

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Duracast Contracting Corp. :

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 12/1/75 - 11/30/76. :

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 20th day of February, 1981, he served the within notice of Decision by mail upon Duracast Contracting Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

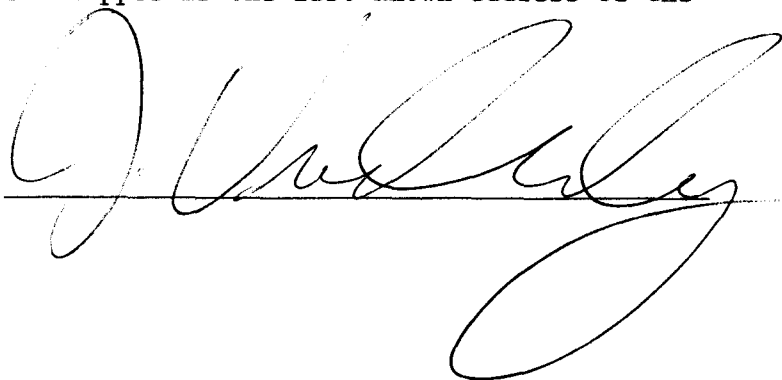
Duracast Contracting Corp.  
32-02 College Point Blv.  
Flushing, NY 11354

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  
20th day of February, 1981.

Cornie P. Hagelund



STATE OF NEW YORK  
STATE TAX COMMISSION

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of  
Duracast Contracting Corp. :

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Sales & Use Tax :  
under Article 28 & 29 of the Tax Law  
for the Period 12/1/75 - 11/30/76. :

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 20th day of February, 1981, he served the within notice of Decision by mail upon Jack L. Modell 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. Jack L. Modell  
187 Garth Rd.  
Scarsdale, NY 10583

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  
20th day of February, 1981.

*Carmie A. Haglund*

*J. Vredenburg*

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

February 20, 1981

Duracast Contracting Corp.  
32-02 College Point Blv.  
Flushing, NY 11354

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  
Jack L. Modell  
187 Garth Rd.  
Scarsdale, NY 10583  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
DURACAST CONTRACTING CORP. : 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 December 1, 1975 :  
through November 30, 1976. :  
:

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Petitioner, Duracast Contracting Corp., 32-02 College Point Boulevard, Flushing, New York 11354, 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 December 1, 1975 through November 30, 1976 (File No. 22254).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 18, 1980 at 10:45 A.M. Petitioner appeared by Jack L. Modell, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner's disposition of fixed assets to its stockholders was a retail sale or a liquidating dividend.

FINDINGS OF FACT

1. Petitioner, Duracast Contracting Corp., was in the business of leasing equipment to affiliated construction corporations which were owned by the same stockholders. On October 31, 1976, the business was discontinued and the assets were transferred to its stockholders. Petitioner's only stockholders were its officers, Frank Castiglione, president and Louis Durante, secretary.

2. On May 22, 1978, 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 December 1, 1975 through November 30, 1976 for taxes due of \$2,275.92, plus minimum statutory interest of \$276.81, for a total of \$2,552.73.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1974 through November 30, 1977 to December 31, 1978.

4. On audit, the Audit Division took the position that petitioner's transfer of assets to its stockholders was a taxable sale of \$28,000.00 and asserted tax thereon of \$2,240.00. The Division also found taxes due of \$35.92; however, this amount is not at issue.

5. On October 31, 1976, petitioner's Board of Directors held a special meeting. The minutes of such meeting state, in part: "...That the meeting had been called for the purpose of disposition of the assets of the corporation; specifically, the liquidation of the marketable assets to the stockholders as a sale, and the company transfer of such sold assets to Jet Asphalt Corporation, a company that is owned by the same stockholders." It was resolved that the corporation deliver to Jet Asphalt Corporation the marketable assets on behalf of the stockholders.

On the same date, petitioner entered into an agreement with the stockholders which provided that "in so much as the corporation is totally inactive and has only fixtures and equipment as its sole marketable assets, that the corporation liquidate these assets to the stockholders as a sale and the company is directed to transfer such sold assets to Jet Asphalt Corporation, a company that is owned by the same stockholders".

6. The foregoing agreement was written to show that the assets were sold rather than transferred to the stockholders as a liquidating dividend. The agreement was written in this manner to allow the individual stockholders to derive personal income tax benefits. However, petitioner argued that, in substance, the transfer was a liquidating dividend and thus exempt from the retail sales tax under section 1101(b)(4)(ii)(B) of the Tax Law and 20 NYCRR 526.6(d)(9).

7. Petitioner's books and records reflect the following journal entry to record the disposition of assets:

|                          |             |                               |              |
|--------------------------|-------------|-------------------------------|--------------|
| Due from Jet Asphalt     | \$28,000.00 |                               |              |
| Accumulated depreciation | 78,046.05   |                               |              |
|                          |             | Fixed Assets                  | \$105,157.94 |
|                          |             | Gain on disposition of assets | 888.11       |

Jet Asphalt Corporation recorded the acquisition of the fixed assets as follows:

|  |             |             |
|--|-------------|-------------|
| Fixed Assets                                     | \$28,000.00 |             |
| Due to Duracast on behalf<br>of the stockholders |             | \$28,000.00 |

Petitioner and the other affiliated corporations have a general ledger account titled "Due to and from affiliates" for the purpose of recording intercompany receivables and payables since the companies are wholly owned by the same stockholders and there were no monetary exchanges between them.

Petitioner argued that no consideration was received for the assets and, as such, there was no sale.

8. The intercompany receivable account "Due from Jet Asphalt" remained open on petitioner's balance sheet as of October 31, 1976.

9. For Federal income tax purposes, petitioner considered the transfer of assets as a sale and reported the gain thereon.

CONCLUSIONS OF LAW

A. That petitioner's disposition of fixed assets constituted a retail sale within the meaning and intent of section 1101(b)(4) of the Tax Law and, therefore, is subject to the imposition of sales tax pursuant to section 1105(a) of the Tax Law. That petitioner chose not to dispose of the assets by a liquidating dividend which would have exempted the transaction from sales tax, but rather chose to effectuate a direct sale for the personal income tax benefits of the individual stockholders; that for such choice, the resulting sales tax consequences cannot be avoided (Prospect Dairy, Inc. v. Tully, 53 A.D.2d 755).

B. That the petition of Duracast Contracting Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 22, 1978 is sustained.

DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER