

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

December 14, 1982

SAI Constructors, Inc.
2200 Maxon Rd., P.O. Box 2200
Schenectady, NY 12301

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
Vincent J. Reilly
Englert, Reilly & McHugh, P.C.
144 Barrett St.
Schenectady, NY 12305
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SAI CONSTRUCTORS, 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 June 1, 1975	:	
through February 28, 1977.	:	

Petitioner, SAI Constructors, Inc., 2200 Maxon Road, Schenectady, New York 12301, 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 June 1, 1975 through February 28, 1977 (File No. 19993).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on October 8, 1980 at 10:45 A.M. Petitioner appeared by Vincent J. Reilly, Jr., Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner is liable for sales and use tax on materials and supplies purchased for use in the performance of capital improvement contracts with exempt organizations.

FINDINGS OF FACT

1. On July 20, 1978, 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 SAI Constructors, Inc. [hereinafter SAI] assessing \$9,621.18 in tax plus penalty and interest for the period June 1, 1975 through February 28,

1977. The notice was timely protested. It was paid in full on August 7, 1978 to stop the accrual of penalty and interest.

2. The audit consisted of a test period audit which was agreed to by the petitioner. Purchases in the six month test period of January 1, 1975 through June 30, 1975 for contracts for three exempt institutions were reviewed. Materials and supplies not incorporated in the projects themselves were considered taxable retail purchases. Property of this type as listed on the auditor's workpapers included scaffolding, photographs, memo pads, boots, hard hats, portable toilets, space heaters, a typewriter, a file cabinet, etc.

3. It was SAI's position that the aforementioned materials and supplies used for construction management or general conditions were purchased in the capacity of an agent of the exempt institution.

4. The Audit Division argued that in order for an agency relationship to exist, the contract must provide for the contractor to act as an agent for the exempt organization, title to any materials or supplies must pass to the exempt organization upon purchase, and the materials or supplies must be paid for directly by the exempt organization or from a special fund established with monies of the exempt organization.

5. SAI or its predecessor, Sweet Associates, Inc., entered into construction contracts for capital improvements to real property with the following tax exempt institutions:

- a. Glens Falls Hospital, Glens Falls, New York
- b. Rensselaer Polytechnical Institute (RPI), Troy, New York
- c. St. Clare's Hospital, Schenectady, New York

6. a) In its contract with Glens Falls Hospital, SAI was construction manager responsible for the organization, direction, and completion of the capital improvement. The contract was for a guaranteed maximum price for the

construction, a separate additional fee was payable for construction management services, and general condition items were payable on a cost reimbursement basis.

Under the construction management agreement, SAI's functions included the creation of the construction budget, the development of bid packages, the awarding of contracts for construction, the maintenance of construction records and the revision of construction design as construction progressed. SAI additionally had to have a competent full-time supervisory staff at the construction location to coordinate and direct the work of the building contractors.

General condition items for which the costs [exclusive of profit and overhead] were reimbursable to SAI as the construction manager included: scaffolding, hoists, cranes, temporary toilets, temporary protective enclosures, photographs, etc. These items were furnished by SAI to avoid duplication of services by the building contractors and thus effectuate a cost savings.

b) The contract with RPI was similarly written with the exception of authorization to the construction manager to submit bids on certain phases of construction separate from the management services and separate from general condition items.

c) The contract with St. Clare's Hospital was a time and materials contract with no provision for construction management services.

7. Separate checking accounts were maintained for each contract and each account was funded with monies of the exempt organization. The amount for deposit in the checking account was based on requests by SAI for funds to pay for construction management and general conditions items. SAI periodically batched the invoices it received from its suppliers and submitted them to the

exempt institution with the request for funds. The majority of the invoices represented general condition items.

8. a) Article 5.2.1 of the Glens Falls Hospital contract provided that reimbursable costs for general condition items shall include:

"9. The amount of all sales and use taxes paid by the Construction Manager in connection with general conditions to be provided by it."

b) Article VIII of the RPI contract similarly provided that reimbursable costs shall include:

"8. Sales, use or similar taxes related to the General Conditions work and for which the CONSTRUCTION MANAGER...may be liable..."

c) Article 9.3.1 of the St. Clare's Hospital contract provided, in part:

"Sales taxes on all materials to be incorporated into the project which are sold to the owner pursuant to the provisions of this contract are not to be included in bids. The exemption does not, however apply to tools, machinery, equipment or other property leased by or to the Contractor...and the Contractor...shall be responsible for any pay any (sic) and all applicable taxes, including sales and compensating use taxes, on such leased tools, machinery, equipment or other property, and for any materials not incorporated into the project..."

9. SAI acted in good faith at all times.

CONCLUSIONS OF LAW

A. That an agency relationship was not created by the provisions of the contracts between SAI Constructors, Inc. and the Glens Falls Hospital, Rensselaer Polytechnical Institute, or St. Clare's Hospital.

B. That pursuant to sections 1101(b)(4)(i), 1105(a) and 1115(a)(15) of the Tax Law, sales tax is imposed on tangible personal property sold to a contractor that does not become an integral component part of the structure, building or real property of an exempt institution.

C. That tax was properly determined due from SAI Constructors, Inc. on tangible personal property purchased for construction management and general conditions work.

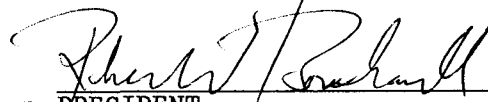
D. That all penalties and interest in excess of the statutory minimum are cancelled.

E. That the petition of SAI Constructors, Inc. is granted to the extent indicated in Conclusion of Law "D" above. The Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 20, 1978. Except as so granted, the petition is in all other respects denied.


DATED: Albany, New York


DEC 14 1982

STATE TAX COMMISSION


PRESIDENT

ACTING


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SAI Constructors, Inc.	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/75-2/28/77.	:	

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 SAI Constructors, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

SAI Constructors, Inc.
2200 Maxon Rd., P.O. Box 2200
Schenectady, NY 12301

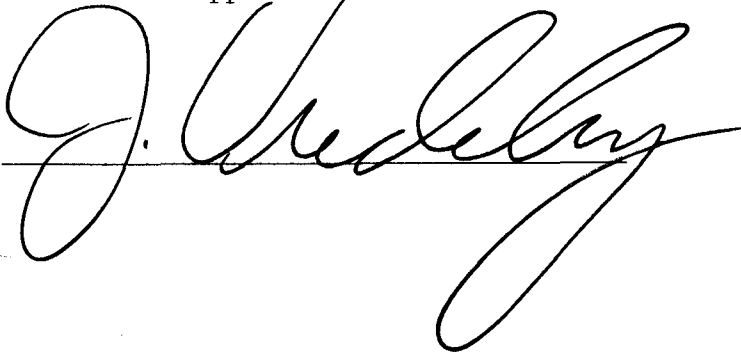
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 :
SAI Constructors, 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 6/1/75-2/28/77. :

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 Vincent J. Reilly the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vincent J. Reilly
Englert, Reilly & McHugh, P.C.
144 Barrett St.
Schenectady, NY 12305

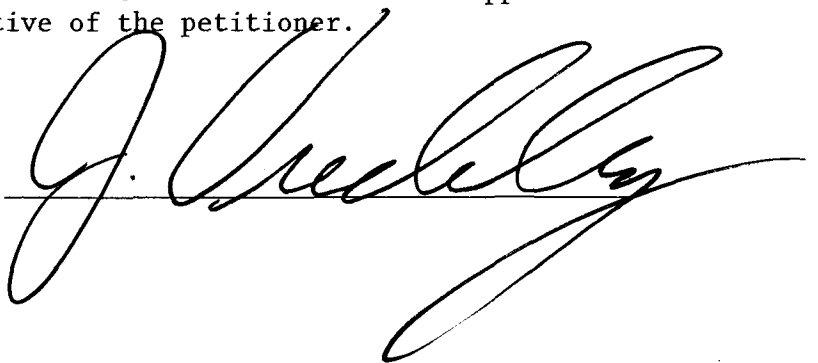
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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



P 230 844 307
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Vincent J. Reilly	
STREET AND NO.		144 Barnett St	
P.O., STATE AND ZIP CODE		Schonectady N.Y. 12305	
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		\$	
POSTMARK OR DATE			

P 230 844 306
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		SAI Contractors, Inc	
STREET AND NO.		P.O. Box 2200 Maxon Rd 2200	
P.O., STATE AND ZIP CODE		Schonectady N.Y. 12301	
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		\$	
POSTMARK OR DATE			