

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PROFESSIONAL ACOUSTICS, LTD.	:	DECISION
and JOHN J. MASSA, INDIVIDUALLY	:	
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 March 1, 1970	:	
through May 31, 1978.	:	

Petitioners, Professional Acoustics, Ltd., 1862 Muliner Avenue, Bronx, New York 10462 and John J. Massa, 1862 Muliner Avenue, Bronx, New York 10462, 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 March 1, 1970 through May 31, 1978 (File No. 28431).

On May 29, 1982, petitioners, by their representative, David Schiller, CPA, requested submission of this matter to the State Tax Commission thereby waiving an oral hearing. Petitioners were given until July 20, 1982 to submit further written argument, counsel for the Audit Division was given until August 17, 1982 to submit a written argument and petitioners were given until August 31, 1982 to reply to the Audit Division's argument. After due consideration of the entire file and arguments submitted, the State Tax Commission renders the following decision.

ISSUES

- I. Whether petitioners' "Motion to Strike" was properly made.
- II. Whether the Audit Division properly determined additional sales taxes due from Professional Acoustics, Ltd. and John J. Massa for the period March 1, 1970 through May 31, 1978.

III. Whether the Audit Division properly applied a taxable sales percentage of 100 percent.

FINDINGS OF FACT

1. Petitioners filed a "Motion to Strike" dated August 4, 1982 which sought to strike from the record a memorandum dated July 20, 1982 of Kevin A. Cahill, Esq. which minimized the relevance of certain correspondence received by the Department of Taxation and Finance from petitioners' representative, David Schiller, and also transmitted the correspondence to the Tax Appeals Bureau. Mr. Schiller did not swear to the truth of the allegations in his motion papers.

2. On August 20, 1978, the Sales Tax Bureau issued to petitioner, Professional Acoustics, Ltd. (hereinafter, "Professional Acoustics"), three notices of determination and demand for payment of sales and use taxes due in the amounts of (1) \$12,555.00 in tax, plus \$627.75 in penalty, plus \$9,639.00 in interest for the period March 1, 1970 through August 31, 1973; (2) \$14,670.00 in tax, plus \$3,613.50 in penalty, plus \$5,283.00 in interest for the period September 1, 1973 through February 28, 1977; and (3) \$5,400.00 in tax, plus \$648.00 in penalty, plus \$432.00 in interest for the period March 1, 1977 through May 31, 1978. On August 20, 1978, three notices of determination and demand for payment of sales and use taxes due were also issued to petitioner, John J. Massa, in the same amounts and for the same periods as described above for Professional Acoustics. John J. Massa was issued the notices as he was deemed a responsible financial officer of Professional Acoustics.

3. An auditor from the Audit Division examined monthly bank statements of Professional Acoustics for October, 1977, November, 1977, and January, 1978 through March, 1978. The auditor requested the following records which petitioners

failed to make available: general ledger, cash receipts, cash disbursements, sales and purchase journals, federal income tax returns, capital improvement certificates, purchase and sales invoices.

4. The Audit Division made estimated assessments using \$54,000.00 per year as gross sales which was arrived at as follows: Net profit per year was estimated at \$25,000 and expenses were estimated at \$11,000 together totalling \$36,000 in gross profits. Gross sales of \$54,000 were estimated by adding costs of goods sold of \$18,000, which was one-third of the gross sales, to gross profits. Schedule D of the Audit Division's field audit report states that "since there were no records available, above estimates were used by team leader Carucci, based upon his experiences." There is no clear evidence in the record to indicate why the available bank statements were not used to estimate any taxes due.

5. The Audit Division applied a taxable sales percentage of 100 percent resulting in \$54,000 per year as taxable sales.

6. The place of business of Professional Acoustics was in John J. Massa's home, and it employed one or two persons as needed. In a letter dated November 20, 1979 from John J. Massa to the New York State Sales Tax Division, Bronx District Office, Professional Acoustics was described as doing "predominantly new installations of drywall partitions and ceilings; acoustical ceilings and also installation of new vinyl asbestos floors, new ceramic tiles and installation of new carpentry and hardware...". Petitioners contend that 100 percent of Professional Acoustic's sales were for capital improvements, and John J. Massa in the above letter stated that "Professional Acoustics Ltd. pays sales tax on all purchases for these jobs and does not collect any sales tax on any of its contracts." However, petitioners did not present as evidence any certificates

of capital improvement nor other documentary evidence showing that any sales were for capital improvements.

7. Prior to the issuance of the notices of determination and demand for payment of sales and use taxes due on August 20, 1978, Professional Acoustics did not file New York State and local sales and use tax returns for the period March 1, 1970 through May 31, 1978 except for a filing dated January 28, 1978 for the period ended November 30, 1977 which showed \$3,000 gross sales and no taxable sales. Petitioners' representative, David Schiller, C.P.A., contends¹ that he filed sales tax returns for all quarters beginning November, 1973 until February 28, 1978 on behalf of Professional Acoustics on February 10, 1982 which showed no taxable sales for any quarter and the following gross sales and services:

<u>SALES TAX PERIOD</u>	<u>GROSS SALES AND SERVICE</u>
November 1973 to February 1974	\$ 2,022.63
March 1974 to May 1974	\$ 3,235.00
June 1974 to August 1974	\$ 2,200.00
September 1974 to November 1974	\$ 3,335.00
December 1974 to February 1975	\$10,360.75
March 1975 to May 1975	\$20,204.00
June 1975 to August 1975	\$25,229.64
September 1975 to November 1975	\$15,322.00
December 1975 to February 1976	\$12,666.00
March 1976 to May 1976	\$13,735.00
June 1976 to August 1976	\$15,325.52
September 1976 to November 1976	\$12,740.49
December 1976 to February 1977	\$ 9,375.00
March 1977 to May 1977	\$19,868.53
June 1977 to August 1977	\$17,406.04
September 1977 to November 1977	\$ 4,748.96
December 1977 to February 1978	\$ 700.00

¹ Petitioners' representative contended that the returns were filed with an Audit Division District Office; copies were submitted to be considered with the entire file.

8. Professional Acoustics began business in 1970 according to the certificate of authority to collect sales and use taxes signed by John J. Massa on September 11, 1977, and the certificate of incorporation of Professional Acoustics was filed on July 30, 1970. However, petitioners alleged in their perfected petition dated October 6, 1981 that "Professional Acoustics, Ltd., a domestic corporation, organized 1970, lay inactive and dormant until 1974." To confuse the matter further, petitioners in their "Motion to Strike" dated August 4, 1982 contended that "(t)he corporation formed 7/30/1970 was 'dissolved by proclamation 12/16/1974'." In fact, the certificate of incorporation of Professional Acoustics, Ltd. was dissolved by proclamation of the Secretary of State published on December 16, 1974, pursuant to Tax Law §203-A, "Dissolution of delinquent business corporations", which authorizes the Department of State to dissolve business corporations that have been delinquent in the payment of corporate taxes. John J. Massa was president of Professional Acoustics during its corporate existence and continued to do business under such name after its dissolution as a corporation by the Secretary of State.

CONCLUSIONS OF LAW

A. That petitioners' "Motion to Strike" the memorandum submitted by counsel for the Audit Division is improper since there is no basis in law or regulation for a motion to strike the written argument of an opposing counsel.

B. That the determination of gross sales and the tax thereon was ascertained from such information that was available in accordance with Tax Law section 1138(a). Gross sales and the tax thereon were properly estimated since petitioners failed to make adequate records available. However, the gross sales reported by petitioners on February 10, 1982, as described in Finding of Fact 7, average approximately \$43,500 per year or approximately \$10,875 per sales tax quarter

as compared to yearly gross sales estimated by the Audit Division of \$54,000 or \$13,500 per sales tax quarter. It is reasonable to use the average reported gross sales of \$10,875 per sales tax quarter for purposes of calculating sales tax deficiency for the period in issue rather than the gross sales estimated by the Audit Division; although we note that the reported sales substantiate the reasonableness of the estimated assessment.

C. That Tax Law section 1105(c)(3) imposes a tax on receipts from the service of "(i)nstalling tangible personal property... except for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land...".

D. That pursuant to Tax Law section 1132(c), the burden of proving that any receipt is not taxable is upon the petitioners.

E. That petitioners' contention that 100 percent of Professional Acoustics' sales were for capital improvements was not substantiated by documentary or other credible evidence, which evidence is necessary to sustain their burden of proof. For example, petitioners failed to provide any evidence, other than the affidavit of John J. Massa, that Professional Acoustics paid sales tax to its suppliers; nor did they present any evidence to show that their sales were for capital improvement contract work. For example, proof from customers or copies of contracts with customers were not presented in support of their position. No certificates of capital improvement were presented. Given this failure by petitioners to present sufficient evidence in support of their contention that their sales were for capital improvements, it cannot be said that it was arbitrary or capricious for the Audit Division to use a taxable sales percentage of 100 percent.

F. That Tax Law section 1131(1) provides as follows:

"'Persons required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services... Said term(s) shall also include any officer or employer of a corporation... who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article...".

G. That Tax Law section 1133(a) provides in part, as follows:

"(E)very person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

Therefore, John J. Massa as president of Professional Acoustics is personally liable for the sales tax that the corporation was required to collect up to December 16, 1974 when Professional Acoustics was dissolved by proclamation of the Secretary of State because it was delinquent in the payment of corporate taxes. For the period December 16, 1974 through May 31, 1978, John J. Massa is personally liable for the sales tax that he was required to collect as a vendor who did business under the name of Professional Acoustics. It is no defense against his personal liability that the corporation had been dissolved by the Secretary of State. However, liability for sales tax may not be imposed against the corporation, Professional Acoustics, for the period after it had been dissolved.

H. That full statutory penalty and interest was properly imposed in accordance with Tax Law section 1145 as reasonable cause for waiver of that amount over and above minimum statutory interest was not demonstrated.

I. That since Professional Acoustics did not file its certificate of incorporation with the Department of State until July 30, 1970, it is reasonable to assume that it did not commence substantial business activities until such date. Therefore, it was not reasonable for the Audit Division to determine and

demand sales taxes for the period from March 1, 1970 until July 30, 1970. Consequently, taxes, penalty and interest should not have been determined and demanded for the period from March 1, 1970 until July 30, 1970. It should be noted that petitioners failed to present sufficient evidence to show that the business was inactive until 1974 as they contended.

J. That the "Motion to Strike" is denied; that the petition of Professional Acoustics and John J. Massa is granted to the extent indicated in Conclusions of Law "B", "G" and "I"; that the Audit Division is hereby directed to modify accordingly the notices of determination and demand for payment of sales and use taxes due issued on August 20, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 24 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

P 278 401 530
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		Prof. Acoustics, Ltd. and John J. Massa, Indl.	
STREET AND NO.		1862 Muliner Ave.	
P.O., STATE AND ZIP CODE		Bronx, NY 10462	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	

PS Form 3800, Apr. 1976

POSTMARK OR DATE

P 278 401 531
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		David Schiller	
STREET AND NO.		160 Broadway	
P.O., STATE AND ZIP CODE		NY, NY 10038	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	

PS Form 3800, Apr. 1976

POSTMARK OR DATE

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Professional Acoustics, Ltd. :
and John J. Massa, Individually :
: 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 :
3/1/70-5/31/78. :

State of New York
County of Albany

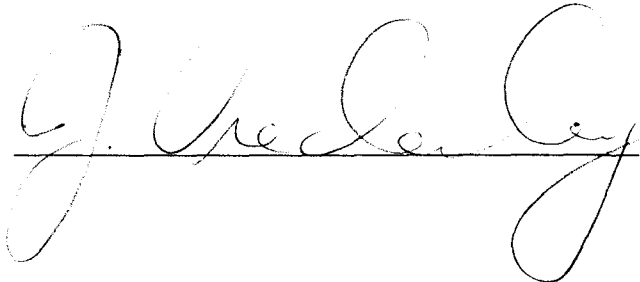
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of December, 1982, he served the within notice of Decision by certified mail upon Professional Acoustics, Ltd. and John J. Massa, Individually the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

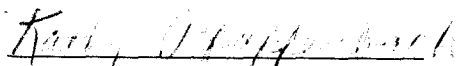
Professional Acoustics, Ltd.
and John J. Massa, Individually
1862 Muliner Ave.
Bronx, NY 10462

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
24th 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	:	
Professional Acoustics, Ltd.	:	
and John J. Massa, Individually	:	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 3/1/70-5/31/78.	:	

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 24th day of December, 1982, he served the within notice of Decision by certified mail upon David Schiller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Schiller
160 Broadway
New York, NY 10038

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
24th day of December, 1982.

Kathy Haggard
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

J. Vredenburg

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

December 24, 1982

Professional Acoustics, Ltd.
and John J. Massa, Individually
1862 Muliner Ave.
Bronx, NY 10462

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
David Schiller
160 Broadway
New York, NY 10038
Taxing Bureau's Representative