

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
R. E. Drake, 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 6/1/73 - 5/31/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

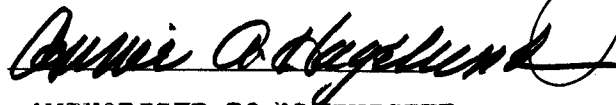
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 22nd day of October, 1982, he served the within notice of Decision by certified mail upon R. E. Drake, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

R. E. Drake, Inc.
c/o Ernest A. Drake, President
76 E. Genesee St.
Baldwinsville, NY 13027

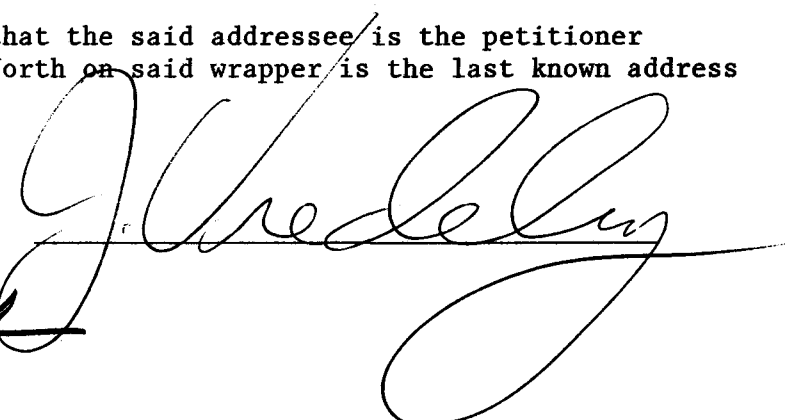
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
22nd day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
R. E. Drake, 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 6/1/73 - 5/31/76. :

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 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Alfonse J. Damico the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

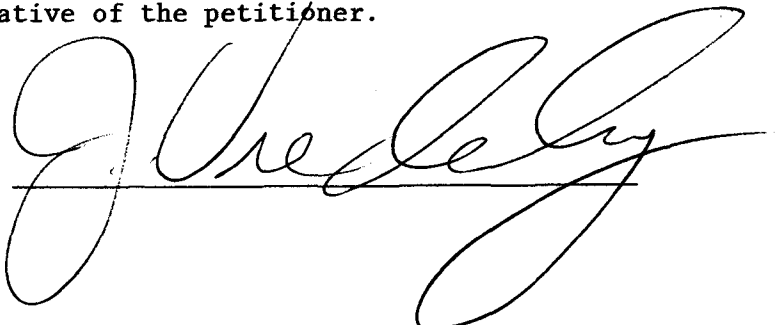
Alfonse J. Damico
R.J. & P.R. Shanahan
1001 Onondaga Savings Bank Bldg.
Syracuse, NY 13202

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
22nd 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 22, 1982

R. E. Drake, Inc.
c/o Ernest A. Drake, President
76 E. Genesee St.
Baldwinsville, NY 13027

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
Alfonse J. Damico
R.J. & P.R. Shanahan
1001 Onondaga Savings Bank Bldg.
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
R. E. DRAKE, 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 June 1, 1973
through May 31, 1976.

DECISION

Petitioner, R. E. Drake, Inc., 76 East Genesee Street, Baldwinsville, New York 13027, 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, 1973 through May 31, 1976 (File No. 17434).

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 30, 1981 at 10:30 A.M. Petitioner appeared by Alfonse J. Damico, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioner.

II. Whether petitioner is entitled to a credit for sales taxes paid on certain purchases of materials and supplies.

III. Whether petitioner is liable for tax on purchases of materials and supplies used in the performance of a capital improvement to real property.

FINDINGS OF FACT

1. Petitioner, R. E. Drake, Inc., was a mechanical contractor that furnished, installed and serviced commercial and industrial boilers.

2. On September 20, 1976, 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, 1973 through May 31, 1976 for taxes due of \$9,022.73, plus penalty and interest of \$3,543.41, for a total of \$12,566.14.

3. The tax deficiency determined by the Audit Division comprised the following:

a) additional taxable sales of \$21,126.00 which were mileage and labor charges on repair work

b) sales tax credits of \$1,762.61 claimed by petitioner on sales tax returns were denied

c) tax asserted on purchases of supplies, materials and equipment rentals amounting to \$83,960.00.

4. The Audit Division conceded that the taxes due should be adjusted to \$3,825.42 based on documentation it reviewed subsequent to the audit. The adjusted tax due for each area of deficiency is:

additional taxable sales	\$ 972.12
credits denied	940.48
purchases	<u>1,912.82</u>
Total	\$3,825.42

Petitioner conceded that the following taxes are due:

additional taxable sales	\$ 622.17
credits denied	262.25
purchases	<u>500.17</u>
Total	\$1,384.59

5. Petitioner submitted a Direct Payment Permit from Corning Glass Works covering a sale of \$60.56. Additionally, petitioner substantiated that sales taxes of \$175.95 (which were part of the deficiency) were collected from Fowler's Department Store and paid over to New York State.

Petitioner submitted both an Exempt Use Certificate and a Capital Improvement Certificate from Pyramid Structural Systems Co. and Lee Dyeing Co. of North Carolina, Inc. covering sales of \$321.28 and \$1,502.90, respectively.

Petitioner submitted Exempt Use Certificates for the balance of the additional taxable sales at issue.

An Exempt Use Certificate states thereon that "This certificate cannot be used to exempt charges covering installation of production machinery and equipment. No exemption is allowable for labor charges covering repairs to production machinery and equipment."

6. The credits claimed by petitioner were for sales taxes paid on materials and supplies that petitioner determined were used in tax exempt jobs. The credits denied that are at issue herein are:

(a) <u>Customer</u>	(b) <u>Sales Tax Credit Denied</u>	(c) <u>Certificate Issued By Customer</u>
Rockwell International	\$ 34.78	Direct Payment Permit
Continental Can	258.40	None
Sprout Walden	523.31	Capital Improvement, Exempt Use
Allied Chemical	93.58	None
Zotto's	24.81	Exempt Use
Schaffell Tanning	5.60	Exempt Use

Petitioner adduced no evidence to show that the credits claimed were for taxes paid on purchases of production machinery and equipment or tangible personal property used in production.

7. The adjusted tax due on purchases of materials and supplies represents supplies of \$9,786.00 and materials of \$17,540.00 for stock.

Petitioner argued that the applicable sales tax, if any, is reported on its sales tax returns when the materials are actually used.

8. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part,

"...it shall be presumed that all receipts for property or services... are subject to tax until the contrary is established and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen,...the sale shall be deemed a taxable sale at retail. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt...is not taxable hereunder shall be solely upon the customer."

That section 1115(a)(12) of the Tax Law does not exempt labor charges to install production machinery and equipment or labor charges on repairs to such machinery and equipment. An exempt use certificate clearly states this information on its face. Therefore, petitioner had actual knowledge that the certificate was issued erroneously and is not relieved of its responsibility to collect tax on such charges. Accordingly, petitioner is liable for the taxes imposed on such sales pursuant to section 1133(a) of the Tax Law.

That petitioner is not liable for tax on the sale of \$60.56 for which it was furnished a Direct Payment Permit, the taxes of \$175.95 collected from customers and paid over to New York State and the sales totaling \$1,824.18 for which it was furnished Capital Improvement Certificates (Saf-Tee Plumbing Corp. v. State Tax Commission, 77 AD2d 1).

B. That the credits denied by the Audit Division were for sales taxes paid on materials incorporated in the capital improvement contracts set forth in Finding of Fact "6". Petitioner was furnished with the certificate indicated in Column 6(c).

That section 1101(b)(4) of the Tax Law provides, in part, that a contractor is liable for tax on materials purchased for use or consumption in capital improvements to real property.

That a contractor may accept a Direct Payment Permit where the tax obligation rests with the issuer as consumer. A contractor accepting a Direct Payment Permit from his customer is not relieved of any sales tax liability when under the contract terms, or by law, he is the consumer of tangible personal property purchased for a contract. Likewise, the acceptance of a Certificate of Capital Improvement from a customer does not relieve a contractor of liability for tax on its purchases of tangible personal property for use in performing a capital improvement.

That with respect to the exempt use certificates, petitioner failed to establish that any of the credits claimed related to sales tax paid on purchases exempt from tax under section 1115(a)(12) or 1210(a)(1) of the Tax Law. That a statute or regulation authorizing an exemption from taxation is to be strictly construed against the taxpayer (Matter of Grace v. New York State Tax Commission, 37 N.Y.2d 193).

That based on the foregoing, petitioner is not entitled to a credit for the sales tax of \$940.48.

C. That petitioner is liable for tax on the purchases referred to in Finding of Fact "7" in accordance with the provisions of section 1101(b)(4) of the Tax Law. That section 1119(c) of the Tax Law provides that petitioner may

apply for a credit or refund where the materials are resold or used in an exempt manner after the tax was paid. In the alternative, section 1132(c) of the Tax Law provides that a purchaser may apply for authorization to pay the tax directly to the State Tax Commission.

D. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

E. That the petition of R. E. Drake, Inc. is granted to the extent indicated in Conclusions of Law "A" and "D" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1976; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 22 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER