

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Briar Route, Inc.

:
:
: 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:
3/1/77-11/30/79.

State of New York
County of Albany

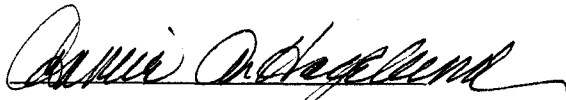
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Briar Route, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Briar Route, Inc.
102 Headson Dr.
Dewitt, NY 13214

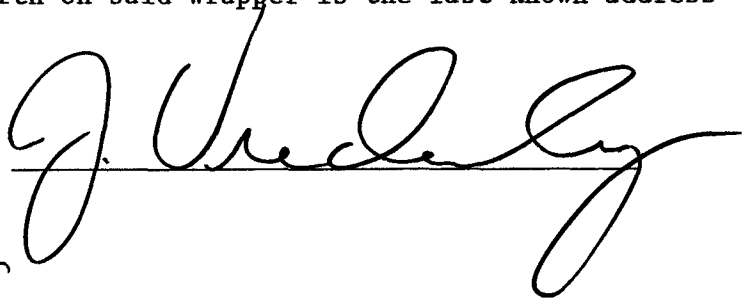
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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of
Briar Route, Inc.

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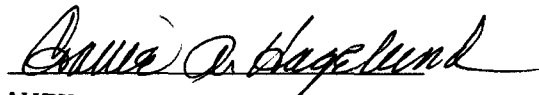
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of October, 1982, he served the within notice of Decision by certified mail upon Arnold J. Hodes the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold J. Hodes
Arnold J. Hodes & Co.
2030 Erie Blvd. E.
Syracuse, NY 13224

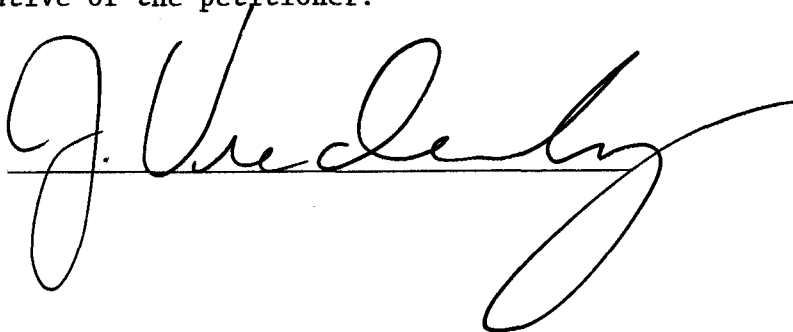
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
12th day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

October 12, 1982

Briar Route, Inc.
102 Headson Dr.
Dewitt, NY 13214

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Arnold J. Hodes
Arnold J. Hodes & Co.
2030 Erie Blvd. E.
Syracuse, NY 13224
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BRIAR ROUTE, INC.	:	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 March 1, 1977	:	
through November 30, 1979.	:	

Petitioner, Briar Route, Inc., 102 Headson Drive, Dewitt, New York 13214, 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 March 1, 1977 through November 30, 1979 (File No. 30614).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 28, 1981, at 9:15 A.M. Petitioner appeared by Arnold J. Hodes, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether certain leasehold improvements made by petitioner constitute capital improvements to real property.

FINDINGS OF FACT

1. Petitioner, Briar Route, Inc. operated nine tobacco and gift shops located in shopping malls in the Syracuse, Ithaca, Rochester and Poughkeepsie areas.

2. On June 20, 1980, 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 covering the period March 1, 1977 through November 30, 1979 for taxes due of \$3,443.65, plus minimum statutory interest of \$580.00, for a total of \$4,023.65.

3. On audit, the Audit Division found no deficiency regarding sales tax reported and paid by petitioner on taxable receipts. However, an examination of purchase invoices disclosed that petitioner failed to pay a sales or use tax on certain purchases of furniture and fixtures, repairs and leasehold improvements amounting to \$49,195.00.

At the hearing, petitioner conceded to the tax determined due on the purchases of furniture, fixtures and repairs which totaled \$6,283.98. The Audit Division conceded that it erred in asserting tax on purchases of \$1,178.00. The balance of the purchases at issue are leasehold improvements to three of petitioner's stores located at 1) South Hills Mall, Poughkeepsie, New York; 2) Fairmont Fair, Fairmont, New York; and 3) Penn-Cann Mall, Cicero, New York.

4. The physical size of petitioner's stores ranged from 700 square feet to 950 square feet. In each of the foregoing stores, petitioner had similar work performed. The work consisted of the following:

- a) installation of a store front covering the entire frontage of the leased premises.
- b) installation of all finished ceilings and coves.
- c) installation of a concrete floor and floor covering installed over the unfinished floor.
- d) installation of all electrical work, fixtures and connections throughout the leased premises, including the furnishing and installation of the panel and connection of the service to such panel.
- e) installation of all piping from the sewer tap and cold water capped outlet, plumbing fixtures, trim, seats and similar items, including connections to plumbing systems.
- f) installation of all sprinkler piping and heads throughout the leased premises.
- g) installation of heating, ventilating and air conditioning system.

Petitioner executed lump sum contracts with general contractors or subcontractors to perform the work described above, the payments for which the Audit Division held subject to tax.

5. The leases which petitioner entered into for these stores provided that upon the expiration or sooner termination of the lease, all improvements, alterations, additions, fixtures and equipment, except personal property and other movable trade fixtures installed at lessee's expense shall thereupon become the property of the lessor.

6. The leasehold improvements referred to in Finding of Fact "4", increased the value of the lessor's real property. Said improvements were intended to become permanent additions as evidenced by the terms of the lease and such improvements, if removed would have little or no value. The removal would not cause material damage to the mall structure, however you are left with space unsuitable for occupancy.

7. For Federal income tax purposes, the leasehold improvements at issue do not qualify for the investment tax credit applicable to personal property.

CONCLUSIONS OF LAW

A. That 20 NYCRR 527.7(3) defines the term "capital improvement" as an addition or alteration to real property "... (i) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the property, and (ii) which becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself, and (iii) is intended to become a permanent installation."

B. That the leasehold improvements described in Finding of Fact "4" constitute capital improvements to real property within the meaning and intent

of section 1105(c)(5) of the Tax Law and 20 NYCRR 527.7(3) and therefore, the payments made by petitioner to contractors for performing such work, are not subject to tax.

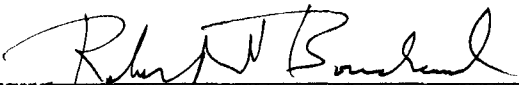
C. That in accordance with Finding of Fact "3", petitioner is liable for tax on purchases of \$6,283.98.

D. That the petition of Briar Route, Inc. 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 June 20, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 12 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER