

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Albert H. Mast
d/b/a Clarence Pride Greenhouse

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
3/1/75-8/31/78.

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 2nd day of June, 1982, he served the within notice of Decision by certified mail upon Albert H. Mast, d/b/a Clarence Pride Greenhouse the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert H. Mast
d/b/a Clarence Pride Greenhouse
5445 Salt Rd.
Clarence, NY 14031

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
2nd day of June, 1982.

Connie A. Hagedorn

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Albert H. Mast :
d/b/a Clarence Pride Greenhouse : AFFIDAVIT OF MAILING
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of a Determination or a Refund of Sales & Use Tax :
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Period 3/1/75-8/31/78 :

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 2nd day of June, 1982, he served the within notice of Decision by certified mail upon Fred Friedman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Friedman
Friedman & Friedman
74 Main St.
Akron, NY 14001

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
2nd day of June, 1982.

James R. Haglund

Jay Vredenburg

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

June 2, 1982

Albert H. Mast
d/b/a Clarence Pride Greenhouse
5445 Salt Rd.
Clarence, NY 14031

Dear Mr. Mast:

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
Fred Friedman
Friedman & Friedman
74 Main St.
Akron, NY 14001
Taxing Bureau's Representative

STATE TAX COMMISSION

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 23, 1981 at 9:15 A.M. Petitioner appeared by Fred Friedman, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

- I. Whether materials purchased by petitioner and used in the construction of a "Harvestall" grain bin are subject to sales or use tax.
- II. Whether petitioner is entitled to a credit or refund for sales tax paid on electricity used to operate fans in a grain bin.

FINDINGS OF FACT

1. Petitioner, Albert H, Mast d/b/a Clarence Pride Greenhouse, operated a greenhouse, as well as a 1,200 acre farm on which he grows corn for sale as feed.

2. On September 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 covering the period March 1, 1975 through August 31, 1978 for taxes due of \$2,956.85, plus penalty and interest of \$3,191.24, for a total of \$6,148.09 as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
2-29-76	(120.33)	-0-	\$ 35.80
5-31-76	\$ 583.63	\$ 145.91	227.62
8-31-76	(137.12)	-0-	34.97
11-30-76	(192.97)	-0-	45.11
2-28-77	(565.74)	-0-	120.22
5-31-77	(429.76)	-0-	82.19
8-31-77	(473.05)	-0-	80.42
11-30-77	4,104.87	1,026.22	862.02
2-28-78	1,098.93	241.76	197.81
5-31-78	(645.02)	-0-	68.53
8-31-78	(266.59)	-0-	22.66

The above notice improperly asserts interest due from petitioner in those periods in which the audit disclosed tax credits. Petitioner is entitled to credit for interest applicable to the sales tax paid erroneously.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period at issue, to December 20, 1979.

4. The audit conducted by the Audit Division disclosed that petitioner failed to pay a sales or use tax on purchases of tangible personal property used in the construction of three "Harvestall" grain bins which resulted in taxes due of \$7,102.55. Petitioner was given credit of \$4,145.70 for sales tax paid on electricity, gas and diesel fuel used directly and exclusively in his farming operations, leaving additional taxes due of \$2,956.85. The Audit Division did not allow a credit of \$231.04 representing that portion of sales tax paid on electricity used to operate fans in the grain bins.

5. During the period at issue, petitioner purchased materials for three "Harvestall" grain bins. The grain bins were erected by petitioner and bolted to a concrete foundation. A "Harvestall" grain bin is constructed of corrugated galvanized steel panels which when completed is approximately 45 feet high and 48 feet in diameter.

6. The "Harvestall" processes the corn from field condition when harvested into a salable condition by decreasing the moisture content in the corn. This drying process consists of circulating air by fans through the grain bin for two to three months. The air is sometimes heated by infrared lights to hasten the process.

7. Petitioner argued that the grain bins are not assessed for real property tax purposes nor are they subject to a mortgage lien. On that basis petitioner concluded that the grain bins when erected, remain tangible personal property and that such tangible personal property is used directly and predominantly in the production of corn for sale and therefore exempt from tax by virtue of section 1115(a)(6) of the Tax Law.

8. Reasonable cause existed for petitioner's failure to pay the taxes at issue.

CONCLUSIONS OF LAW

A. That section 1115(a)(6) of the Tax Law provides in part, an exemption from sales and use tax for "[t]angible personal property, except property incorporated in a building or structure (emphasis added)..., for use or consumption directly and predominantly in the production for sale of tangible personal property by farming...".

B. That a "Harvestall" grain bin when erected, constitutes a "building or structure" within the meaning and intent of section 1115(a)(6) of the Tax Law;

that petitioner purchased tangible personal property which was incorporated in a structure and therefore, said purchases are not exempt from the taxes imposed under sections 1105(a) and 1110 of the Tax Law.

That a statute or regulation authorizing an exemption from taxation is to be strictly construed against the taxpayer (Matter of Grace v. New York State Tax Commission, 37 NY 2d 193).

C. That the electricity used to operate the fans for the drying process referred to in Finding of Fact "6" is consumed directly and exclusively in the production of tangible personal property for sale and thus is exempt from tax pursuant to section 1115(c) of the Tax Law. Accordingly, petitioner is entitled to credit or refund of \$231.04.

D. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

E. That the petition of Albert H. Mast d/b/a Clarence Pride Greenhouse is granted to the extent indicated in Conclusions of Law "C" and "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1979 to conform with said conclusions as well as correct the interest computations noted in Finding of Fact "2"; and that, except as so granted, the petition is in all other respects denied.

DATED, Albany, New York

JUN 2 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER