

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
A-1 Fence Co., Inc. :
& James Ruppert, William Buckley & Hedy Ruppert, :
Indiv. & as Officers :

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 :
3/1/74 - 2/28/77. :

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 3rd day of July, 1981, he served the within notice of Decision by mail upon A-1 Fence Co., Inc., & James Ruppert, William Buckley & Hedy Ruppert, Indiv. & as Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A-1 Fence Co., Inc.
& James Ruppert, William Buckley
& Hedy Ruppert, Indiv. & as Officers
Hillside Lake Rd.
Wappingers Falls, NY 12590

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
3rd day of July, 1981.

Cornie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
A-1 Fence Co., Inc. :
& James Ruppert, William Buckley & Hedy Ruppert, :
Indiv. & as Officers :
: 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 3/1/74 - 2/28/77. :

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 3rd day of July, 1981, he served the within notice of Decision by mail upon Paul A. Baldovin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul A. Baldovin
2 Lagrange Ave., Suite 226
Suite 226
Poughkeepsie, NY 12602

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
3rd day of July, 1981.

Constance A. Hagelund

J. Vredenburg

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

July 3, 1981

A-1 Fence Co., Inc.
& James Ruppert, William Buckley &
Hedy Ruppert, Indiv. & as Officers
Hillside Lake Rd.
Wappingers Falls, NY 12590

Gentlemen:

Please take notice of the Decision 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
Paul A. Baldovin
2 Lagrange Ave., Suite 226
Suite 226
Poughkeepsie, NY 12602
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
A-1 FENCE COMPANY, INC.	:	DECISION
AND JAMES RUPPERT, WILLIAM BUCKLEY &	:	
HEDY RUPPERT, INDIVIDUALLY & AS OFFICERS	:	
	:	
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 March 1, 1974 through February 28,	:	
1977.	:	

Petitioner, A-1 Fence Company, Inc., and James Ruppert, William Buckley & Hedy Ruppert, individually and as officers, Hillside Lake Road, Wappingers Falls, New York 12590, filed a petition 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 March 1, 1974 through February 28, 1977 (File No. 20065).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on March 26, 1980 at 1:00 P.M. Petitioner appeared by Paul A. Baldovin, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether use tax is due from petitioner on materials used in capital improvements to real property.

II. Whether use tax is due from petitioner on materials used in capital improvements to real property sold to direct payment permit holders.

III. Whether James Ruppert, William Buckley and Hedy Ruppert, who were assessed as officers of petitioner, A-1 Fence Company, Inc., are persons responsible for the tax.

FINDINGS OF FACT

1. On June 10, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against A-1 Fence Company, Inc. and James Ruppert, William Buckley and Hedy Ruppert, individually and as officers for the period March 1, 1974 through February 28, 1977 in the amount of \$12,478.44 tax plus penalties and interest. The Notice was issued as a result of a field audit.

2. On August 26, 1977, petitioner filed a timely protest to the Notice issued stating, in part, that the individuals assessed along with petitioner were not responsible parties.

3. Petitioner was a fencing contractor dealing primarily in fencing installations which resulted in capital improvements to real property. It was the Audit Division's position that fencing materials purchased by petitioner for use in making capital improvements to real property were taxable to it as a retail purchase.

4. On audit, the Audit Division examined sales made for the entire audit period. The sales tax required to be collected on repairs and maintenance was computed on all such sales except those sales made to exempt organizations. Use tax was computed on materials used in capital improvements to real property other than for exempt organizations. Petitioner did not pay any sales tax to its out-of-state supplier. The Audit Division deducted the sales and use taxes reported by petitioner on its returns filed and determined additional use tax due of \$12,111.17 and additional sales tax due of \$367.27.

5. Petitioner introduced two Direct Payment Permits it received from International Business Machines to whom chain link fences had been sold and installed. Petitioner contended that it should not be held responsible for the tax due on materials used in capital improvements sold to the direct payment permit holders since they are to pay the tax directly to the Sales Tax Bureau.

6. Petitioner's sales of installed fences for which it was assessed use tax were made on a time and material basis. Therefore, it argued that all its purchases of material were for resale by it and not a taxable purchase.

7. In its perfected petition, petitioner contended that the sales tax had been assessed against its out-of-state supplier on petitioner's purchases of material. No evidence was submitted to show that the taxes due on these materials were assessed against its supplier.

8. Petitioner argued that the Sales Tax Bureau, during a previous audit, changed petitioners procedures for recording sales taxes and discussed the procedures with office personnel; however, the Bureau did not advise the preparer of the sales and use tax returns of such changes. It, therefore, argued that the penalty is not in order. The sales tax returns were prepared by petitioner's accountant from sales invoices.

9. Petitioner offered no substantial evidence to show that the individuals included in the notice issued were not persons required to collect any tax imposed by Articles 28 and 29 of the Tax Law.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i) of the Tax Law states that a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land...is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. That, therefore, the purchase of materials by petitioner were retail sales pursuant to section 1101(b)(4)(i) of the Tax Law and subject to the imposition of sales and/or use tax under the provisions of sections 1105(a) and/or 1110 of the Tax Law.

B. That the authority granted a direct payment permit holder under the provisions of section 1132(c) of the Tax Law extends only to the purchase of tangible personal property or services by the permit holder. That petitioner sold capital improvements to real property of which the materials were retail sales to petitioner; therefore, the acceptance of a direct payment permit does not relieve petitioner of its tax liability on its retail purchases.

C. That the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

D. That the inclusion of individuals personally responsible for the tax was proper and in accordance with the provisions of sections 1131 and 1133(a) of the Tax Law.

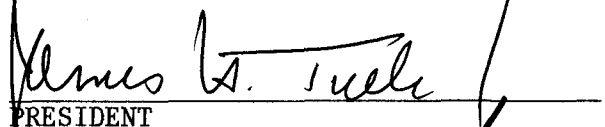
E. That the penalties and interest as assessed are sustained. Petitioner has not shown reasonable cause for not paying over the taxes found due; ignorance of the law is not considered reasonable cause.

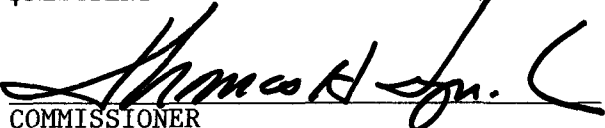
F. That the petition of A-1 Fence Company, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 10, 1977 is sustained.

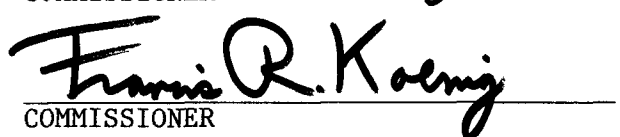
DATED: Albany, New York

JUL 03 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER