

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Gallin & Sons, 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 10/1/71-9/30/74. :

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon John Gallin & Sons, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

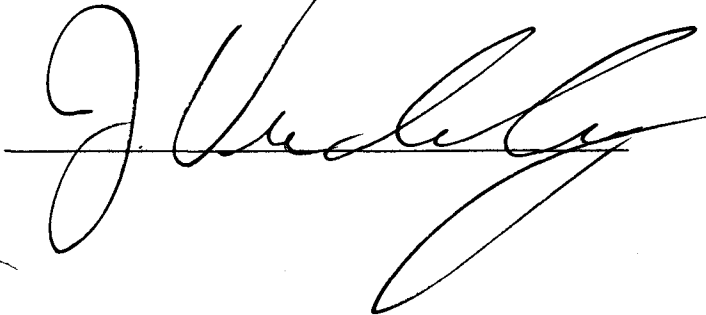
John Gallin & Sons, Inc.
40 Gold St.
New York, NY 10038

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
4th day of August, 1982.





STATE OF NEW YORK

STATE TAX COMMISSION

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of :
John Gallin & Sons, 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 10/1/71-9/30/74. :

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Gerard W. Cunningham the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerard W. Cunningham
Cunningham & Lee
40 Gold St.
New York, NY 10038

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
4th day of August, 1982.

Cornie A. Haglund

J. Vredenburg

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

August 4, 1982

John Gallin & Sons, Inc.
40 Gold St.
New York, NY 10038

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) 1139 & 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
Gerard W. Cunningham
Cunningham & Lee
40 Gold St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN GALLIN & SON, 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 October 1,	:	
1971 through September 30, 1974.	:	

Petitioner, John Gallin & Son, Inc., 40 Gold Street, New York, New York 10038, 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 October 1, 1971 through September 30, 1974 (File No. 21062).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1980 at 1:15 P.M. Petitioner appeared by Gerard W. Cunningham, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of sales tax paid on the service of debris removal from a construction or demolition site.

FINDINGS OF FACT

1. Petitioner was a general contractor engaged in the construction of capital improvements to real property. A small amount of demolition work was also performed. Petitioner hired various carters to remove debris from its construction sites and paid sales tax on such services.

2. On March 19, 1975, petitioner, John Gallin & Son, Inc., filed an Application for Credit or Refund of State and Local Sales and Use Tax for the period October 1, 1971 through September 30, 1974. Petitioner claimed sales tax of \$6,507.04 was erroneously paid on the service of debris removal from construction and demolition sites.

3. Petitioner's application was timely filed for all periods. A consent extending the period of limitation for assessment was executed to December 19, 1975 on a field audit.

4. The Audit Division denied petitioner's claim for refund on May 25, 1977 on the grounds that the sales tax was correctly paid. It held that 20 NYCRR 527.7(b)(2) effective September 1, 1976 clarified the Department's position on debris removal services and reads as follows:

"All services of trash, garbage or debris removal are taxable, whether from inside or outside of a building, a construction site or vacant land."

5. On November 4, 1974 and February 28, 1975, in response to requests from the law offices of Lee, Meagher, Cunningham and Lee for an opinion regarding the application of sales tax on debris removal services, counsel for the Department of Taxation and Finance issued the following opinions in summary:

That the receipts from the service of removal of debris resulting from demolition and construction of a capital improvement are not subject to sales tax since such service is a constituent part of the services performed in adding to or improving real property, property or land by a capital improvement and, therefore, such receipts are not subject to the sales tax imposed by section 1105(c)(5) of the Tax Law.

On that basis, petitioner requested a refund of sales tax paid for the period October 1, 1971 through September 30, 1974.

6. During the period in issue, petitioner included in its contract bids any sales tax anticipated to be paid on debris removal services with the intent

to refund the amount of the tax to its customers upon a favorable ruling. Petitioner offered no evidence to show that its customers contracts were subsequently reduced upon receipt of counsel's opinion.

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law imposes sales tax on the service of maintaining, servicing or repairing real property as distinguished from adding to or improving such real property, property or land by a capital improvement.

B. That the sales tax status of a service performed upon real property, property or land is governed by the "end result" of the service [20 NYCRR 527.7(b)(4)].

C. That since the completion of a capital improvement project cannot be accomplished without removal of the construction and demolition debris, the service thereof falls well within the "end result" test for exemption from sales tax (Building Contrs. Assoc. v. Tully ____ A.D.2d ____).


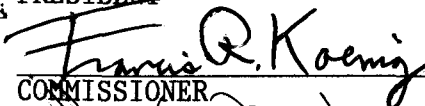
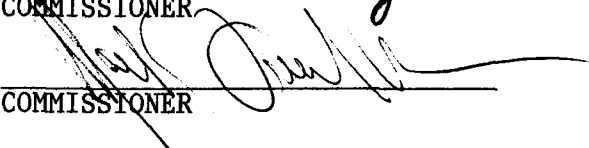
D. That in view of the total absence of any statutory support for an interpretation of maintaining, servicing or repairing real property to include removal of construction and demolition debris from the site of a capital improvement, Regulation 20 NYCRR 527.7(b)(2), as thus applied, is invalid (Building Contrs. Assoc. v. Tully, supra).

E. That the petition of John Gallin & Son, Inc. is accordingly granted. The Audit Division is hereby directed to refund the sales taxes paid by petitioner

on the service of debris removal together with such interest as may be lawfully owing.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER