

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Tupper Lake Drive-In Custard Stand :
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 12/1/72 - 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 18th day of July, 1980, he served the within notice of Determination by mail upon Tupper Lake Drive-In Custard Stand, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tupper Lake Drive-In Custard Stand
Tupper Saranac Highway
Tupper Lake, NY 12986

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 July, 1980.

Evelyn A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Tupper Lake Drive-In Custard Stand :
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 12/1/72 - 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 18th day of July, 1980, he served the within notice of Determination by mail upon Sheldon G. Kall the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

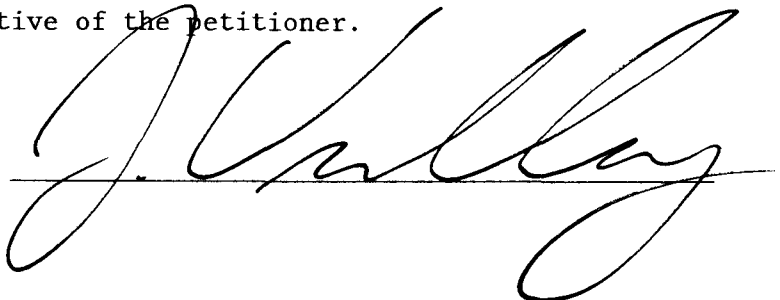
Mr. Sheldon G. Kall
3522 James St.
Syracuse, NY 13206

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 July, 1980.

Robert A. Bank



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

July 18, 1980

Tupper Lake Drive-In Custard Stand
Tupper Saranac Highway
Tupper Lake, NY 12986

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
Sheldon G. Kall
3522 James St.
Syracuse, NY 13206
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
TUPPER LAKE DRIVE-IN CUSTARD STAND	:	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 December 1, 1972 through August 31,	:	
1975.	:	

Applicant, Tupper Lake Drive-In Custard Stand, Tupper Saranac Highway, Tupper Lake, New York 12986, 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 December 1, 1972 through August 31, 1975 (File No. 12865).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on September 20, 1979 at 9:15 A.M. Applicant appeared by Sheldon Kall, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kathy Sanderson, Esq., of counsel).

ISSUE

Whether the rental and subsequent purchase by applicant of a screening plant is exempt from tax under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. On February 3, 1976, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Tupper Lake Drive-In Custard Stand for \$3,468.92 tax, plus penalties and interest.
2. Applicant protested the above Notice on February 23, 1976.

3. Applicant, Tupper Lake Drive-In Custard Stand, operated as an excavating contractor under the name of George Shaheen Excavating. Applicant discontinued the soft ice cream business in 1971, but continued to file sales tax returns for the excavating business under the identification number assigned to the custard stand.

4. On audit, the Sales Tax Bureau determined that applicant purchased and rented many pieces of construction equipment and failed to pay tax. The only equipment at issue is the rental and subsequent purchase of a screening plant. The tax due on the rental of the screening plant for the months of September and October, 1973 was \$315.00. Tax due on the purchase of the screening plant in June, 1974 was \$1,404.20.

5. Applicant contended that it was producing gravel; therefore, the equipment was exempt under section 1115(a) (12) of the Tax Law as processing equipment.

6. Applicant, under the name of George Shaheen Excavating, entered into a contract with American Central Corporation, a land developer, for construction of a road at Gull Pond located in the Town of Altamont, New York. To facilitate the performance of the contract, applicant rented and later purchased equipment known as a screening plant for the purpose of screening gravel for use in constructing the road. The screening plant, which was located at a gravel bank, filtered bank run gravel consisting of various sizes of stone, leaving only the gravel appropriate for use in building a road. The properly sized gravel was loaded onto trucks and delivered to the construction site. The screened gravel was used solely for the construction of the road and was never offered for sale to others as tangible personal property. This equipment was purchased for use in conjunction with this one project only and was later sold.

1. The following is a summary of the information received from the various sources mentioned in the report.

2. The information received from the various sources mentioned in the report is as follows:

3. The information received from the various sources mentioned in the report is as follows:

4. The information received from the various sources mentioned in the report is as follows:

5. The information received from the various sources mentioned in the report is as follows:

6. The information received from the various sources mentioned in the report is as follows:

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20. The information received from the various sources mentioned in the report is as follows:

21. The information received from the various sources mentioned in the report is as follows:

22. The information received from the various sources mentioned in the report is as follows:

23. The information received from the various sources mentioned in the report is as follows:

24. The information received from the various sources mentioned in the report is as follows:

25. The information received from the various sources mentioned in the report is as follows:

CONCLUSIONS OF LAW

A. That section 1115(a) (12) of the Tax Law, prior to its September 1, 1974 amendment changing "exclusively" to "predominantly", exempted from tax machinery and equipment for use or consumption directly and exclusively in the production of tangible personal property for sale by processing. That the applicant did not produce tangible personal property for sale, but rather used such property in the performance of a capital improvement to real property; therefore, applicant is not afforded the exemption as provided in section 1115(a) (12).

B. That the rental and purchase of the screening plant by applicant was a purchase at retail as defined by section 1101(b) (1) of the Tax Law and that such transactions were subject to the imposition of a compensating use tax pursuant to section 1110(A).

C. That the application of Tupper Lake Drive-In Custard Stand is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 3, 1976 is sustained.

DATED: Albany, New York

JUL 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

