

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Elmer C. Johnson, Jr. :
d/b/a Crown Lumber & Supply Co. : 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 :
12/1/75-11/30/78. :

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Elmer C. Johnson, Jr., d/b/a Crown Lumber & Supply Co. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Elmer C. Johnson, Jr.
d/b/a Crown Lumber & Supply Co.
101 Main St.
Fishkill, NY 12524

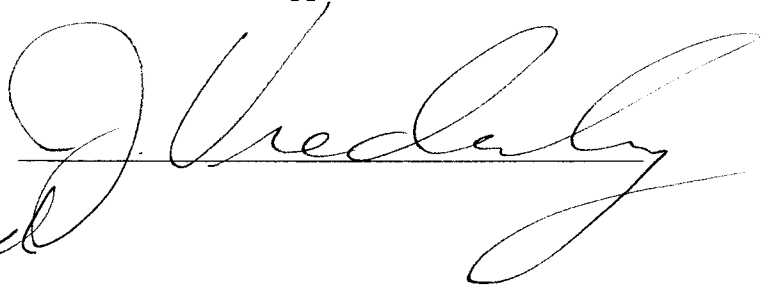
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
11th day of June, 1982.



Connie A. Hagelund



Jay Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Elmer C. Johnson, Jr.	:	
d/b/a Crown Lumber & Supply Co.	:	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 12/1/75-11/30/78	:	

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Thomas R. DiGiovanni the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas R. DiGiovanni
P.O. Box 2553, 175 Robins Ave.
Newburgh, NY 12550

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
11th day of June, 1982.

Connie A. Hyland

J. Vredenburg

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

June 11, 1982

Elmer C. Johnson, Jr.
d/b/a Crown Lumber & Supply Co.
101 Main St.
Fishkill, NY 12524

Dear Mr. Johnson:

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
Thomas R. DiGiovanni
P.O. Box 2553, 175 Robins Ave.
Newburgh, NY 12550
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ELMER C. JOHNSON, JR.	:	DECISION
d/b/a CROWN LUMBER AND SUPPLY COMPANY	:	
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,	:	
1975 through November 30, 1978.	:	

Petitioner, Elmer C. Johnson, d/b/a Crown Lumber and Supply Company, 101 Main Street, Fishkill, New York 12524, 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 December 1, 1975 through November 30, 1978 (File No. 26189).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on October 10, 1980, at 9:15 A.M. Petitioner appeared by Thomas R. DiGiovanni, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether the Audit Division, on audit, properly disallowed non-taxable sales made by petitioner.

FINDINGS OF FACT

1. On March 9, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Elmer C. Johnson, Jr. d/b/a Crown Lumber and Supply Company covering the period December 1, 1975

through November 30, 1978. The Notice was issued as a result of a field audit and asserted tax due of \$10,733.67 plus penalties and interest.

2. As a result of a conference, the Audit Division cancelled tax due of \$720.35. Petitioner agreed to tax due of \$3,875.95. The remaining amount of tax at issue is therefore \$6,137.37.

3. Petitioner did not issue sales invoices for cash sales made. Petitioner relied on the total amount of tax collected from cash register tapes, divisible by the tax rate, to determine the amount of its taxable sales.

4. On audit, the Audit Division reviewed sales made during the period March 1 through May 31, 1978. It disallowed non-taxable cash sales made in the amount of \$8,267.89 due to unsubstantiation as to whom they were sold. Credit sales made by petitioner were reviewed for the same period and \$585.49 in non-taxable sales were disallowed due to unsubstantiation by an exemption certificate. The disallowance represented 67.09017 percent of the non-taxable sales made by petitioner in the three-month period. The Audit Division applied the above ratio to the non-taxable sales reported for the audit period and determined additional taxable sales of \$133,159.83 and tax due thereon of \$6,617.72. Petitioner further substantiated non-taxable credit sales thereby reducing the additional tax due to \$6,137.37.

5. Petitioner argued that 97 percent of his credit sales were substantiated by exemption certificates; therefore, the same rate of accuracy should have been applied to his cash sales. Petitioner followed the same procedure of obtaining exemption certificates on cash sales as with credit sales.

6. The Audit Division has not shown that the petitioner's records were inadequate to determine the exact tax liability. The field audit report of the Audit Division noted the condition of petitioner's records as "good".

7. Petitioner did not raise the issue of application of penalties.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law states that it shall be presumed that all receipts for property or services subject to tax are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax unless a properly completed exemption certificate is obtained. That petitioner's cash sales were not discernible as to whom such sales were made for the purpose of verifying their non-taxability. Petitioner did not sustain the burden of proof necessary to show that the non-taxable cash and credit sales disallowed by the Audit Division in Finding of Fact "4" were not subject to tax.

B. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44, 411 N.Y.S. 2d 41). That petitioner's records were adequate for the determination of the exact amount of its unsubstantiated exempt cash and credit sales for the entire audit period without the need of a test period; therefore, the amount of tax due is limited to that found in the test period.

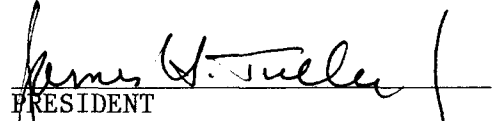
C. That the petition of Elmer C. Johnson, Jr. d/b/a Crown Lumber and Supply Company is granted pursuant to Finding of Fact "2" and to the extent indicated in Conclusion "B" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 9, 1979 with applicable penalties and interest

thereon; and that, except as so granted, the petition is in all other respects denied.

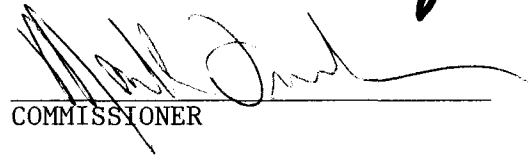
DATED: Albany, New York

JUN 11 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER