

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert S. Leo & Dominic Maccarini :
d/b/a L & M Equipment Co. :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 of the Tax Law :
for the Period 9/1/75-2/29/76. :

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 3rd day of April, 1981, he served the within notice of Decision by mail upon Robert S. Leo & Dominic Maccarini, d/b/a L & M Equipment Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert S. Leo & Dominic Maccarini
d/b/a L & M Equipment Co.
92 Bedford Rd.
Katonah, NY 10536

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 April, 1981.

Carrie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert S. Leo & Dominic Maccarini :
d/b/a L & M Equipment Co. :
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 of the Tax Law :
for the Period 9/1/75-2/29/76. :

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 3rd day of April, 1981, he served the within notice of Decision by mail upon Leon N. Weiss 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. Leon N. Weiss
271 North Ave.
New Rochelle, NY 10801

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 April, 1981.

Ann M. A. Haglund

J. Vredenburg

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

April 3, 1981

Robert S. Leo & Dominic Maccarini
d/b/a L & M Equipment Co.
92 Bedford Rd.
Katonah, NY 10536

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
Leon N. Weiss
271 North Ave.
New Rochelle, NY 10801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT S. LEO and DOMINIC MACCARINI	:	DECISION
d/b/a L & M EQUIPMENT CO.	:	
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 September 1, 1975 through	:	
February 29, 1976.	:	

Petitioners, Robert S. Leo and Dominic Maccarini, d/b/a L & M Equipment Co., 92 Bedford Road, Katonah, New York 10536, 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 September 1, 1975 through February 29, 1976 (File No. 22227).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 12, 1980 at 1:15 P.M. Petitioner appeared by Leon N. Weiss, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether a resale certificate received by petitioners was valid, thereby relieving them of the respective sales tax liability.

FINDINGS OF FACT

1. On March 8, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Robert S. Leo and Dominic Maccarini, d/b/a L & M Equipment Co. for the period September 1, 1975

through February 29, 1976. The Notice, issued as the result of a field audit, was for \$643.75 in tax, plus penalties and interest.

2. Petitioners' business activity consisted of the rental of construction equipment. On audit, the Audit Division examined sales made for the audit period, and disallowed \$12,875.00 in non-taxable sales resulting in tax due thereon of \$643.75. Of the non-taxable sales disallowed, \$11,000.00 were sales made to Alder Construction Corp. which furnished a completed Resale Certificate to petitioner. It was the Audit Division's position that based on the definition of a retail sale contained in section 1101(b)(4) of the Tax Law, the rental of equipment to a contractor was a retail sale; and, therefore, the resale certificate issued to L & M Equipment Co. by Alder Construction Corp. should not have been accepted.

3. The resale certificate issued by Alder Construction Corporation contained its name and address, date issued, identification number, signature of its vice-president and was checked "blanket certificate". The equipment leased by Alder was re-leased to Felix Construction Company.

4. Petitioners acted in good faith as evidenced by the fact that the proper amount of sales tax was billed to Alder Construction until the receipt of the resale certificate in lieu of the sales tax.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that unless a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address..., the number of his registration certificate, together with such other information as said commission may require, to the effect that the property or service was purchased for resale..., the sale shall be deemed a taxable sale, at retail. Where such a certificate has been furnished to the vendor, the burden of proving that the receipt... is not taxable hereunder

shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a certificate of resale... in proper form.

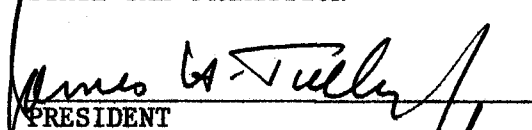
B. That the resale certificate issued to L & M Equipment by Alder Construction Corp. was in proper form and contained all the necessary information required; therefore, petitioners were not required to collect sales tax on those transactions to Alder Construction Corp. Petitioners accepted the resale certificate in good faith and were not under duty to investigate or police its customers. American Cyanamid and Chemical Corp. v. Joseph, 308 N.Y. 259.

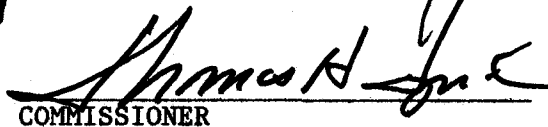
C. That the petition of Robert S. Leo and Dominic Maccarini d/b/a L & M Equipment Co. is granted to the extent indicated in Conclusion "B" above; that the Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 8, 1978 to tax due of \$93.75 plus interest at the minimum statutory rate; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

APR 03 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER