

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Roeder Trust - Elk Market Terminal :

: 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 9/1/74 - 5/31/75.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Roeder Trust - Elk Market Terminal, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roeder Trust - Elk Market Terminal
726 Lebrun Rd.
Amherst, NY 14226

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
5th day of June, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Roeder Trust - Elk Market Terminal :
: 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 9/1/74 - 5/31/75.

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 5th day of June, 1981, he served the within notice of Decision by mail upon Harold Fein 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. Harold Fein
245 Statler Hilton Hotel
Buffalo, NY 14202

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
5th day of June, 1981.

Cornelia A. Hagelund

J. Vredenburg

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

June 5, 1981

Roeder Trust - Elk Market Terminal
726 Lebrun Rd.
Amherst, NY 14226

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
Harold Fein
245 Statler Hilton Hotel
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROEDER TRUST - ELK MARKET TERMINAL	:	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 September 1, 1974 through May 31,	:	
1975.	:	

Petitioner, Roeder Trust - Elk Market Terminal, 726 Lebrun Road, Amherst, New York 14226, 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, 1974 through May 31, 1975 (File No. 21974).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on November 20, 1980 at 1:15 P.M. Petitioner appeared by Harold Fein, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

- I. Whether roofing materials purchased by petitioner for use in a capital improvement to real property were subject to sales tax.
- II. Whether petitioner paid sales tax on the purchase of a capital improvement and is thereby entitled to a refund.

FINDINGS OF FACT

1. On July 14, 1977, petitioner, Roeder Trust - Elk Market Terminal, filed an application for credit or refund for sales taxes of \$2,401.00. Said

application represents sales taxes which petitioner alleged were erroneously paid to a contractor pursuant to two capital improvement contracts.

2. On March 1, 1978, the Audit Division denied \$1,814.96 of petitioner's refund claim based on the following reasons:

- a) The contract written for Building B, Queen City Liquor, dated May 8, 1975, was considered a lump-sum contract and the contractor did not charge separately for sales tax.
- b) The tax paid on the contract written for Building A, Bison Liquor, was denied, in part, because the contract price was partially for the purchase of materials rather than a capital improvement.

3. On September 10, 1974, petitioner entered into a contract with S. S. & G. Construction Co. to supply and install Armco steel roofing for complete canopy at Building A, Bison Liquor, for the sum of \$18,018.80. Said amount was broken down as follows:

Material and Labor	\$15,300.00
Reline gutters	<u>1,540.00</u>
	16,840.00
7% sales tax	<u>1,178.80</u>
	\$18,018.80

The contract also provided that petitioner pay for roofing materials totaling \$9,060.76 which is to be deducted from the contract price leaving a balance due of \$8,958.04.

4. On January 2, 1975, petitioner paid \$8,468.00 for roofing materials, plus sales tax of \$592.76, for a total of \$9,060.76. The Audit Division approved a refund of \$586.04 based on the difference between the sales tax charged on the above contract (3) and the sales tax paid on the roofing materials directly to the supplier.

5. S. S. & G Construction Co., Inc. submitted a proposal dated September 10, 1974 to petitioner to supply and install Armco steel roofing for complete canopy at Building B, Queen City Liquor for the sum of \$22,149.00. Said proposal showed that the price was comprised of the following:

Material and Labor	\$19,000.00
Reline gutters	<u>1,700.00</u>
	20,700.00
7% sales tax	<u>1,449.00</u>
	\$22,149.00

Petitioner did not accept the proposal at this time and subsequently additions were made to such proposal which increased the price to \$27,749.00. On May 8, 1975, the contractor submitted a second proposal which was accepted by petitioner on May 12, 1975. Said proposal provided that the total price of the job was \$27,749.00. The sales tax was not separately stated on this proposal.

CONCLUSIONS OF LAW

A. That the nature of the work to be performed pursuant to the contract referred to in Finding of Fact "3" constituted a capital improvement to real property; however, said contract provided that the contractor was to supply labor only and that the materials were to be purchased by petitioner. That the roofing materials purchased by petitioner constituted a retail sale of tangible personal property subject to the tax imposed under section 1105(a) of the Tax Law and thus the sales tax paid by petitioner on said purchase was proper. The contractor erroneously charged sales tax of \$1,178.80; however, under the terms of the contract, only \$586.04 in sales taxes (labor - \$8,372.00 x 7 percent) was paid to the contractor. Accordingly, the amount of petitioner's refund claim approved by the Audit Division was correct.

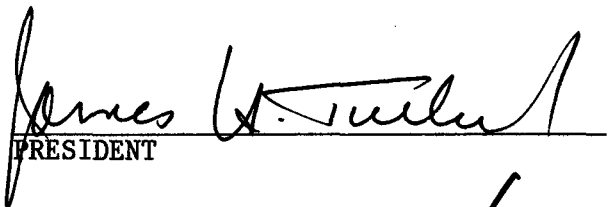
B. That the proposal dated September 10, 1974 referred to in Finding of Fact "5" indicated that sales tax was incorrectly charged by the contractor on a capital improvement; however, since said proposal was not accepted by petitioner, it was not a contract. That the proposal dated May 8, 1975 and accepted by petitioner on May 12, 1975, was a contract and that said contract did not separately charge sales tax. Therefore, since petitioner did not pay a sales tax to the contractor, it is not entitled to a refund.

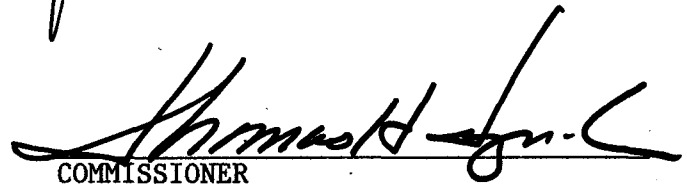
C. That the petition of Roeder Trust - Elk Market Terminal is denied and the partial refund denial issued March 1, 1978, is sustained.

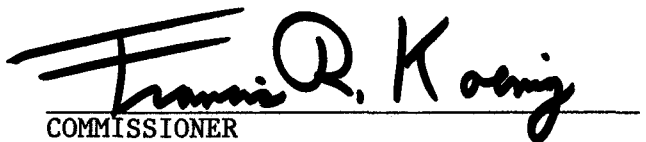
DATED: Albany, New York

STATE TAX COMMISSION

JUN 5 1981


PRESIDENT


COMMISSIONER


COMMISSIONER