed to be a retail sale within the intent and meaning of section 1101(b)(4)(i) of the Tax Law. Applicant agreed to and paid the sales tax assessed on audit on materials and supplies purchased during the audit period.

B. That sales tax is imposed on maintaining, servicing or repairing real property, as distinguished from adding to or improving real property by a capital improvement. That the labor costs billed to Carl A. Morse, Inc. and recorded as Winter Protection, Temporary Heat, Temporary Electric and Temporary Plumbing were not maintenance services but necessary prerequisites to the construction of real property. As such they were capital improvements within the meaning and intent of section 1105(c)(5) of the Tax Law and 20 NYCRR 527.7(a)(3)(i)(ii)(iii). Section 527.7(b)(4) of the Regulations sets out the

criteria for taxability of services performed on real property:

"(4) The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property such services are taxable. If the end result of the same service is a capital improvement to the real property such services are not taxable."

Of like import is Treasury Regulation 1.263(a)-2(a) which defines capital expenditures to include cost of acquisition, construction or erection of buildings. Sales Tax Letter No. 40, relied upon by the auditor in making his assessment, mentions temporary heat as taxable but the context indicates that it was being compared with rentals, office supplies, telephone and electric services. Fuel is apparently intended.

The opinion in Walling v. C.I.R., 373 F.2d 190, 193 summarized the rule which is usually followed in Federal law and would seem to be controlling in the instant case:

"The test which normally is to be applied is that if the improvements were made to 'put' the particular capital asset in efficient operating condition, then they are capital in nature. If, however, they were made merely to 'keep' the asset in efficient operating condition, then they are repairs..."

C. That labor costs for watchmen on construction projects billed by sub-contractors to applicant general construction contractor are capital improvements and not subject to sales tax under section 1101(b)(4) of the Tax Law.

D. That the application of Carl A. Morse, Inc. for a refund of \$40,864.73 sales tax plus such interest as may be legally due is granted.


DATED: Albany, New York

JUN 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER