

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lewis & Valentine Nurseries, 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 9/1/72-8/31/76. :

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 5th day of May, 1982, he served the within notice of 1138 & 1243 by certified mail upon Lewis & Valentine Nurseries, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lewis & Valentine Nurseries, Inc.
627 Cedar Swamp Rd.
Glen Head, NY 11545

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
5th day of May, 1982.

Bernie A. Hayden

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lewis & Valentine Nursuries, 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 9/1/72-8/31/76 :

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 5th day of May, 1982, he served the within notice of 1138 & 1243 by certified mail upon Leon Bizar the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leon Bizar
99 Jericho Tpke.
Jericho, NY 11753

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
5th day of May, 1982.

Samuel A. Gayland

J. Vredenburg

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

May 5, 1982

Lewis & Valentine Nurseries, Inc.
627 Cedar Swamp Rd.
Glen Head, NY 11545

Gentlemen:

Please take notice of the 1138 & 1243 of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 4 months 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 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
Leon Bizar
99 Jericho Tpke.
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LEWIS & VALENTINE NURSERIES, 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 September 1, 1972	:	
through August 31, 1976.	:	

Petitioner, Lewis & Valentine Nurseries, Inc., 627 Cedar Swamp Road, Glen Head, New York 11545, 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 September 1, 1972 through August 31, 1976 (File No. 19759).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commisison, Two World Trade Center, New York, New York, on May 16, 1979 at 9:40 A.M. and was thereafter continued before Edward Goodell, Hearing Officer, at the same location, on November 1, 1979 at 2:00 P.M. Petitioner appeared by Leon Bizar, Esq. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund and Aliza Schwadron, Esqs., of counsel).

ISSUES

I. Whether \$12,673.82 of the credit balance in petitioner's general ledger account "New York State Sales Tax Payable" was correctly capitalized by the Audit Division to arrive at additional taxable sales.

II. Whether petitioner's out-of-state sales were correctly determined by the Audit Division.

III. Whether petitioner's expense purchases subject to use tax were correctly determined by the Audit Division.

IV. Whether petitioner's machinery and equipment purchases subject to use tax were correctly determined by the Audit Division.

FINDINGS OF FACT

1. Petitioner, Lewis & Valentine Nurseries, Inc. is a landscape contractor whose principal place of business is 627 Cedar Swamp Road, Glen Head, New York. Petitioner is mainly engaged in the installation of shrubbery and nursery plants which result in capital improvements to real property. In addition, petitioner performs maintenance work and sells horticulture products to homeowners as well as to other contractors.

2. Petitioner filed New York State and local sales and use tax returns for the taxable period September 1, 1972 through August 31, 1976.

3. Petitioner executed consents that extended the period of limitation for assessment of sales and use taxes for the taxable period September 1, 1972 through May 31, 1976 to December 20, 1977.

4. On May 12, 1977, 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 for taxes due of \$47,232.52, plus penalty and interest of \$22,288.38, for a total of \$69,520.90 for the taxable period September 1, 1972 through August 31, 1976.

5. Petitioner timely filed a petition for a hearing to review the aforesaid notice of determination.

6. On audit, petitioner's general ledger, cash receipts and disbursements journals, Federal income tax returns, sales and purchase registers, sales and purchase invoices, contracts, and sales tax returns were examined.

7a. The examination revealed that petitioner failed to pay the State \$34,348.49 posted in the general ledger under the account "New York State Sales

Tax Payable". The auditor capitalized this amount (\$34,348.39 divided by 107%) to arrive at additional taxable sales of \$487,778.03.

b. The examination further revealed that petitioner had gross sales of \$5,714,024.88. Petitioner had reported taxable sales of \$746,646.00. The auditor deducted from the gross sales the taxable sales reported and the additional taxable sales as determined in "a" above to arrive at alleged non-taxable sales of \$4,479,600.85. The auditor determined that of said non-taxable sales, the out-of-state sales, resale sales and capital improvement sales to exempt organizations totaled 72.0 percent or \$3,225,312.61. The auditor determined that the cost of materials used in these sales represented 34.5 percent of the sales or \$1,112,732.85. The auditor determined that of the total material purchases, the tax was paid on 15.51 percent or \$305,936.00 and that \$425,876.29 was sold in a taxable sale. These amounts were deducted from the total material purchases of \$1,972,509.79 to arrive at material purchases subject to use tax of \$127,964.65.

c. An analysis of expense purchases for the month of May 1975 revealed that .0062 percent thereof was subject to use tax against sales for the month. The auditor applied said percentage against sales for the audit period to arrive at expense purchases subject to use tax of \$35,427.00.

d. A complete examination of the fixed assets accounts revealed that petitioner had not paid tax on the purchase of machinery and equipment. The auditor arrived at machinery and equipment purchases subject to use tax of \$13,628.50.

8. Petitioner's general ledger account "New York State Sales Tax Payable" reflects amounts of money collected for New York State sales tax and amounts billed on sales invoices for sales tax. The account had a credit balance on

August 31, 1972 of \$17,871.31. After the sales and use tax returns had been filed for the tax period June 1, 1972 through August 31, 1972 in September 1972, a credit balance of \$12,673.82 was maintained.

9a. Petitioner's material purchases on which the Audit Division assessed use tax represent items of tangible personal property purchased for use or consumption in capital improvement projects in this State with persons other than exempt organizations.

b. As a result of the May 15 hearing, the Audit Division extended its examination of material purchases. The first examination had shown, based on a test of the month of May, 1975, that out-of-state sales constituted three tenths of one percent of the nontaxable sales or a total of \$13,438.00. On review, the auditor examined each sale made during the period at issue that the petitioner claimed to be an out-of-state sale and found the actual out-of-state sales to be \$332,477.00.

10. Petitioner offered no documentation or other substantial evidence to refute the Audit Division's findings that additional use tax was due on its expense purchases and machinery and equipment purchases.

11. The Audit Division failed to establish that petitioner's records were insufficient to determine the exact amount of tax due on expense purchases.

CONCLUSIONS OF LAW

A. That section 1147(b) of the Tax Law provides, in part, "except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return."

B. That since it has not been shown that petitioner filed a willfully false or fraudulent return for the period June 1, 1972 through August 31, 1972,

the Audit Division can not capitalize the credit balance of \$12,673.82 in petitioner's general ledger account "New York State Sales Tax Payable".

C. That the additional taxable sales for which petitioner is liable for unpaid sales tax is \$306,725.00, instead of \$487,778.03.

D. That the Audit Division erred in its original determination of petitioner's out-of-state sales. The error, however, was corrected on the Division's re-examination, as set forth in Finding of Fact "9b", and petitioner's actual out-of-state sales are \$332,477.00, instead of \$13,438.00.

E. That due to the corrections in the audit as set out in Conclusions of Law "C" and "D" above, the amount of purchases of materials subject to use tax is \$32,042.00 instead of \$127,964.65.

F. That lacking a showing that petitioner's purchase records were incomplete or insufficient, the test adopted by the Audit Division to determine petitioner's expense purchases subject to use tax is incorrect. Petitioner's liability is limited to the amount found due for the test period of May 1975.

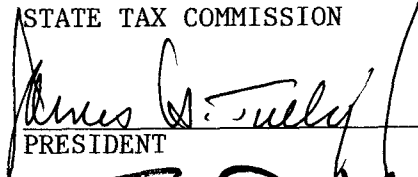
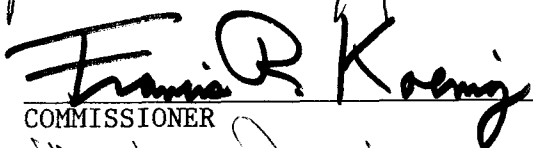
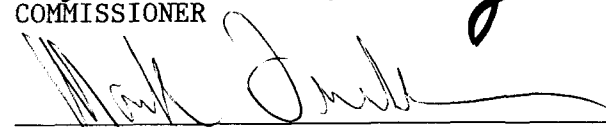
G. That the burden of proof is upon the petitioner and the petitioner has not shown that the Audit Division erred in the determination of its purchase of machinery and equipment subject to use tax.

H. That the penalties and interest as assessed are sustained. Petitioner has not shown reasonable cause for not paying over the taxes found due.

I. That the petition of Lewis & Valentine Nurseries, Inc. is granted to the extent indicated in Conclusions of Law "B", "C", "D", "E", and "F". The Audit Division is hereby directed to accordingly modify the Notice of

Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1977. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
MAY 05 1982

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER