

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Douglas Brothers, 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 6/1/76-5/31/79. :

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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 May, 1982, he served the within notice of Decision by certified mail upon Douglas Brothers, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Douglas Brothers, Inc.  
Box 201  
Sayre, PA 18840

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 May, 1982.

*Annice P. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of

Douglas Brothers, 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 6/1/76-5/31/79.

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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 May, 1982, he served the within notice of Decision by certified mail upon Roy Fuhrman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roy Fuhrman  
138 Chaumont Dr.  
Williamsville, NY 14221

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 May, 1982.

*Ann M. P. Hayden*

*J. Vredenburg*

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

May 27, 1982

Douglas Brothers, Inc.  
Box 201  
Sayre, PA 18840

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  
Roy Fuhrman  
138 Chaumont Dr.  
Williamsville, NY 14221  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
DOUGLAS BROTHERS, 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 June 1, 1976 :  
through May 31, 1979.

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Petitioner, Douglas Brothers, Inc., Box 201, Sayre, Pennsylvania 18840, 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 June 1, 1976 through May 31, 1979. (File No. 30290)

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 September 23, 1981 at 2:45 P.M. Petitioner appeared by Roy Fuhrman. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether electricity and fuel oil used in the production of asphalt that is consumed by petitioner in performing capital improvement contracts is subject to tax.

FINDINGS OF FACT

1. Petitioner, Douglas Brothers, Inc., is primarily engaged in the manufacturing and sale of asphalt. However, petitioner is also a contractor and uses the asphalt it produces in performing capital improvements.

2. On November 21, 1979, 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 June 1, 1976 through May 31, 1979 for taxes due of \$3,402.60, plus minimum statutory interest of \$468.50, for a total of \$3,871.10. The taxes due on said Notice were subsequently adjusted to \$3,297.72 pursuant to a Notice of Assessment Review issued to petitioner.

3. The Audit Division, based on a review of petitioner's books and records for 1978, determined that 36.3 percent of the asphalt produced was used by petitioner in capital improvement work performed in New York State. Petitioner paid use tax on said asphalt based on its cost of \$5.00 per ton. The Audit Division, however, determined that use tax was due on the retail selling price to others (\$16.00) rather than petitioner's cost. This resulted in additional taxes due of \$1,833.66.

The Audit Division also asserted use taxes of \$1,358.52 on 36.3 percent of petitioner's purchases of electricity and fuel oil since that portion of the asphalt produced was not sold.

A review of capital expenditures revealed taxes due of \$105.54.

4. Petitioner agreed to the taxes determined above, except for the taxes on electricity and fuel oil. Petitioner remitted \$1,727.49 in payment thereof (the agreed amount was actually \$1,939.20). At the hearing, petitioner conceded that the balance, \$211.71, is due on the agreed amount.

5. The Audit Division conceded that petitioner maintained complete books and records from which the actual tax liability on electricity and fuel oil could have been determined and therefore the taxes due should be reduced to \$703.80, the amount found due for 1978.

6. Petitioner took the position that the cost of electricity and fuel oil is reflected in the retail selling price; and since use tax is paid on its selling price, the petitioner concluded that tax is not applicable on its purchases of electricity and fuel oil.

CONCLUSIONS OF LAW

A. That section 1115(c) of the Tax Law provides, in part, an exemption from sales and use tax for fuel, gas, electricity... for use or consumption directly and exclusively in the production of tangible personal property... for sale (emphasis added)... by manufacturing...".

That the electricity and fuel oil at issue herein are used to produce asphalt that is not sold but rather consumed by petitioner in the performance of capital improvement contracts and, therefore, that portion of petitioner's purchases of electricity and fuel oil is not exempt from the taxes imposed under sections 1105 and 1110 of the Tax Law. Moreover, said purchases are not for "resale" within the meaning and intent of section 1101(b)(4) of the Tax Law.

B. That in accordance with Finding of Fact "5", the taxes determined due on electricity and fuel oil are reduced to \$703.80.

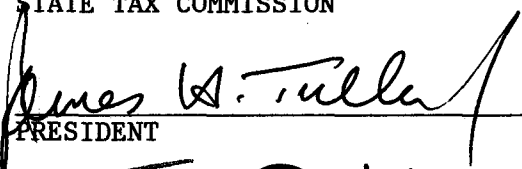
C. That the petition of Douglas Brothers, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 21, 1979 and credit petitioner with its payment of

\$1,727.49; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 27 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER