

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Charles F. Zweifel & Co., Inc. :
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 3/1/70-12/31/75. :

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 7th day of July, 1980, he served the within notice of Determination by mail upon Charles F. Zweifel & Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles F. Zweifel & Co., Inc.
148 E. 40th St.
New York, NY 10016

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
7th day of July, 1980.

Dorothy A. Bank

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Charles F. Zweifel & Co., 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 3/1/70-12/31/75. :

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 7th day of July, 1980, he served the within notice of Determination by mail upon Joseph J. Perrini 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. Joseph J. Perrini
Deputy General, NYC Municipal Service Adm.
Municipal Bldg.
New York, NY 10007

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
7th day of July, 1980.

Walter A. Bank

J. J. Vredenburg

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

July 7, 1980

Charles F. Zweifel & Co., Inc.
148 E. 40th St.
New York, NY 10016

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
Joseph J. Perrini
Deputy General, NYC Municipal Service Adm.
Municipal Bldg.
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
CHARLES F. ZWEIFEL & CO., 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 Periods March 1, 1970 through	:	
December 31, 1975.	:	

Applicant, Charles F. Zweifel & Co., Inc., 148 East 40th Street, New York, New York 10016, 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 periods March 1, 1970 through December 31, 1975 (File No. 16899).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 14, 1978 and continued to completion on June 20, 1978 at 9:15 A.M. Applicant appeared by Alexander S. Moser, Esq. The City of New York, Dept. of General Services, appeared by Joseph Perrini, Esq., Deputy General Counsel. The Audit Division appeared by Peter Crotty, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUES

I. Whether the contract between applicant and the City of New York constituted a pre-existing lump-sum construction contract within the meaning and intent of section 1119(a)(3) of the Tax Law.

II. Whether the application for refund with respect to the tax periods March 1, 1970 through February 28, 1973, was filed within the statutory time period established by section 1139 of the Tax Law.

III. Whether applicant is entitled to a refund for the periods March 1, 1973 through December 31, 1975 for sales tax in excess of the tax rate in effect on the date of the original contract.

FINDINGS OF FACT

1. Applicant, Charles F. Zweifel & Co., Inc., was during the periods in issue and still is a domestic corporation organized under the laws of the State of New York, which maintained its principal place of business at 148 East 40th Street, New York, New York.

2. On May 17, 1966, applicant, Charles F. Zweifel & Co., Inc., as contractor, entered into an agreement with the City of New York, Dept. of Public Works, for electrical and related work on the construction of a new hospital building at Bellevue Hospital Center.

3. The aforementioned contract provided that the contractor was to receive a percentage above the cost for materials, labor, and other costs incurred in the performance of the contract, including sales taxes on materials incorporated in the work to be performed.

4. Applicant paid sales tax on materials in connection with the aforementioned original contract at the 5 percent rate.

5. On May 14, 1970, applicant and the City of New York, Department of Public Works, entered into a "supplemental" agreement modifying the original contract dated May 17, 1966. The time for the completion of the contract was extended to June 8, 1972, due to the inability of the contractor to obtain labor, services, or materials from its customary sources. The time for completion of the job was further extended to October 15, 1975. The percentage payable to the contractor above actual costs for labor and materials was increased and a guaranteed maximum cost established.

6. Applicant was required to and did pay increased sales tax at the 6

percent, 7 percent, and 8 percent rate during the periods from March 1, 1970 to October 15, 1975.

7. On May 28, 1976, applicant filed a claim for refund with the Audit Division in the amount of \$54,738.00 for the periods involved, based on the difference between the sales tax rate at the time of the original contract and the increased sales tax rate thereafter. The Audit Division denied the application for refund.

8. Applicant agreed to refund to the City of New York, any refunds received by it.

CONCLUSIONS OF LAW

A. That section 1119(a) of the Tax Law defines the term "pre-existing lump-sum or unit price construction contract" for the purpose of clause (3) thereof, as a contract for the construction of improvements to real property, under which the amount payable to the contractor or subcontractor is fixed, without regard to the cost incurred by him in the performance thereof.

B. That applicant's contract described in Findings of Fact "2" and "5" is not a "pre-existing lump-sum or unit price construction" contract, within the meaning and intent of section 1119(a)(3) of the Tax Law, in that applicant was reimbursed by the owner for the actual cost incurred, which would include the amount of sales tax paid; therefore, the amount payable was not fixed with regard to the cost which it incurred, irrespective of the guaranteed maximum cost.

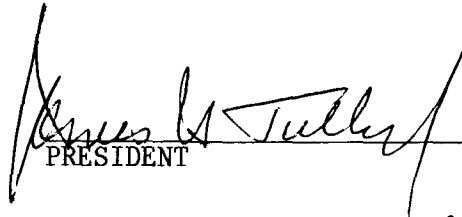
C. That since applicant's contract does not qualify as a pre-existing lump-sum contract, the question regarding the timeliness of the refund application is moot.

D. That the application of Charles F. Zweifel & Co., Inc. is denied and the denial of refund is sustained.

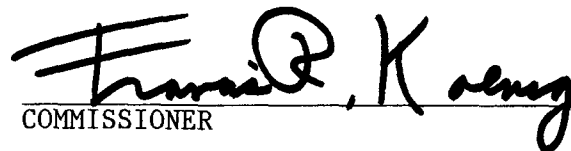
DATED: Albany, New York

JUN 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER