

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Leonard L. Frank

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 12/1/71-11/30/75.

State of New York
County of Albany

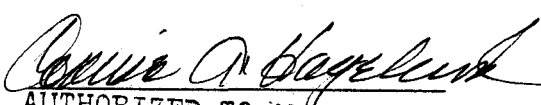
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Leonard L. Frank, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

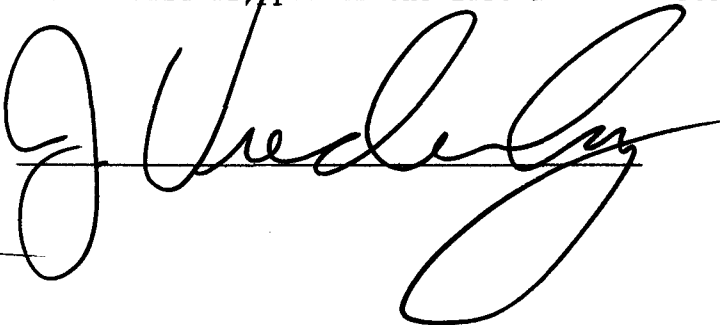
Leonard L. Frank
830 Bryant Ave.
Roslyn Harbor, NY 11576

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
6th 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 6, 1982

Leonard L. Frank
830 Bryant Ave.
Roslyn Harbor, NY 11576

Dear Mr. Frank:

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

Franklin L. Frank :

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 12/1/71-11/30/75. :

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Franklin L. Frank, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

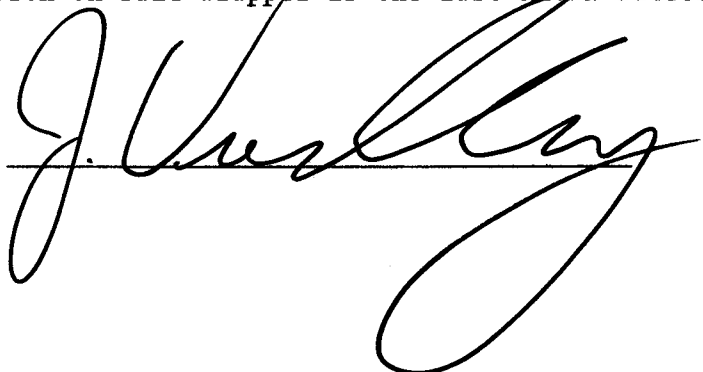
Franklin L. Frank
4 Waylor Lane
Laurel Hollow, NY 11040

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
6th 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 6, 1982

Franklin L. Frank
4 Waylor Lane
Laurel Hollow, NY 11040

Dear Mr. Frank:

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.

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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	:	
Triple F. Building Co., Inc.	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/71 - 11/30/75.	:	

State of New York
County of Albany

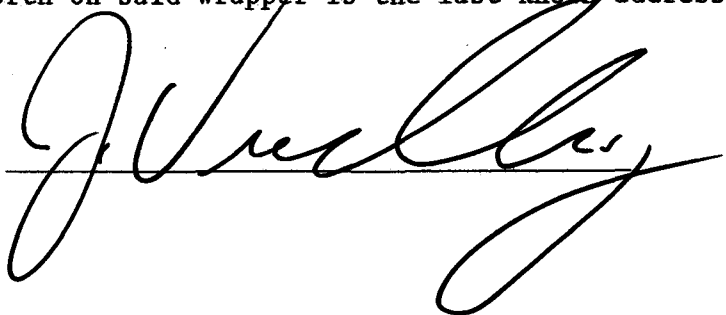
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Triple F. Building Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Triple F. Building Co., Inc.
358 B Mid-Island Plaza
Hicksville, NY 11802

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
6th 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 :
Triple F. Building Co., 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 12/1/71 - 11/30/75. :

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Jack Mitnick the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

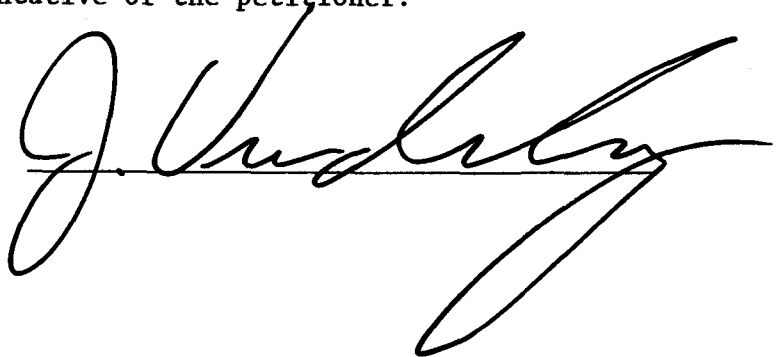
Jack Mitnick
Spahr, Lacher, Berk & Naimer
3000 Marcus Ave.
Lake Success, NY 11042

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
6th 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 6, 1982

Triple F. Building Co., Inc.
358 B Mid-Island Plaza
Hicksville, NY 11802

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
Jack Mitnick
Spahr, Lacher, Berk & Naimer
3000 Marcus Ave.
Lake Success, NY 11042
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
TRIPLE F BUILDING 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, 1971 :
through November 30, 1975.

In the Matter of the Petition :
of :
FRANKLIN L. FRANK : 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 December 1, 1971 :
through November 30, 1975.

In the Matter of the Petition :
of :
LEONARD I. FRANK :
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, 1971 :
through November 30, 1975.

Petitioners, Triple F Building Co., Inc., 358 B Mid-Island Plaza,
Hicksville, New York 11802; Franklin L. Frank, 4 Waylor Lane, Laurel Hollow,
New York 11040; and Leonard I. Frank, 830 Bryant Avenue, Roslyn Harbor, New
York 11576 filed petitions 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, 1971 through November 30, 1975 (File Nos. 22972, 22973 and 22974).

A combined formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 21, 1981 at 1:15 P.M. Petitioners appeared by Jack Mitnick, C.P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel J. Freund, Esq., of counsel).

ISSUES

I. Whether petitioners are liable for sales tax and compensating use tax on the purchase of materials used in capital improvement work for an exempt organization.

II. Whether the audit procedures employed by the Audit Division in an examination of petitioner Triple F Building Co., Inc.'s books and records were proper.

FINDINGS OF FACT

1. During the periods at issue Triple F Building Co., Inc. ("Triple F") was a general building contractor. Franklin L. Frank and Leonard I. Frank were, respectively, the President and Vice-President of Triple F.

2. On March 1, 1978 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Triple F for the periods ended February 28, 1972 through November 11, 1975 in the amount of \$28,910.41, plus penalty and interest of \$19,234.53, for a total of \$48,144.94. On March 1, 1978, the Audit Division also issued a Notice and Demand for Payment of Sales and Use Taxes Due against each of the individual petitioners for the periods ended February 28, 1972 through November 30, 1975 in the amount of \$28,910.41, plus penalty and interest of \$19,234.53, for a total due of \$48,144.94. The deficiency was asserted against the individual petitioners pursuant to section 1141(c) of the Tax Law on the assumption that as corporate

officers they were stockholders in Triple F and received liquidating dividends upon a sale of the assets of Triple F.

3. On November 22, 1971 Triple F entered into a "lump-sum" contract with the United Presbyterian Home in Syosset, Inc. ("United Presbyterian Home") for the construction of a 150 bed residence on the United Presbyterian Home grounds. This contract provided, in part, that the United Presbyterian Home was to reimburse Triple F for the cost of the work as the work progressed on a periodic basis up to a certain estimated maximum cost. Article 9.1.10 included in this cost "[s]ales, use or similar taxes related to the work and for which the Contractor is liable imposed by any governmental authority." The contract provided that Triple F would receive ten percent of the total cost of the project in consideration for the performance of the contract. The contract did not contain a provision for the sale of material independent of the charge for labor or a clause for the passage of title of the materials to United Presbyterian Home before the installation of the materials. In addition, the contract did not contain a clause which set up a separate pool of funds by the exempt organization for the payment of Triple F's suppliers and vendors.

4. The foregoing contract was prepared by the architect for United Presbyterian Home.

5. Triple F did not include sales tax in its bid for the foregoing contract.

6. The Audit Division concluded that Triple F's purchases and its sub-contractors' purchases were subject to sales and use tax because of the form of the contract between Triple F and United Presbyterian Home and because Triple F showed a cost of goods sold section on its Federal tax return.

7. On audit, the Audit Division examined Triple F's purchases of \$19,585.26 from January through June, 1973. The Audit Division determined that purchases of \$9,235.70 were subject to sales and use tax. This resulted in 47 percent of Triple F's purchases being subject to tax during the test period. This percentage was then applied to the total job cost purchases during the audit period resulting in purchases subject to tax of \$103,962.59.

8. An analysis of the total purchases of the sub-contractors of \$1,767,964.41 for the test period January 1, 1973 through December 31, 1973 generated purchases subject to tax of \$69,587.80. This resulted in 4 percent of the sub-contractors' purchases being subject to tax during the test period. This percentage was then applied to the total purchases of the sub-contractors of \$7,726,082.00 resulting in sub-contractor purchases subject to tax in the amount of \$309,043.28.

9. The foregoing resulted in total purchases of \$413,005.87 being subject to tax and additional tax liability of \$28,910.41.

10. The auditors who conducted the foregoing audit were not denied access to any documents in Triple F's possession.

11. Triple F entered into the contract with United Presbyterian Home under the impression that it was an agency contract. When this contract was entered into, Triple F sent its vendors and suppliers a letter which stated in pertinent part:

"To Vendors, Suppliers

Re: United Presbyterian Home
at Syosset, Inc.
Graham House
Evangelical House
Woodbury, New York

We are general contractor agent for the referred project. United Presbyterian Home at Syosset is a tax exempt organization for whom we will perform our services on a cost plus a fee basis.

All invoicing for the referred project should be as:

United Presbyterian Home at Syosset, Inc.
c/o Triple F Building Co., Inc., agent
Woodbury Road
Woodbury, New York

There is enclosed exempt organization certification and contractor exempt purchase certificate for your files.

Very truly yours,

Dominick LaRosa,
Comptroller"

12. As indicated by the foregoing letter, vendors and suppliers were given an exemption certificate provided by United Presbyterian Home. The vendors and suppliers who complied with the instructions in the letter addressed their bills to the United Presbyterian Home in care of Triple F as agent.

13. Generally, the vendors or suppliers did not charge sales tax on the items that Triple F purchased. When a vendor or supplier did charge sales tax on an item, Triple F would, as a standard operating procedure, not pay tax on the item.

14. Triple F received payment based upon job progress and percentage of completion of the contract. Therefore, Triple F would not be paid until after a portion of the work was performed and materials used.

15. On a monthly basis Triple F would furnish United Presbyterian Home with a requisition for payment based upon the progress of construction. United Presbyterian Home would then provide the appropriate amount of money to Triple F which would then pay the sub-contractors. On one or two occasions United Presbyterian Home advanced money to Triple F in anticipation of price increases.

16. During the period in issue Triple F worked only for the United Presbyterian Home.

17. Triple F ceased doing business on December 23, 1975.

CONCLUSIONS OF LAW

A. "That where the evidence indicates at the time of the contract a) the contracting parties were aware of the exempt status of the organization, b) the parties intended to exclude taxes on purchases for the performance of the contract and c) no sales tax was charged the exempt organization, no sales tax is applicable." Matter of Certified Fence Corp., State Tax Commission, August 17, 1979 citing Matter of Sweet Assoc. v. Gallman, 36 A.D.2d 95, aff'd. 29 N.Y.2d 902; see Matter of Joseph Davis, Inc., State Tax Commission, December 13, 1978, determination confirmed sub nom Matter of Davis v. Tully, 76 A.D.2d 946, mot. for lv. to app. den. 51 N.Y.2d 706).

B. That the foregoing conditions have been satisfied. Therefore, the materials purchased and used by Triple F in fulfilling its contract with United Presbyterian Home are not subject to sales and compensating use taxes.

C. That in view of Conclusion of Law "B," it is unnecessary to determine whether the audit procedures employed by the Audit Division in an examination of Triple F Building Co., Inc.'s books and records were proper.

D. That the petitions of Triple F Building Co., Inc., Franklin L. Frank and Leonard I. Frank are hereby granted.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER