

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Diemolding Corporation :
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 6/1/73 - 8/31/76. :

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 9th day of January, 1981, he served the within notice of Decision by mail upon Diemolding Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Diemolding Corporation
125 Rasbach St.
Canastota, NY 13032

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
9th day of January, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
Diemolding Corporation :
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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 9th day of January, 1981, he served the within notice of Decision by mail upon Elmer Shaw the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

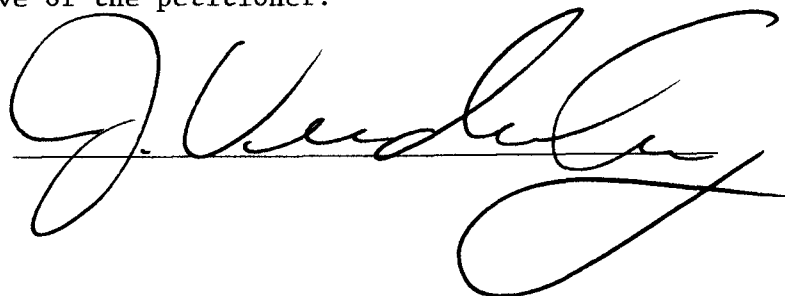
Mr. Elmer Shaw
2601 Lodi St.
Syracuse, NY 13208

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
9th day of January, 1981.

Annice A. Hageland



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

January 9, 1981

Diemolding Corporation
125 Rasbach St.
Canastota, NY 13032

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
Elmer Shaw
2601 Lodi St.
Syracuse, NY 13208
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DIEMOLDING CORPORATION	:	DECISION
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 June 1, 1973	:	
through August 31, 1976.	:	

Petitioner, Diemolding Corporation, 125 Rasbach Street, Canastota, New York 13032, 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 June 1, 1973 through August 31, 1976 (File No. 18725).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on May 14, 1980 at 1:15 P.M. Petitioner appeared by Elmer Shaw, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed certain non-taxable sales reported by petitioner.

II. Whether machinery or equipment purchased by petitioner is used directly and predominantly in the production of tangible personal property for sale.

III. Whether petitioner is entitled to an exemption from sales or use taxes on that portion of its utilities used directly and exclusively in the production of tangible personal property for sale.

FINDINGS OF FACT

1. Petitioner, Diemolding Corp., is engaged in the manufacture of plastic products. Dietooling, a Division of Diemolding Corp. is a machining operation which produces new molds, as well as, modifies, revises or repairs existing molds. Diemolding Corp. filed consolidated New York State and local sales and use tax returns.

2. On June 3, 1977, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period June 1, 1973 through August 31, 1976 for taxes due of \$14,390.51, plus penalty and interest of \$6,992.44, for a total of \$21,382.95.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1973 through February 28, 1974 to June 20, 1977.

4. On audit, the Audit Division examined sales invoices for the entire period under audit. It determined that Dietooling performed taxable modifications, revisions, alternations or repairs to customer's molds for which an exemption certificate was not on file or the certificate issued was deemed improper. Such sales totaled \$204,332.51 with tax asserted thereon of \$12,397.48. The Audit Division considered Dietooling's services taxable when performed on molds that have been completed and accepted by the customer.

The Audit Division also reviewed petitioner's acquisition of fixed assets for the audit period and found that Dietooling made purchases of \$38,433.31 for machinery and equipment without payment of tax. It was determined that such machinery and equipment was not used directly and exclusively (predominantly after September 1, 1974) in production of tangible personal property for sale.

This determination was based on information provided by the plant manager. The resultant tax due was \$2,305.99.

The Audit Division determined that Diemolding overpaid sales taxes of \$1,260.68 on utilities used directly and exclusively in production. However, the Division disallowed an exemption on utilities for Dietooling's operations which resulted in additional tax due of \$947.72. During the period at issue, Dietooling paid 4 percent tax on approximately 25 percent of its utility purchases.

5. Petitioner submitted exemption certificates covering the following sales at issue:

<u>CUSTOMER</u>	<u>AMOUNT</u>	<u>TYPE OF CERTIFICATE</u>
Hubbard Industries	\$132,076.64	resale
Smith-Lee Co., Inc.	20,350.96	exempt use
Allen Tool Corp.	611.50	direct payment
R.E. Dietz Co.	21,429.44	resale
Mohawk Electro Techniques, Inc.	4,640.00	resale
Carpenter Mfg. Co., Inc.	625.00	resale
Uebler Mfg.	480.28	exempt use
American Plastics	5,770.70	exempt use
Beaverite Products, Inc.	611.25	direct payment
The Black Clawson Co.	295.00	resale
Diebold, Inc.	5,841.00	resale
Lipe Clutch Products	575.00	direct payment

Petitioner submitted substantial documentary evidence to show that of the total sales to Smith-Lee Co., Inc., \$11,453.16 were sales of parts.

Petitioner submitted purchase orders indicating a New York State sales tax registration number from Voplex Corp., Oneida Molded Plastics Corp., Dzus Fastener Co., Inc., Universal Medical Instrument Corp. and Farrington Packaging Corp. in lieu of an actual exemption certificate.

6. Dietooling's invoices for repairs, modifications or revisions do not show separate charges for labor and material.

7. During the period at issue, Dietooling acquired the following machinery and equipment:

<u>DATE PURCHASED</u>	<u>AMOUNT</u>	<u>DESCRIPTION</u>
January 1, 1974	\$ 4,576.71	Harrison Lathe
February 14, 1974	16,095.00	Blohm Surface Grinder
February 14, 1974	162.45	parts
January 24, 1974	1,185.00	Magnetic Chuck
March 11, 1974	307.60	Magnetic Block
May 6, 1974	6,250.00	Harrison Lathe
May 6, 1974	429.00	chuck, shank
October 21, 1974	554.36	Sine Plate
May 30, 1975	2,746.90	Monorail System
June 12, 1975	1,495.00	Digital Readout System
July 18, 1975	191.40	Twin City Trolley
February 2, 1976	4,278.50	Milling Machine
February 2, 1976	161.39	Vacuum Cleaner
	<u>\$38,433.31</u>	

8. Dietooling's sales of repairs, modifications or revisions represented 25 percent of gross sales for the period at issue. Dietooling charged its customers approximately the same hourly rate for labor on producing new mold and parts as it did for repairing, modifying or revising existing molds; therefore, Dietooling's machinery and equipment is used 75 percent of the time directly and predominantly in production of tangible personal property for sale. Additionally, 75 percent of its utility purchases are used directly and exclusively in the production of tangible personal property for sale.

9. Petitioner argued that the amount held subject to tax by the Audit Division was erroneous in that such amount included not only labor but also such items as material, profit and overhead.

10. Reasonable cause existed for petitioner's failure to pay the sales and use taxes at issue.

CONCLUSIONS OF LAW

A. That repairs, modifications, revisions or alterations to molds constitute services subject to the taxes imposed under sections 1105(c)(2) and 1105(c)(3)

of the Tax Law. That based on Finding of Fact "6", the entire charge by petitioner is the amount subject to tax unless it has a properly completed resale or direct payment permit on file from the customer.

B. That section 1132(c) of the Tax Law provides, in part, that it shall be presumed that all receipts for property or services... are subject to tax until the contrary is established, and the burden of proving that any receipt... is not taxable shall be upon the person required to collect tax. Unless a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe... to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under section 1115 of the Tax Law. Where such a certificate has been furnished to the vendor, the burden of proving that the receipt... is not taxable shall be solely upon the customer. Therefore, petitioner is not liable for the tax on those sales referred to in Finding of Fact "5" where it was issued a resale certificate or a direct payment permit. However, the exempt use certificates accepted by petitioner were not proper in that the exemption provided in section 1115(a)(12) of the Tax Law is limited to machinery or equipment and parts for such machinery or equipment that have a useful life of more than one year. Petitioner failed to show that the sales for which it accepted exempt use certificates were sales of machinery, equipment or parts rather than sales of services, except as indicated in Finding of Fact "5". Consequently petitioner is liable for the taxes imposed on such sales pursuant to section 1133(a) of the Tax Law. Moreover, petitioner failed to sustain its burden of proof required by section 1132(c) of the Tax Law with respect to those sales on which it failed to collect tax based on purchase orders. A purchase order is not an exemption certificate within the meaning and intent of section 1132(c) of the Tax Law.

That in accordance with the foregoing conclusions, the additional taxable sales determined by the Audit Division are adjusted to \$26,174.52.

C. That section 1115(a)(12) of the Tax Law (as amended by Ch. 851, Laws 1974), provides an exemption for machinery or equipment for use or consumption directly and predominantly (directly and exclusively prior to September 1, 1974) in the production of tangible personal property,...for sale... but not including parts with a useful life of one year or less...

That the machinery or equipment acquired by Dietooling as set forth in Finding of Fact "7" purchased prior to September 1, 1974 was not used directly and exclusively in the production of tangible personal property for sale within the meaning and intent of former section 1115(a)(12) of the Tax Law, but was rather used 25 percent of the time in the petitioner's repair operation. (Emphasis added)

That the machinery or equipment purchased after September 1, 1974 was used directly and predominantly in the production of tangible personal property for sale within the meaning and intent of section 1115(a)(12) of the Tax Law. Accordingly the taxes asserted thereon of \$565.64 are cancelled.

D. That section 1115(c) of the Tax Law provides an exemption for "fuel, gas, electricity... for use or consumption directly and exclusively in the production of tangible personal property... for sale..."

The Audit Division erred in its determination that Dietooling was not entitled to an exemption for any portion of its utility usage. That 75 percent of Dietooling's utility purchases were used directly and exclusively in the production of tangible personal property for sale thus, 25 percent of such purchases are subject to tax. Accordingly, since Dietooling paid tax at the rate of 4 percent on 25 percent of its utility purchases it is liable for only an additional 2 percent tax (Madison County rate) thereon. That the tax due

on utility usage is reduced from \$947.72 to \$93.82.

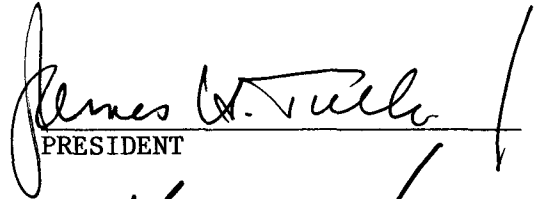
E. That the penalty and interest, in excess of the minimum statutory rate, imposed pursuant to section 1145(a) of the Tax Law are cancelled.

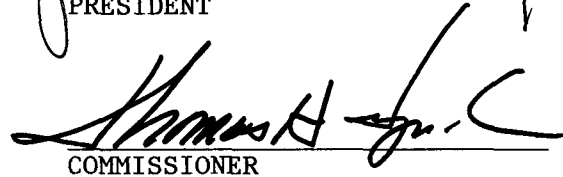
F. That the petition of Diemolding Corporation is granted to the extent indicated in Conclusions of Law "B", "C", "D" and "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 3, 1977; and that, except as so granted, the petition is in all other respects denied.

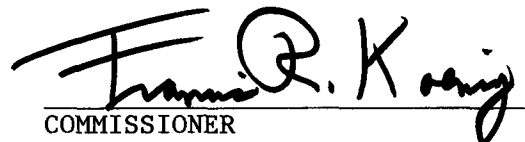
DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER