

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

September 27, 1982

S. B. Mechanical Corp.
33-13 58th St.
Woodside, NY 11377

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 & 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
Murray Knight
60 E. 42nd St.
New York, NY 10017
and
Hyman Dann
160 West End Ave.
New York, NY 10023
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
S. B. MECHANICAL CORPORATION
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,
1974 through November 30, 1977.

DECISION

Petitioner, S. B. Mechanical Corporation, 33-13 58th Street, Woodside, New York 11377, 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, 1974 through November 30, 1977 (File No. 24446).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 14, 1981 at 2:30 P.M. Petitioner appeared by Hyman Dann and Murray M. Knight, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division adopted a proper method to calculate petitioner's sales and use tax liability.

FINDINGS OF FACT

1. As the result of a field audit, the Audit Division issued to petitioner, S. B. Mechanical Corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, under date October 16, 1978, asserting additional taxes under Articles 28 and 29 of the Tax Law in the sum \$41,164.42, plus

penalties of \$9,338.92 and interest of \$10,934.56, for the period ended February 28, 1975 through the period ended November 30, 1977.

On January 25, 1978, Steven Berger, president of S. B. Mechanical Corporation, had executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1974 through August 31, 1977, to and including February 28, 1979.

2. Petitioner is an air-conditioning and ventilation contractor.

3. The method used by the sales tax examiner may be outlined as follows:

(a) Purchases and sales as reflected in petitioner's books, sales tax returns and Federal corporation income tax returns were analyzed for the test period December 1, 1976 through February 28, 1977.

(b) Sales as shown on petitioner's Federal return were found to be 6.01 percent higher than sales as reflected in petitioner's books. The examiner adjusted petitioner's sales upward by such percentage to \$1,071,475.00. The percentage of taxable sales was computed at 47.47 percent and applied to the adjusted sales figure, producing taxable sales of \$508,629.00. The latter amount, when compared to taxable sales reported by petitioner for the test period, represented an increase of 165 percent. This percentage was applied to taxable sales as reported by petitioner on its sales tax returns for all quarterly periods under review, thereby producing a sales tax liability of \$25,341.18.

(c) Purchases as shown on petitioner's Federal return were found to be 43.47 percent higher than purchases as recorded in petitioner's books. The examiner adjusted petitioner's purchases upward by such percentage to \$487,432.00. The examiner found that taxes had been paid upon 1.46 percent of purchases. After calculating the percentage of capital improvements at 40.91 percent, the

examiner applied 39.45 percent (40.91 less 1.46) to the adjusted amount of purchases to produce \$192,290.00 of purchases subject to use tax and \$15,383.24 in use taxes due for the entire period.

(d) Use taxes of \$440.00 were determined to be due upon acquisition of \$5,500.00 of fixed assets.

4. After a pre-hearing conference, the sales tax examiner returned to petitioner's business premises and recomputed certain portions of the audit.

(a) Petitioner presented proof that use taxes had been paid upon the acquisition of fixed assets. At the hearing, counsel for the Audit Division stipulated that the use tax deficiency should accordingly be reduced by \$440.00.

(b) Sales and purchases as reflected in petitioner's books and on its Federal returns were reconciled to some extent. That portion of the audit which increased sales by 6.01 percent was eliminated. Petitioner presented several resale certificates and direct payment certificates which had been previously unavailable. Taxable sales as reflected in petitioner's books were therefore determined to be 31.48 percent (rather than 47.47 percent).

(c) The examiner conducted a three-month test of capital improvements for the period December 1, 1976 through February 28, 1977 and determined that 16.78 percent of purchases constituted purchases of materials subject to use tax. This resulted in a figure of \$63,925.00 for purchases subject to use tax for the entire period under review and use taxes due of \$5,114.00.

In sum, the amounts of sales and use taxes as recomputed were \$8,439.84 and \$5,114.00, respectively.

5. The recomputations were reviewed and rejected by the examiner's supervisor. Since the three-month test of capital improvements encompassed

only five invoices and produced a percentage of purchases subject to use tax of 16.78 percent, the supervisor believed that the period selected was not representative. He instructed the examiner to abandon the method previously used (the taxable percentage or ratio method) and to use a method which contrasts additional taxable sales and purchases found on audit with taxable sales and purchases as reported on petitioner's sales tax returns. In accordance with the latter method, the examiner again recomputed petitioner's sales and use tax liability as follows:

(a) A comparison of taxable sales as revealed by audit and as reported by petitioner on its return for the period ended February 28, 1977 showed an increase of 91.11 percent over taxable sales as reported. Such percentage was applied to total taxable sales reported for the period under review, resulting in sales tax liability of \$13,993.90 (after allowing credit for sales taxes paid).

(b) Capital improvements were computed at 33.58 percent of gross sales for the test period (December 1, 1976 through February 28, 1977). Such percentage was reduced to 32.12 after allowing credit for taxes paid, and applied to total purchases for the period under review. Total use tax liability was \$8,730.09.

6. Petitioner maintains that the method used by the Audit Division to compute the amounts of sales and use taxes asserted in the Notice of Determination and Demand should have equal application during the post-conference re-examination and should not have been abandoned in favor of the method described in paragraphs (a) and (b) of Finding of Fact "4".

CONCLUSIONS OF LAW

A. That in accordance with the stipulation made by counsel to the Audit Division, the portion of the deficiency based upon petitioner's acquisition of fixed assets is cancelled.

B. That in the absence of evidence as to petitioner's insufficiency of record-keeping, the Audit Division's use of a test period was not warranted; therefore, those portions of the deficiency projected from the test period computations are cancelled. Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44.

C. That as to the portion of the deficiency remaining, i.e., for the period December 1, 1976 through February 28, 1977, the Audit Division determined that petitioner's sales tax return for that period was incorrect. Under such circumstances, the State Tax Commission is authorized, by subdivision (a) of section 1138 of the Tax Law, to determine the proper amount of tax from such information as may be available, by means of a method "reasonably calculated to reflect taxes due". Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206. It is not bound to follow any particular method, e.g., percentage of taxable sales or percentage of omission. Petitioner has not shown that the alternate method used by the sales tax examiner subsequent to the pre-hearing conference was erroneous; therefore, petitioner's sales and use tax liability for the period ended February 28, 1977 as so calculated by the examiner is sustained.

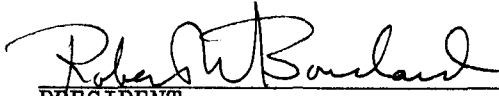
D. That the petition of S. B. Mechanical Corporation is granted to the extent indicated in Conclusions of Law "A" and "B"; that the Notice of Determination and Demand issued October 16, 1978 and subsequently recomputed is to be

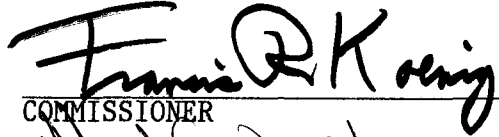
modified accordingly; and that except as so modified, the Notice is in all other respects sustained.

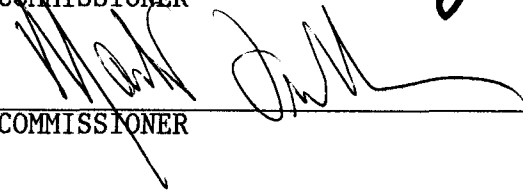
DATED: Albany, New York

SEP 27 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
S. B. Mechanical 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 12/1/74 - 11/30/77.

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 27th day of September, 1982, he served the within notice of Decision by certified mail upon S. B. Mechanical Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

S. B. Mechanical Corp.
33-13 58th St.
Woodside, NY 11377

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
27th day of September, 1982.

Annita A. Hackett
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
S. B. Mechanical 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 12/1/74 - 11/30/77. :

State of New York
County of Albany

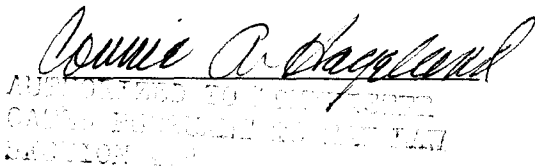
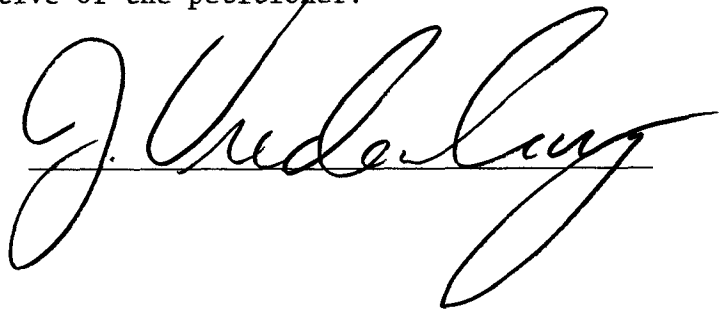
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of September, 1982, he served the within notice of Decision by certified mail upon Murray Knight the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray Knight
60 E. 42nd St.
New York, NY 10017

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
27th day of September, 1982.



NOTED TO THE COMPTROLLER
CASHED BY THE COMPTROLLER
RECEIVED 10/1/82

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
S. B. Mechanical 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 12/1/74 - 11/30/77. :

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 27th day of September, 1982, he served the within notice of Decision by certified mail upon Hyman Dann the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hyman Dann
160 West End Ave.
New York, NY 10023

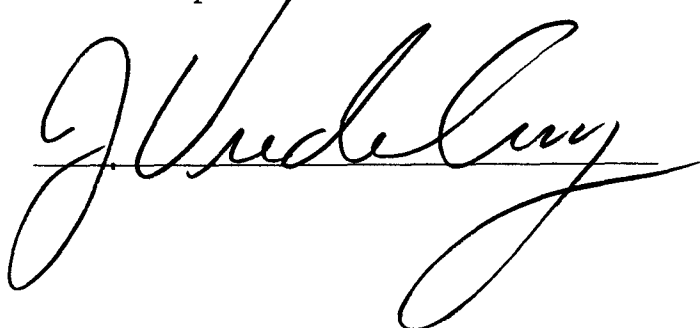
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
27th day of September, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 842 938
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		<i>Murray Knight</i>		
STREET AND NO.		<i>60 E. 42 St</i>		
P.O. STATE AND ZIP CODE		<i>New York, NY 10017</i>		
POSTAGE		\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE		¢	
	OPTIONAL SERVICES	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 230 842 937
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		<i>S. B. Mechanical Corp</i>		
STREET AND NO.		<i>33-13 58th St</i>		
P.O. STATE AND ZIP CODE		<i>Brooklyn NY 11217</i>		
POSTAGE		\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE		¢	
	OPTIONAL SERVICES	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				

PS Form 3800, Apr. 1976

SENT TO		<i>William Lane</i>		
STREET AND NO.		<i>145 West End Ave.</i>		
P.O. STATE AND ZIP CODE		<i>New York, NY 10023</i>		
POSTAGE		\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE		¢	
	OPTIONAL SERVICES	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 230 842 939
RECEIPT FOR CERTIFIED MAIL
 NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)