

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Broadway Maintenance 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 Years :
1971 - 1974. :

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 8th day of September, 1982, he served the within notice of Decision by certified mail upon Broadway Maintenance Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Broadway Maintenance Corp.
22-09 Bridge Plaza N.
Long Island City, NY

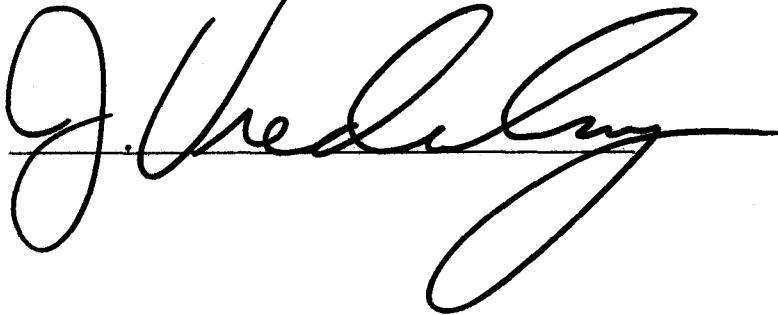
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
8th day of September, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

September 8, 1982

Broadway Maintenance Corp.
22-09 Bridge Plaza N.
Long Island City, NY

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
BROADWAY MAINTENANCE CORP.
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,
1971 through August 31, 1974.

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DECISION

Petitioner, Broadway Maintenance Corp., 22-09 Bridge Plaza North, Long Island City, New York 11101, 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, 1971 through August 31, 1974 (File No. 16853).

Petitioner advised the State Tax Commission that it desired to waive a formal hearing and to submit the case to the Commission, based on the entire record contained in the file. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether credit claimed by petitioner for overpayment of tax should be denied because it was barred by the statute of limitations.

FINDINGS OF FACT

1. Petitioner, Broadway Maintenance Corp., duly filed sales and use tax returns for the period September 1, 1971 through August 31, 1974.
2. Petitioner is an electrical contractor and service house.
3. On July 15, 1972, petitioner requested a ruling from the Audit Division as to whether materials purchased in connection with providing certain services to municipalities were subject to the provisions of Article 28 of the Tax Law.

4. There was subsequent correspondence between the Audit Division and petitioner in this matter. By letter dated March 12, 1974, petitioner was advised that the materials specified in the request for ruling were exempt from use tax.

5. While awaiting the ruling, petitioner paid tax on these items.

6. Upon receipt of the ruling dated March 12, 1974, petitioner claimed a credit of \$46,453.83 on its sales tax return for the quarter ended May 31, 1974.

7. A subsequent audit revealed that the statute of limitations had expired with respect to \$19,013.24 of the amount taken as a credit.

8. There is nothing in the record indicating that the Audit Division advised the petitioner that a favorable ruling would entitle it to obtain an automatic credit and/or refund even if the date of the favorable ruling was beyond the period of limitation for filing a claim for refund.

9. There is nothing in the record indicating that the petitioner was unaware of its rights under Tax Law section 1139 to file an application for a refund or credit of any sales and use taxes "erroneously, illegally or unconstitutionally collected or paid."

10. On October 8, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner in the amount of \$19,013.24, plus penalty and interest.

11. Petitioner contends that the statute of limitations should be waived with respect to the entire amount in issue in that the Audit Division was negligent in not answering its request for a ruling sooner.

12. Petitioner's New York State Sales and Use Tax Return for the quarter ending May 31, 1974 was timely filed and petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1139(a)(ii) of the Tax Law provides that no refund shall be paid in the case of a tax erroneously paid unless the taxpayer files a claim within three years after the date when the tax was payable.

B. That there is a "strong public policy against payment by public bodies of claims barred by the statute of limitations" and an acknowledgement of a debt after the statute has run is an impermissible waiver of the statute (Parsons v. Department of Transportation, 344 N.Y.S.2d 19 (Sup. Ct. 1973); 35 Park Avenue, Inc. v. City of New York, 64 Misc. 2d 418 (1969)).

C. That petitioner's claim for a refund was not contingent on a favorable letter ruling from the Audit Division. At any time prior to expiration of the statute of limitations, petitioner could have claimed a refund and received a hearing on its claim. The Audit Division did not lull the petitioner into "a sense of security, and into a belief that" petitioner's claim would be recognized in due course after a favorable reply to petitioner's inquiry (Cf. Poucher v. Board of Education of City of New York, 128 Misc. 853 (Sup. Ct. 1927)). Therefore any alleged negligence on the part of the Audit Division in replying to petitioner's inquiry was irrelevant to the issue of the timing of petitioner's claim for a refund.

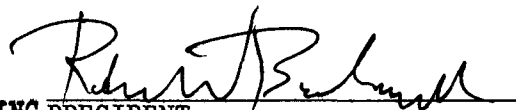
D. That penalty and interest in excess of the minimum prescribed by section 1145(a) of the Tax Law are waived.

E. That the petition of Broadway Maintenance Corp. is granted to the extent indicated in Conclusion of Law "D" above. The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 8, 1976. Except as so granted, the petition is in all other respects denied.

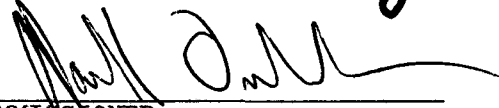
DATED: Albany, New York

SEP 08 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER