

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

H. J. O'Connell Associates, Ltd.

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 9/1/73-8/31/76. :

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 11th day of January, 1980, he served the within notice of Determination by mail upon H. J. O'Connell Associates, Ltd., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

H. J. O'Connell Associates, Ltd.  
Executive Park East  
Albany, NY 12203

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  
11th day of January, 1980.

Joanne Knapp

[Signature]

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
H. J. O'Connell Associates, Ltd. :  
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 9/1/73-8/31/76. :

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 11th day of January, 1980, he served the within notice of Determination by mail upon Mary A. Tommaney the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ms. Mary A. Tommaney  
DiFabio and Couch  
4 Automation Lane - Computer Park  
Albany, NY 12205

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  
11th day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 11, 1980

H. J. O'Connell Associates, Ltd.  
Executive Park East  
Albany, NY 12203

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  
Mary A. Tommaney  
DiFabio and Couch  
4 Automation Lane - Computer Park  
Albany, NY 12205  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
H.J. O'CONNELL ASSOCIATES, LTD. : 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 September 1, 1973 :  
through August 31, 1976. :

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Applicant, H.J. O'Connell Associates, Ltd., Executive Park East, Albany, New York 12203, 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 September 1, 1973 through August 31, 1976 (File No. 17803).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on February 9, 1979, at 10:45 A.M. Applicant appeared by Mary Anne Tommaney, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Paul Lefebvre, Esq. of counsel).

ISSUES

I. Whether certain construction equipment purchased and used in Saratoga County was subsequently brought into Albany County and thereby subject to the imposition of local sales or use tax.

II. Whether applicant is liable for sales or use tax on certain purchases where the vendor failed to collect said taxes.

III. Whether the penalties imposed pursuant to section 1145(a) of the Tax Law and interest in excess of the minimum statutory rate be waived.

FINDINGS OF FACT

1. As the result of an audit December 16, 1976 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant. The notice was issued for the period August 1, 1973 through August 31, 1976 in the amount of \$6,453.50 plus penalty and interest of \$2,524.36 for a total of \$8,977.86.

2. During the period at issue, applicant did business and/or maintained an office in Saratoga County and Albany County. Applicant was engaged almost exclusively in the construction of the Clifton Country Mall located in Clifton Park, Saratoga County, New York. Pursuant to a verbal agreement with My-Mar Associates, applicant acted as a project coordinator whose responsibilities included purchasing materials, sub-contracting work and negotiating rental space.

Applicant also provided construction labor when work could not be sub-contracted for the amount budgeted.

3. On audit, the Sales Tax Bureau reviewed construction contracts for the entire audit period and the purchase invoices for materials relating thereto. The Sales Tax Bureau determined that applicant failed to pay a sales or use tax or paid the incorrect amount of tax on purchases totaling \$134,638.84, resulting in additional tax due of \$5,443.11. The Sales Tax Bureau also found that the applicant purchased equipment for use in the construction of the Clifton Country Mall and paid New York State sales tax at the time of purchase. The Sales Tax Bureau held that all the equipment purchased was brought into Albany County after completion of the Clifton Country Mall contract. The Bureau held applicant liable for Albany County local tax of \$660.39, based on the equipment's fair market value of \$22,013.03 as of May 31, 1976. Additionally,

the president of the corporation transferred his motor vehicle to the corporation for \$5,000.00. That transaction was held taxable at 7 percent, for a tax due of \$350.00.

4. Three of the seven pieces of equipment on which the Sales Tax Bureau assessed on additional tax, were not brought into Albany County; therefore, no additional use tax was due. This equipment included:

- a) A wheel loader, (Serial No. 174624) purchased October 18, 1974, which was traded in for a different model June 9, 1975, as evidenced by a copy of the bill of sale from the vendor.
- b) A 27 foot construction office trailer was purchased under a "lease-purchase agreement" whereby applicant made monthly lease payments that, if purchased, would be applied towards the purchase price. Applicant, however, did not exercise this option and the trailer was returned to the vendor in Saratoga County.
- c) An office trailer, (No. AMAS-264) was purchased under a similar lease-purchase agreement. Said trailer was repossessed by the vendor within Saratoga County. Applicant paid sales tax on the monthly lease payments for both trailers.
- d) Applicant conceded the remaining four pieces of equipment were brought into Albany County and is liable for the use tax.

5. Applicant made the following contentions with respect to the material purchases:

- a) Purchase orders were issued to vendors indicating that sales tax be added to or included in the purchase price. Applicant contended the vendor was responsible for the tax if such tax was not collected.

- b) Material purchases from three vendors, totaling \$15,290.78, were part of a stipulation of settlement between applicant and My-Mar Associates which provided, in part, that My-Mar Associates assumed payment of applicant's obligations to various vendors and subcontractors. Therefore, applicant argued that My-Mar Associates was liable for the sales tax.
- c) The purchase of ceiling grids from N.L. Corporation for \$90,507.00 was made by Manufacturers Hanover Trust Co.

6. The suppliers of the material purchases at issue did not charge applicant sales tax. Applicant paid only the invoice amount.

7. Manufacturers Hanover Trust Co. agreed to finance the payment of invoices from N.L. Corporation. However, applicant issued the purchase order for the materials and also payment for said materials was made by checks drawn on applicant's account.

8. Applicant acted in good faith at all times and there was no intent to evade the tax.

#### CONCLUSIONS OF LAW

A. That the equipment set forth in Finding of Fact '4' which was used solely in the performance of a capital improvement construction contract located in a taxing jurisdiction with a 4 percent tax rate, was not brought into Albany County. Therefore, the Albany County local tax of \$266.67 on said equipment is cancelled.

B. That applicant was a "purchaser" within the meaning and intent of section 1101(b)(2) of the Tax Law and as such, is liable for sales or use tax on the purchase of materials in accordance with the provisions of section 1110 and 1133(b) of the Tax Law.

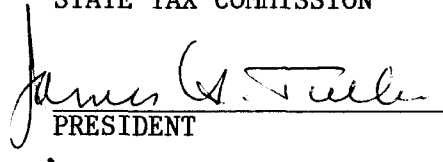
C. That the penalties imposed pursuant to section 1145(a) of the Tax Law and the interest in excess of the minimum statutory rate are cancelled.

D. That the application of H.J. O'Connell Associates, Ltd. is granted to the extent indicated in Conclusions of Law 'A' and 'C'. The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 16, 1976. Except as so granted, the application is in all other respects denied.

DATED: Albany, New York

**JAN 11 1980**

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER