

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
William E. Bouley 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 Years :
1973 - 1977.

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 19th day of June, 1981, he served the within notice of Decision by mail upon William E. Bouley Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William E. Bouley Co., Inc.
265 Genesee St.
Auburn, NY 13021

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
19th day of June, 1981.

Connie P. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
William E. Bouley 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 :
Years 1973 - 1977. :

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 19th day of June, 1981, he served the within notice of Decision by mail upon Joel M. Howard, III 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. Joel M. Howard, III
Couch & Howard
State Bank Bldg., 75 State St., Suite 1011
Albany, NY 12207

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
19th day of June, 1981.

Carrie A. Haglund

J. Vredenburg

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

June 19, 1981

William E. Bouley Co., Inc.
265 Genesee St.
Auburn, NY 13021

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) 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
Joel M. Howard, III
Couch & Howard
State Bank Bldg., 75 State St., Suite 1011
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
WILLIAM E. BOULEY CO., INC. : 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, 1975, 1976 and 1977. :
:

Petitioner, William E. Bouley Co., Inc., 265 Genesee Street, Auburn, New York 13021, 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 years 1973, 1974, 1975, 1976 and 1977 (File No. 20360).

A formal hearing was held before Jerome M. Hesch, Hearing Officer, on May 19, 1980 at 1:15 P.M. at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York. Petitioner appeared by Joel M. Howard, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel).

ISSUE

Whether petitioner's purchases of supplies and materials used in the performance of a capital improvement contract for an exempt organization were exempt from sales tax.

FINDINGS OF FACT

1. Petitioner, William E. Bouley Co., Inc., filed an Application for Credit or Refund of State and Local Sales or Use Tax on March 17, 1975, requesting a credit of \$36,807.51 for sales taxes on the purchase of materials incorporated into the construction of a housing project for an exempt organization.

2. On June 17, 1976, such request was denied by the Audit Division.

3. Petitioner paid \$36,807.51 in sales taxes on October 1, 1976, and \$3,000.95 in interest on January 13, 1977.

4. Petitioner filed a second application on June 28, 1977, requesting a refund for sales taxes paid in the amount of \$36,807.51, plus \$3,000.95 in interest paid. This refund claim was also based on the ground that the materials were incorporated into a construction project for an exempt organization.

5. On August 19, 1977, the second request for a refund was denied by the Audit Division.

6. On February 4, 1972, petitioner entered into a contract with the Sleepy Hollow Community Development Fund Company ("Sleepy Hollow"), an exempt organization, for the construction of a low income housing project in Monticello, New York.

7. The contract was on a standardized form supplied by the U.S. Department of Housing and Urban Development. Pursuant to the terms of said contract, Sleepy Hollow was to pay petitioner on a cost basis plus a fixed profit of \$146,533.00 for the construction. Paragraph A of Article 10 provided that the cost of construction was to include all items of costs and expenses incurred by petitioner including labor, material and sales tax.

8. Petitioner eliminated from its cost estimate the sales tax due upon the purchase of building materials. It, however, included in the periodic requisitions for payment submitted to Sleepy Hollow the expense of sales tax that had been incurred upon its purchases.

9. As final payment for construction of the housing project, petitioner accepted a residual receipts note for \$95,000.00, principal and all interest payable at maturity in 40 years.

10. Petitioner testified that if successful in its petition to the State Tax Commission, the principal on the note will be reduced by the amount of sales tax refunded to it.

CONCLUSIONS OF LAW

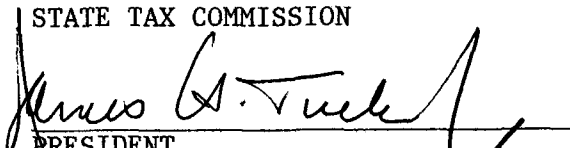

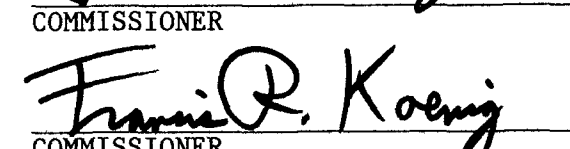
A. That where the evidence indicates that at the time of execution of the contract a) the contracting parties were aware of exempt status of the organization; b) the parties intended to exclude taxes on purchases for the performance of the contract; and c) no sales tax was charged the exempt institution, no sales tax is applicable. Sweet Associates v. Gallman, 36 A.D.2d 95 (3rd Dept. 1971), Aff'd, 29 N.Y.2d 902 (1972).

B. That the petitioner failed to sustain the burden of proof required to show that it was the intention of the tax exempt organization not to bear the cost of sales tax on materials incorporated into the capital improvement. Furthermore, sales tax was included in the cost billed by the petitioner for construction of the exempt organization's low income housing project.

C. That the petition of William E. Bouley Co., Inc. is denied and the denial of refund issued by the Audit Division on August 19, 1977 is sustained.

DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER