

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Silmac Glass and Store Front 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 :
12/1/71 - 11/30/74. :

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 14th day of August, 1981, he served the within notice of Decision by mail upon Silmac Glass and Store Front Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Silmac Glass and Store Front Corp.
1768 Jerome Ave.
Bronx, NY 10453

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
14th day of August, 1981.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Silmac Glass and Store Front Corp. :
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under Article 28 & 29 of the Tax Law for the
Period 12/1/71 - 11/30/74. :

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 14th day of August, 1981, he served the within notice of Decision by mail upon Philip Gottesman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Gottesman
200 Bennett Ave.
New York, NY 10040

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
14th day of August, 1981.

Carrie A. Hagelund

J. Vredenburg

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

August 14, 1981

Silmac Glass and Store Front Corp.
1768 Jerome Ave.
Bronx, NY 10453

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
Philip Gottesman
200 Bennett Ave.
New York, NY 10040
Taxing Bureau's Representative

STATE TAX COMMISSION

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 March 19, 1979 at 10:45 A.M. and scheduled for continuance on January 12, 1981 at 1:15 P.M. Petitioner appeared by Philip Gottesman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Bruce Zalaman, Esq., of counsel).

ISSUE

Whether petitioner is liable for tax on purchases of materials used in the performance of capital improvement contracts.

FINDINGS OF FACT

1. Petitioner, Silmac Glass and Store Front Corp., is a general contractor that fabricated and installed store fronts.
2. On October 3, 1975, 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, 1971 through November 30,

1974 for taxes due of \$30,895.57, plus penalty and interest of \$11,646.31, for a total of \$42,541.88.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to December 20, 1975.

4. On audit, the Audit Division, based on a test of purchase invoices for the period March 1, 1973 through May 31, 1973, determined that petitioner failed to pay a sales or use tax on material purchases of \$434,052.00 that were used by petitioner in the performance of capital improvement work and asserted tax thereon of \$30,895.57.

5. Subsequent to the issuance of the aforementioned Notice, the Audit Division performed an additional test of purchase invoices for the period September 1, 1973 through November 30, 1973 which when combined with the original test period revised the taxes due to \$21,680.04.

6. The Audit Division failed to establish that petitioner's purchase records were incomplete and thereby prevented from conducting a complete audit to determine the exact amount of tax due.

7. The hearing was continued at the request of petitioner and rescheduled for January 12, 1981 at 1:15 p.m.; however, petitioner failed to appear.

8. Petitioner did not establish that reasonable cause existed for the cancellation of penalty and interest above the minimum statutory rate.

CONCLUSIONS OF LAW

A. That although there is statutory authority for the use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete

audit Matter of Chartair, Inc. v. State Tax Commission 65 A.D. 2d 44. That since the Audit Division failed to establish such a foundation, the use of a test period was not proper.

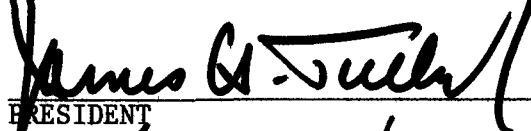
B. That section 1101(b)(4)(i) of the Tax Law, as amended by Chapter 473, Laws 1969, provides, in part, that a contractor is liable for tax on materials purchased for use or consumption in capital improvements to real property. However, in accordance with Conclusion of Law "A", the taxes due are reduced to \$4,287.43 to reflect the tax on actual material purchases for the periods March 1, 1973 through May 31, 1973 and September 1, 1973 through November 30, 1973.

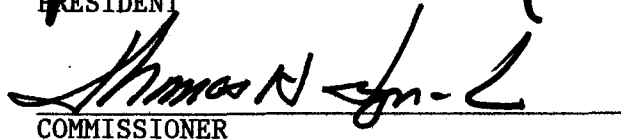
C. That the petition of Silmac Glass and Store Front Corp. is granted to the extent indicated in Conclusion of Law "B;" that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 3, 1975, and that, except as so granted, the petition is in all other respects denied.

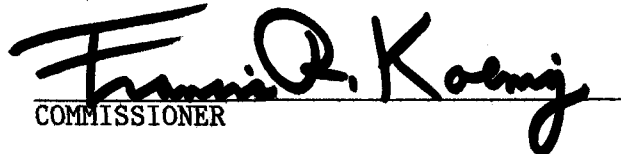
DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

Sales Tax

Singer Company

ST-577 (11/67)

STATE OF NEW YORK - DEPARTMENT OF TAXATION AND FINANCE - SALES TAX BUREAU

WAIVER, MODIFICATION OR CANCELLATION OF PENALTY AND INTEREST REQUIRING APPROVAL OF TAX COMMISSION

In accordance with the provisions of Memorandum No. E-94.2, the approval of the State Tax Commission, i.e. more than one member, is required because the proposed cancellation is for an amount in excess of \$2,500 or for a reason not specifically covered in the memorandum.

VENDOR The Singer Company 313 Underhill Boulevard Syosset, N. Y. 11791		PENALTY AND INTEREST ASSESSED \$ 8825.94
		RECOMMENDED CANCELLATION \$ 7800.84
IDENTIFICATION NUMBER 22-1285090C	PERIOD September 1979-November 1979	BALANCE DUE Paid \$ 645.12
REASON FOR WAIVING, MODIFICATION OR CANCELLATION		

We recommend cancellation of the above penalty based on the attached correspondence dated October 1, 1980 and March 6, 1981.

PREPARED BY TAX EXAMINER Asst. Director, Asst. & Records Mgmt. Bureau <i>Ronald Latta</i>		DATE 4/14/81
APPROVAL RECOMMENDED DIRECTOR, Asst. & Records Mgmt. Bureau <i>Ronald Latta</i>		DATE 4/14/81
APPROVED COMMISSIONER <i>[Signature]</i>		DATE 5/1/81
COMMISSIONER <i>[Signature]</i>		DATE 5/1/81
COMMISSIONER Frank R. Koening		DATE 4/29/81