

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

December 14, 1982

Thomas Piscitell  
Officer of Piscitell Block Co., Inc.  
4949 Carnarvon Rd.  
Syracuse, NY 13215

Dear Mr. Piscitell:

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  
William H. Bogart  
Bogart & Associates  
Suite 1013, State Tower Bldg.  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PISCITELL BLOCK CO., INC. AND	:	
MICHAEL PISCITELL AND THOMAS PISCITELL,	:	DECISION
INDIVIDUALLY AND AS OFFICERS	:	
	:	
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.	:	

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Petitioners, Piscitell Block Co., Inc., and Michael Piscitell and Thomas Piscitell, individually and as officers, 501 Plum Street, Syracuse, New York 13202, 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 Nos. 27943, 27955 and 27956).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Syracuse, New York, on April 29, 1981, at 1:15 P.M. Petitioner appeared by William H. Bogart, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the amount of sales and use tax liability of petitioners for the period under review.

FINDINGS OF FACT

1. On March 9, 1979, a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes was signed for Piscitell Block Co., Inc. ("the Corporation") by an authorized attorney which extended the period of limitation

for assessment for the taxable period of December 1, 1975 through February 29, 1976 to June 20, 1979.

2. On June 8, 1979, based on an audit of records, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the Corporation for the period of December 1, 1975 through November 30, 1978 in the amount of \$136,951.79, plus penalty of \$23,631.37 and interest of \$21,968.34, for a total of \$182,551.50. On June 8, 1979 the Audit Division also issued similar notices against Michael Piscitell and Thomas Piscitell, as officers of Piscitell Block Co., Inc.

3. The corporation was in the wholesale and retail building supply business. An audit of the corporation's records was conducted in April, 1979.

4. The auditor tried unsuccessfully to reconcile sales and cash receipts during the periods in issue. A closer look at the cash receipts journal revealed large cash deposits made several times a week which referred to a "trucking account". These turned out to be short term charge sales and over-the-counter cash sales.

At first, the auditor was told that the amount was actually trucking. No substantiation or detail were presented. Upon pressing the issue, he was shown a drawer full of sales invoices which purportedly represented the cash sales. Some of these invoices were checked. However there was no way of knowing whether all invoices were in the drawer. The entries which the auditor checked appeared in the cash receipts journal but were omitted from the sales tax returns.

For the month of September 1977, the auditor found that 10 percent of the accounts receivable were tax exempt. He then applied this ratio to the cash sales which included the trucking account to ascertain the corporation's

tax liability. For the three year audit period unreported cash receipts were determined to be \$1,352,975.98. This amounted to \$79,661.19 additional tax on the cash sales.

5. The auditor acknowledged that the books, records, and journals of Piscitell Block Co., Inc. were available. However he could not determine whether all invoices were available when shown the "drawer full" which he checked and found that not all entries were made on sales tax returns. No explanation was offered for this and no specific disagreement was indicated with the audit findings.

6. A use tax of \$147.28 was determined to be due on asset purchases which the petitioner has not contested.

7. The Corporation did not file sales tax returns for the period April 1, 1978 through November 30, 1978. Based on tax accrued in the sales journal, \$48,730.02 was found to be due for sales tax. Since no detail was available for total sales, the auditor used the 90 percent taxable ratio to 10 percent nontaxable to prorate sales on the long-term credit sales. Petitioners' representative acknowledged that the amount picked up on credit sales was not in issue.

8. During the period in issue, the Corporation constructed a building for its own use and which it now occupies. Invoices indicated that a use tax in the amount of \$8,005.51 was due on purchases of \$112,103.41 (at a 7 percent sales tax rate). In addition, there were certain purchases of an expense nature on which the Corporation failed to pay use or sales tax. These purchases amounted to \$5,825.57 and tax was found to be due thereon.

9. Petitioners claimed that the cash deposits were the result of rebates from suppliers, money transferred to the Corporation as a loan from officers,

some refunds from suppliers on overpayments and payments from the use of their equipment for snow plowing. It was claimed was that the tax rate ranged between four and six percent and not 7 percent which the auditor applied.

10. The Corporation's accountant sampled some 40 to 50 of the invoices. These represented deposits in the "trucking account". He could not estimate the percentage of invoices checked. He stated that there was a problem with their filing. He believed all the invoices were there but couldn't "honestly" say. He acknowledged that "accounting-wise" he would object to the "commingling" of certain items in the journal entitled "trucking" and that it would take an accountant a year to review in order to make a proper determination. The accountant acknowledged that the "taxable element of sales, if any, was not reported on the tax returns".

11. Petitioner offered no documentary or other substantive evidence that the "trucking account" represented loans from officers, and that the computations of the state auditor did not follow accepted accounting principles and procedures.

#### CONCLUSIONS OF LAW

A. That evidence presented at the hearing by the auditor showed that the books and records were inadequate and were erroneous, as not all sales were listed. The auditor also utilized the Corporation's invoices to show that sales tax returns which were filed did not reflect all sales and that for part of the period in issue no returns were filed. The error rate was derived from the detailed audit of a selected period and was accepted for some schedules. This is within the mandate of section 1138 of the Tax Law that:

"(a)(1) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available."

The Audit Division properly determined the amount of sales and use tax liability of petitioners for the period under review.

B. That the petition of Piscitell Block Co., Inc., and Michael Piscitell and Thomas Piscitell, individually and as officers, is denied and the Notices of Determination issued on June 8, 1979 are sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Piscitell Block Co., Inc. and : AFFIDAVIT OF MAILING  
Michael Piscitell and Thomas Piscitell, :  
Individually and as Officers :  
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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Piscitell Block Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

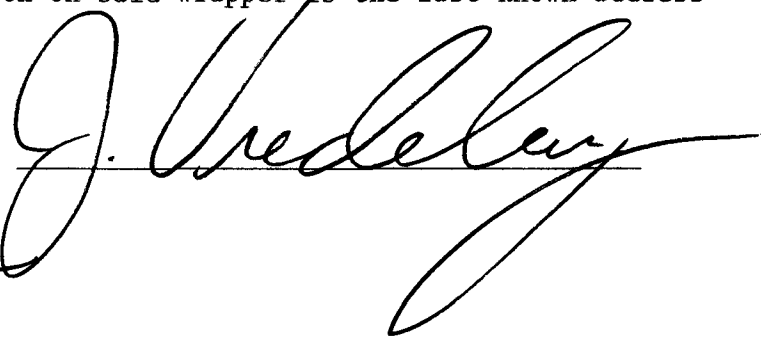
Piscitell Block Co., Inc.  
501 Plum St.  
Syracuse, NY 13202

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

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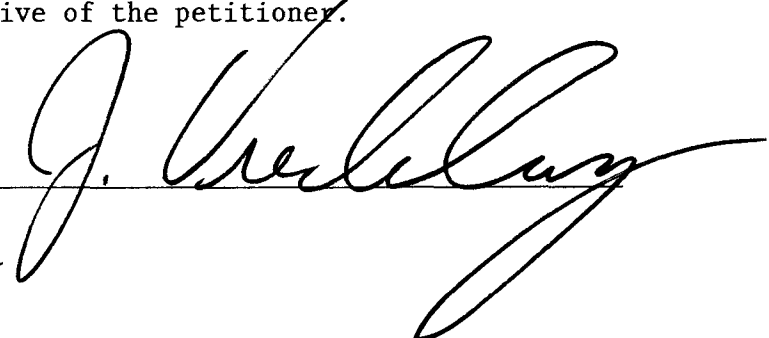
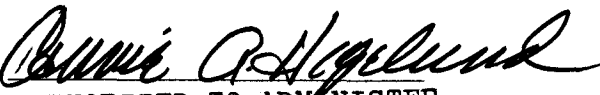
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Michael Piscitell  
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204 Roe Ave.  
Syracuse, NY 13210

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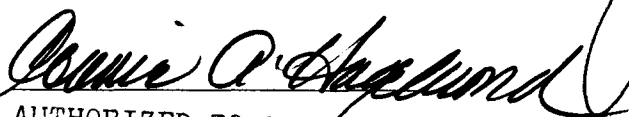
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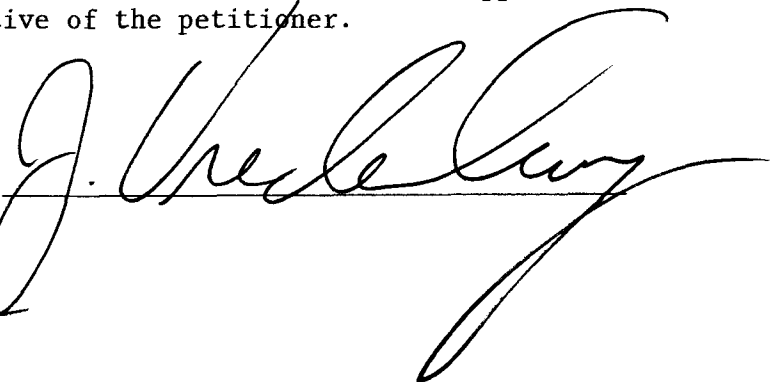
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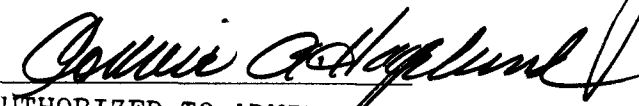
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