

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Bernard Ahouse

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 Years 1973, 1974 & 1975. :

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 13th day of March, 1981, he served the within notice of Decision by mail upon Bernard Ahouse, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bernard Ahouse

Lodi, NY 14860
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
13th day of March, 1981.

Annie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Years 1973, 1974 & 1975. :

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 13th day of March, 1981, he served the within notice of Decision by mail upon John M. Sipos 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. John M. Sipos
100 Fall St.
Seneca Falls, NY 13148

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
13th day of March, 1981.

Cornie A. Hagelund

J. Vredenburg

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

March 13, 1981

Bernard Ahouse
Lodi, NY 14860

Dear Mr. Ahouse:

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) 1139 & 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
John M. Sipos
100 Fall St.
Seneca Falls, NY 13148
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BERNARD AHOUSE	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Tax Under Articles 28 and 29 of	:	
the Tax Law for the Years 1973, 1974 and 1975.	:	

Petitioner, Bernard Ahouse, Lodi, New York 14860, 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 years 1973, 1974 and 1975 (File No. 14581).

A formal hearing was held at the offices of the State Tax Commission at 333 East Washington Street, Syracuse, New York on December 7, 1977 before Julius E. Braun, Hearing Officer. Petitioner appeared by John M. Sipos, Esq. The Audit Division appeared by Peter Crotty, Esq. (James J. Morris, Jr., Esq., of counsel). A continued hearing was held on February 4, 1980 before David Evans, Hearing Officer. Petitioner appeared by Joseph R. Catanise and John M. Sipos, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (J. Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to a refund of sales tax paid on tangible personal property incorporated into real property.

II. Whether petitioner was a contractor liable for sales tax on tangible personal property used in the construction of buildings.

III. Whether some of the items for which a refund is claimed were tools or tangible personal property not incorporated in real property.

IV. Whether a portion of the refund claimed was barred by the statute of limitations.

FINDINGS OF FACT

1. Petitioner filed twenty (20) claims for refund of sales tax in the amount of \$13,474.61, which were denied by the Audit Division. The petitioner timely filed a petition to review the determination denying his claims for refund.

2. Petitioner filed a claim for refund of sales tax on January 27, 1976 for \$537.67 and attached invoices dated June 7, 1972, June 12, 1972 and July 10, 1972 with respect to pre-fabricated components purchased from Modular Concepts, Inc. (hereinafter referred to as "MCI") shipped C.O.D.

3. On January 27, 1976, petitioner filed a claim for refund in the amount of \$1,277.50 in the form of a letter dated January 15, 1976 (marked claim # 4), but did not submit any invoices or other proof showing payment of sales tax.

4. The claim for refund filed January 30, 1976 for \$805.71 (marked claim # 3) included invoices from M.C.I. dated November 10, 1972 and November 15, 1972. Petitioner failed to submit proof that the claim for said refund was filed within three years from the date of payment thereof.

5. The claims for refund filed February 3, 1976 (numbered 6 through 15 inclusive) contained in addition to invoices from M.C.I. (pre-fab components) invoices from Cotton-Hanlon, Inc. for lumber, pipe, sheetrock, electrical and other building supplies, an invoice from Watkins Transit Mix, Inc. (bags of concrete mix); an invoice from Riverside Builders Supplies Co., Inc. (water proofing and floor paste); and an invoice from Skil-Bilt Fence Co., Inc. for stone steps.

6. On the claim for refund filed January 30, 1976 in the amount of \$822.04, petitioner submitted some invoices from Riverside Builders Supplies Co., Inc. for step ladders and tools. Petitioner stipulated at the hearing that he was not entitled to a refund of sales tax on these items.

7. In 1972 petitioner entered into an agreement with M.C.I., a company engaged in the business of designing, manufacturing, marketing, distributing and selling buildings and structures. These buildings and structures were variously referred to in M.C.I.'s Leisure Home Dealer Agreement as materials, products, units or "packages" under the trade name of "The Concept Leisure Home Division of Modular Concepts, Inc.". This agreement granted petitioner an associate franchise for sale and distribution of M.C.I.'s "packaged" Concept Leisure Home Products in a designated territory. Petitioner was designated a "dealer" and agreed to purchase and erect at least one model home. The agreement provided that "dealer will insure and when necessary supervise a top standard of erection utilizing only skilled erection crews on jobs where dealer is involved in construction. Further he will not alter or recut parts unless specifically instructed by the manufacturer to so do".

8. The foregoing agreement did not work out well, so petitioner entered into an oral arrangement with M.C.I. for the erection of conventional type homes from plans designed by M.C.I. M.C.I. manufactured the components which were erected on petitioner's sites or sites of prospective buyers. Subcontractors for the construction of the homes were hired by mutual agreement between M.C.I. and petitioner. Petitioner paid the subcontractors. Houses were built on eleven (11) lots owned by petitioner and nine (9) homes were built on sites owned by prospective buyers. In some instances petitioner did not pay M.C.I. until the house was sold. M.C.I. filed an assignment for the benefit of creditors in 1974. Petitioner settled claims by M.C.I. for monies due by paying M.C.I. \$25,000.00 in May, 1974.

9. Petitioner has failed to submit sufficient evidence or proof to substantiate his contention that M.C.I. was the prime contractor and that he was merely an agent for the manufacturer negotiating sales of the houses erected. Petitioner was in fact the prime contractor. Some of the subcontracting work was done by

B & K Builders of which petitioner's son Carl was a partner. Petitioner supervised the subcontractors and paid them.

CONCLUSIONS OF LAW

A. That petitioner was required to pay sales tax on ladders and tools and was not entitled to any sales tax refund therefor as more fully set forth in Finding of Fact "6", supra.

B. That petitioner was not entitled to any refund with respect to his claim as more fully set forth in Finding of Fact "3", supra, because of his failure to prove payment of sales tax therefor.

C. That petitioner's claim for refund filed January 27, 1976 in the amount of \$537.67 and more fully set forth in Finding of Fact "2", supra, was not timely filed within the three year statutory time period pursuant to the provisions of Section 1139 of the Tax Law.

D. That the sale of tangible personal property by M.C.I. and others to petitioner, a contractor, for use or consumption in erecting homes constituted a retail sale subject to sales tax within the intent and meaning of sections 1101(b)(4) and 1105(a) of the Tax Law.

E. That the Audit Division properly denied the claims of petitioner for a refund of sales tax.

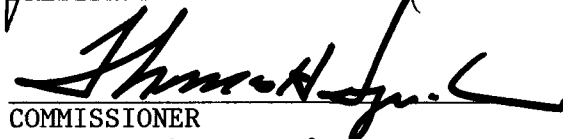
F. That the application of petitioner for refund of sales tax for the years 1973 and 1974 is hereby denied.


DATED: Albany, New York

MAR 13 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER