

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of		
Lew-Port Construction Corp.	:	
		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 9/1/74-2/28/78.	:	

State of New York
County of Albany

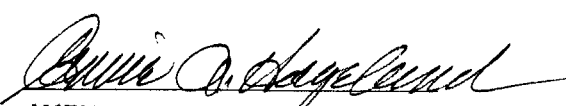
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Lew-Port Construction Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

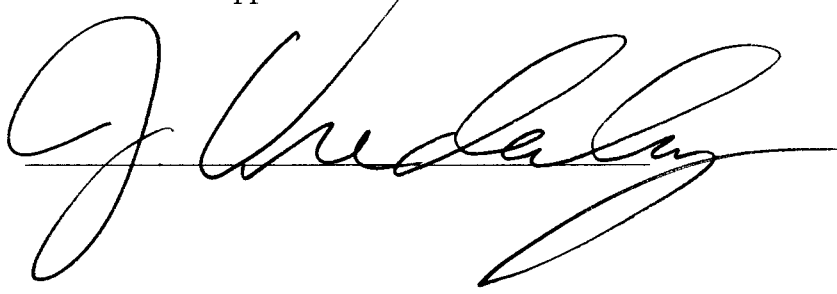
Lew-Port Construction Corp.
Lew-Port Industrial Park
Balmer Road
Youngstown, NY 14174

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
14th day of December, 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 :
Lew-Port Construction Corp. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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State of New York
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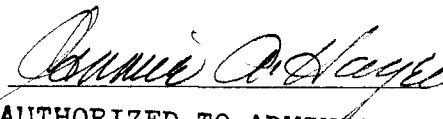
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Lawrence E. Salada the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence E. Salada
Salada, Wynne, Loncto & Kling, P.C.
256 Third St.
Niagara Falls, NY 14303

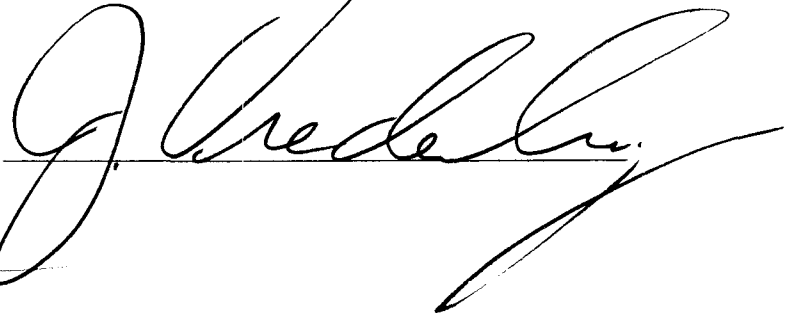
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 14, 1982

Lew-Port Construction Corp.
Lew-Port Industrial Park
Balmer Road
Youngstown, NY 14174

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 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
Lawrence E. Salada
Salada, Wynne, Loncto & Kling, P.C.
256 Third St.
Niagara Falls, NY 14303
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LEW-PORT CONSTRUCTION CORP.	:	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,	:	
1974 through February 28, 1978.	:	

Petitioner, Lew-Port Construction Corp., Lew-Port Industrial Park, Balmer Road, Youngstown, New York 14174, 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, 1974 through February 28, 1978 (File No. 27896).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 22, 1981, at 2:45 P.M. Petitioner appeared by Lawrence E. Salada, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that certain equipment rentals were subject to tax.

11. Whether petitioner's gross sales were subject to tax.

FINDINGS OF FACT

1. On July 20, 1979, 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, Lew-Port Construction Corp. covering the period September 1, 1974 through February 28, 1978 for taxes due of \$18,871.98, plus penalty and interest of \$11,479.45, for a total of \$30,351.43.

2. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period September 1, 1974 through November 30, 1978, to December 20, 1979.

3. Petitioner is a general contractor. During the period at issue, petitioner was primarily engaged in performing construction projects for Lew-Port Central School District, Bell Aerospace and Chem-trol Pollution Services.

4. On audit, the Audit Division determined from an examination of available purchase invoices, accounts payable ledger and cash disbursements journal that petitioner failed to pay a sales or use tax on purchases of materials, supplies and equipment rentals used in the performance of the above construction contracts. The Division found that petitioner's contracts with Lew-Port Central School District and Bell Aerospace were tax exempt and therefore did not assert tax on purchases relating to said contracts. The purchases held subject to tax amounted to \$112,156.09. Petitioner does not contest the taxes assessed thereon of \$7,850.90.

Additionally, the Audit Division held petitioner liable for tax on equipment rentals of \$85,000.00 which did not appear in petitioner's books and records. The auditor testified that the basis for imposing a tax on such rentals was a conversation with R. Thomas Burgasser, attorney, in which he showed the auditor work papers calculating the number of hours that equipment was rented. Mr. Bergasser stated that petitioner filed a lawsuit against Chem-trol Pollution Services seeking damages of \$85,000.00 which represented equipment rented by petitioner for use in performing a contract with Chem-trol for the construction of a landfill.

The Audit Division also determined that petitioner's gross receipts of \$72,444.00 were taxable sales because contracts were not provided to ascertain whether the nature of the work performed by petitioner was a capital improvement.

5. Petitioner argued that all equipment rentals for the Chem-trol contract were included by the auditor in his examination of the disbursements journal and that the additional \$85,000.00 was merely the amount of damages sought from Chem-trol which included not only rentals but also man hours and lost revenue.

Petitioner was given the opportunity to substantiate this argument; however, no evidence was submitted.

6. Petitioner's books and records were insufficient for the Audit Division to determine the actual amount of equipment rented for the Chem-trol landfill contract, or that such rentals were recorded in the books and records.

7. During the period at issue, petitioner performed the following contracts, and received the following payments which were considered taxable sales by the Audit Division.

<u>DATE</u>	<u>OWNER</u>	<u>AMOUNT</u>	<u>DESCRIPTION OF WORK</u>
2/10/75	Unicare	\$ 295.00	opening up cement block wall and installing door
4/28/75	Canadisin Custom Packaging Co.	\$ 6,000.00	construct concrete ramp and ramp drain
3/24/76	Chem-trol Pollution Services, Inc.	\$ 2,150.00	final payment on the construction of large resevoir
8/19/76	Chem-trol Pollution Services, Inc.	\$26,957.50	first installment on the construction of landfill
8/24/76	Chem-trol Pollution Services, Inc.	\$ 9,940.00	supply and install 18" valve, cemented into concrete culvert; install berm and grade entire area bounded by new berm; excavate ditch and install berm

9/2/76	Chem-trol Pollution Services, Inc.	\$ 6,850.00	grade, stone, cut ditch for drainage; landscape, clean and fill ditch; remove silt, build-up berm, cut swale ditches for drainage, dig sump hole
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The nature of the work performed in the foregoing contracts as well as remaining contracts included in the receipts of \$72,444.00, constituted capital improvements to real property.

CONCLUSIONS OF LAW

A. That the Audit Division determined additional sales and use taxes due from such information as was available as provided in section 1138(a) of the Tax Law.



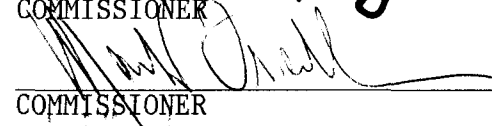
That there was a reasonable basis for the Audit Division to include \$85,000.00 for additional equipment rentals in the determination and that petitioner has failed to meet its burden of proving such determination was incorrect.

B. That petitioner's gross receipts were from capital improvement work rather than from services subject to tax. Therefore, the additional taxes of \$5,071.08 imposed on receipts of \$72,444.00 are cancelled.

C. That the petition of Lew-Port Construction Corp. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 20, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER