

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Tishman Realty & Construction Co., Inc. :
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: :
12/1/74 - 11/30/76. :

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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Tishman Realty & Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tishman Realty & Construction Co., Inc.
666 Fifth Ave.
New York, NY 10019

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
27th day of November, 1981.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Tishman Realty & Construction Co., Inc. :
for Redetermination of a Deficiency or a Revision :
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& :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/74 - 11/30/76 :
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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Terry Wallin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

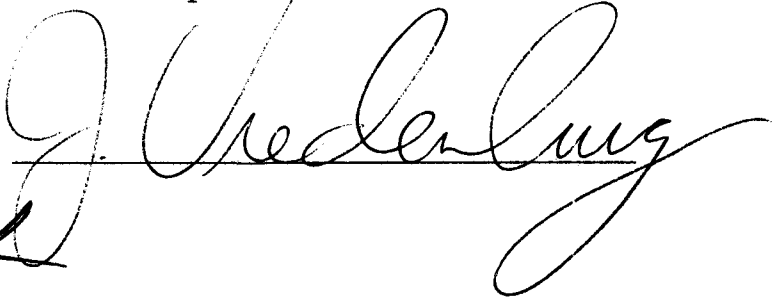
Terry Wallin
Rockefeller Center, Inc.
1230 Avenue of the Americas
New York, NY

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
27th day of November, 1981.





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

November 27, 1981

Tishman Realty & Construction Co., Inc.
666 Fifth Ave.
New York, NY 10019

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
Terry Wallin
Rockefeller Center, Inc.
1230 Avenue of the Americas
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
TISHMAN REALTY & CONSTRUCTION CO., INC.
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,
1974 through November 30, 1976.

DECISION

Petitioner, Tishman Realty & Construction Co., Inc., 666 Fifth Avenue, New York, New York, 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, 1974 through November 30, 1976 (File No. 19996).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 21, 1979. Petitioner appeared by Terry Wallin, Esq. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether billings by subcontractors to the petitioner for temporary heat services, temporary lighting, materials hoisting services, temporary protection services, concrete testing services and replacement of damaged conduits, during construction of a capital improvement are subject to sales tax.

II. Whether payments for carpentry and masonry services were subject to tax.

III. Whether penalty and interest in excess of the statutory minimum should be abated.

FINDINGS OF FACT

1. Petitioner, Tishman Realty & Construction Co., Inc. filed timely New York State and local sales and use tax returns for the period December 1, 1974 through November 30, 1976.
2. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due, No. 90,304,979, in the amount of \$93,722.00, including \$70,800.00 in sales taxes and \$22,922.00 in penalties and interest was issued against petitioner on March 31, 1977. On June 7, 1977, an application for a hearing to review the determination was filed.
3. After the issuance of Notice No. 90,304,979, an audit was conducted. By letter dated August 10, 1977, the Audit Division adjusted Notice No. 90,304,977 to the amount of \$49,121.88 in tax, \$17,994.13 in penalty and interest to August 20, 1977, for a total of \$67,116.01. Also, Notice of Determination and Demand for Payment of Sales and Use Taxes Due No. 90,760,879 was issued on August 19, 1977 for tax of \$10,901.88 and penalty and interest of \$2,845.24, for a total of \$13,747.12.
4. After a conference held on April 17, 1978 concluded without agreement, the taxpayer filed a perfected petition on August 28, 1978 for revision of these determinations as revised.
5. The petitioner is a contractor, and the State is claiming taxes for purchases of \$98,209.27 for the Olympic Towers in New York City, and for purchases of \$815,990.98 for the Texaco Building in Harrison, Westchester County, New York.
6. The petitioner offered testimony that concrete testing services and temporary heating services, which were furnished in connection with the Texaco Building were required to make sure that the quality of the concrete met

Westchester County and American Concrete Institute specifications. Labor costs for temporary heat services were \$275,577.00, and for concrete testing services were \$119,696.00.

7. The petitioner offered testimony that at the Texaco Building temporary lighting services and protection services were required by Federal Occupational Safety and Healthy Administration Standards. The labor charge for the temporary lighting services was \$25,501.36. The charge for the temporary protection services was \$12,009.43. By an error of transcription, the \$12,009.43 appears on the auditor's worksheet as \$120,009.43.

8. The petitioner offered testimony that at the Texaco Building there was a labor charge for replacing conduits destroyed during construction; the replacement was essential for the completion of the project. The Bureau states credit for \$10,246.27 should be allowed for this item; the petitioner claims \$11,368.39 is involved, but did not present evidence in support of its contention.

9. The petitioner offered testimony that the material hoisting services were essential for the completion of the Texaco Building. The total charge was \$66,618.75. The audit report indicates the monthly charge was \$7,590.00. The testimony adduced shows that the monthly charge was made up of a \$2,000.00 charge for the hoist itself, \$600.00 for fuel used to pwer the hoist, and the balance of \$4,990.00 for labor. The petitioner stated that only the labor cost was in issue.

10. No testimony or other evidence was presented at the time of the hearing with respect to other purchases included in the totals for the Texaco Building and the Olympic Towers.

11. The State also claims tax due for carpentry and masonry services to a building managed by petitioner at 99 Park Avenue, New York City. The bills

totalled \$135,930.14 for the audit period, which would yield a tax of \$10,874.40. The petitioner claims that the bills represented a payroll accommodation by National Cleaning Contractors, and the employees were the petitioner's. A letter from National Cleaning Contractors was sent to the examiner. No testimony or other evidence was presented at the time of the hearing.

12. The State further claims additional expense items of \$6,163.20, which would yield a tax of \$493.06. No testimony or other evidence was presented at the time of the hearing on these items.

CONCLUSIONS OF LAW

A. That labor costs incurred for the construction of a capital improvement are not subject to sales tax. See Matter of Carl A. Morse, Inc., State Tax Commission, June 18, 1980. This holding is consistent with Regulation 527.7(b)(4) (effective September 1, 1976) which states:

"The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property such services are taxable. If the end result of the same service is a capital improvement to the real property such services are not taxable."

B. That no tax is due on the concrete testing and temporary heating services described in Finding of Fact "6"; on the temporary lighting service and protection service described in Finding of Fact "7"; and on the labor charge for replacement of conduits described in Finding of Fact "8" to the extent of \$10,246.27.

C. That no tax is due on the labor cost associated with the materials hoist described in Finding of Fact "9" in the amount of \$43,798.10 [4990/7590 x \$66,618.75].

C. That pursuant to section 1132(c) of the Tax Law, the burden of proof that a sale is not taxable is on the taxpayer. The petitioner, herein, has not

met its burden of proof with respect to the other transactions for the Texaco Building, the transactions for Olympic Towers, the carpentry and masonry services described in Finding of Fact "11" and the additional expense items stated in Finding of Fact "12".

E. That all penalties and interest in excess of the statutory minimum are cancelled.

F. That the petition is granted to the extent stated in Conclusions of Law "B", "C" and "E". The Audit Division is hereby directed to accordingly modify the notice of determination and demand for payment of sales and use taxes due. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER