

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

December 3, 1982

Vermont Marble Co.  
c/o Douglas S. Stuart  
61 Main St.  
Proctor, VT 05765

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  
Sidney N. Solomon  
Eisenberg, Solomon & Chekow  
3000 Marcus Ave.  
Lake Success, NY 11040  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

VERMONT MARBLE COMPANY

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 September 1, 1972  
through November 30, 1977.

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Petitioner, Vermont Marble Company, 61 Main Street, Proctor, Vermont 05765, 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 September 1, 1972 through November 30, 1977 (File Nos. 15332 and 25230).

A formal hearing was held before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 24, 1980 at 1:15 P.M. Petitioner appeared by Eisenberg, Solomon & Chekow, Esqs. (Sidney N. Solomon, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

#### ISSUES

I. Whether petitioner was subject to the imposition of use tax upon certain building stones removed from its own quarries and then installed as additions for capital improvements to real property within the State of New York.

II. Whether petitioner is liable for sales and use taxes in the amounts asserted as a result of audits conducted by the Audit Division for the periods at issue herein.

III. Whether petitioner has established that the determinations are time-barred by Section 1147(b) of the Tax Law (Statute of Limitations).

FINDINGS OF FACT

1. Petitioner, Vermont Marble Company, with offices at 61 Main Street, Proctor, Vermont 05765, owns and operates marble quarries at a number of locations in Vermont. It also installed finished products (building stones) in a number of New York sites during the years under review.

2. An audit was conducted by the Audit Division at premises of the petitioner pursuant to which a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued November 6, 1975, for the period September 1, 1972 through February 28, 1975. The compensating use tax computed to be due and owing on marble which had been taken from petitioner's quarries and incorporated in capital construction projects located in New York State was \$24,623.21 plus penalty and interest.

3. Pursuant to a subsequent audit made July 5, 1978 with respect to the periods March 1, 1975 through November 30, 1977, the Audit Division issued a Notice of Determination and Demand dated June 20, 1978, asserting \$18,046.12 of additional tax due plus penalty and interest.

4. The determination for the period March 1, 1975 through November 30, 1977 demanding \$18,046.12 sales and use tax, consisted of \$3,418.73 compensating use tax plus \$14,627.39 additional sales tax due (plus interest and penalty).

5. At a subsequent conference, petitioner presented exempt sales certificates which reduced additional sales tax due from \$14,627.39 to \$1,368.15. Petitioner does not dispute the reduced sales tax liability.

6. With respect to both audits, Vermont Marble Company contended that a use tax should not be imposed on marble extracted from its own quarries.

7. The Audit Division determined use taxes were due on the basis of petitioner's costs in obtaining and finishing the stone and that petitioner was liable as a manufacturer, not as a fabricator.

8. Petitioner's business consisted of providing "finished" building stones which it sold for installation on buildings by others or which petitioner itself installed on buildings.

9. At the hearing, petitioner's witness described the operations of the company. The stone (marble or granite) is quarried out of petitioner's own quarries in large rough blocks approximately 7 feet long, 6 feet high, and 5 feet wide, each weighing 20 to 30 tons. These rough blocks are transported to petitioner's sawmills for reduction by "gang saw" from the large unwieldy blocks of natural stone to thinner slabs. Thereafter, these slabs are "worked" in a finishing shop to the specific lengths and widths required for each particular job. Detailed finishing steps such as the drilling of holes in the slabs for placement of anchors necessary to permit attachment of the slabs to a building, polishing the slabs and bevelling of edges are also performed at this time.

10. During the periods at issue herein, petitioner did not sell rough blocks or standard building stone, but rather every order or job it accepted called for stone cut to the specifications required for the particular job. The price petitioner received varied with the type of stone involved as well as with the amount of finishing work required.

11. At the hearing, the auditor testified that in determining the values which formed the basis for the use taxes owed, he had taken from the petitioner's "book job journal", the quarrying costs plus finishing costs to arrive at a taxable total.

12. The witness for the petitioner testified that about 25 percent of the cost reflected in the "book job journal" was attributable to the cost of quarrying. In petitioner's brief, this figure was refined to 23 percent.

13. The Audit Division did not raise any objection at the hearing to the estimate that quarrying costs represented "around 25% of total costs".

#### CONCLUSIONS OF LAW

A. That clause B of section 1110 of the Tax Law imposes a tax upon the use "...of any tangible personal property manufactured, processed or assembled by the user, if items of the same kind of tangible personal property are offered for sale by him in the regular course of business...".

B. That regulations adopted by the State Tax Commission during the latter part of the periods at issue herein provide:

"Items of the same kind mean (sic) that items belong to an identifiable class, but need not be identical." 20 NYCRR 531.3(b)(1)(i) effective June 1, 1977. (Emphasis as in original).

Example "1" of the above subdivision provides, in pertinent part:

"Items made to the specifications of a particular job will not be considered items of the same kind as items made to the specifications of another particular job."

C. That the building stones provided and installed at various job sites by petitioner during the periods at issue herein were not items of the same kind as were those building stones provided and sold by petitioner, inasmuch as the building stones were produced according to the specifications required for different jobs. Accordingly, petitioner is not subject to the imposition of use tax on the building stones it provided and installed itself, within the meaning and intent of section 1110 of the Tax Law and regulations thereunder.

Moreover, petitioner (which sold no "rough" or unfinished blocks of stone at retail) owes no use tax on that portion of its cost which is attributable to quarrying (approximately 25 percent) because said cost is a portion of petitioner's total cost in providing building stones for each of the different particular jobs.

D. That additional sales tax due in the amount of \$14,627.39 is reduced to \$1,368.15 as a result of the exemption certificates presented. (See Finding of Fact "5".)

E. That section 1147(b) of the Tax Law provides, in part, as follows:

"[N]o assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return... For purposes of this subdivision, a return filed before the last day prescribed by law...for the filing thereof...shall be deemed to be filed on such last day..."

Furthermore, the Court of Appeals held, in Metropolitan Life Insurance Co. v. Schmidt (1949) 299 N.Y. 428:

"'The day from which any specified period of time is reckoned shall be excluded in making the reckoning.' (Emphasis supplied.) That rule applies to the computation of years as well as of days, weeks or months." (299 N.Y. at 431). See also General Construction Law, §20.

F. That the return for the earliest period at issue is for the period ended November 30, 1972. It was required to be filed on or before December 20, 1972. The Notice of Determination for this period was issued out of Albany by the Audit Division on November 6, 1975, which is within the statutory three-year period provided for by the Tax Law.

The earliest return for the period March 1, 1975 to May 31, 1975 was due to have been filed on or before June 20, 1975. The Notice of Determination for this period was issued by the Audit Division in Albany on June 20, 1978.

The computation of the three-year period commences not with June 20, 1975 but with June 21, 1975, and thus the Determination of June 20, 1978 was timely issued. (Metropolitan Life Insurance Co. v. Schmidt, supra.)

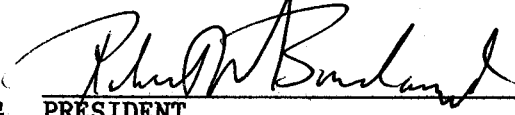
G. That the petition of Vermont Marble Company is granted to the extent indicated by Conclusion of Law "C" and granted to the extent of the reduction in sales taxes allowed by Conclusion of Law "D", but is in all other respects denied.

DATED: Albany, New York

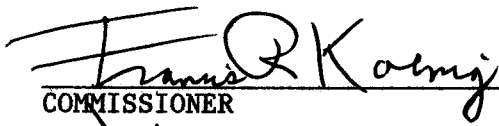
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STATE TAX COMMISSION

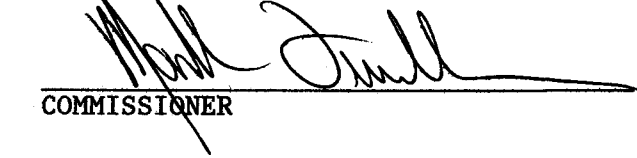
ACTING PRESIDENT

  
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COMMISSIONER

  
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COMMISSIONER

  
\_\_\_\_\_

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Vermont Marble Co. :  
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 Years :  
1972 - 1977. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

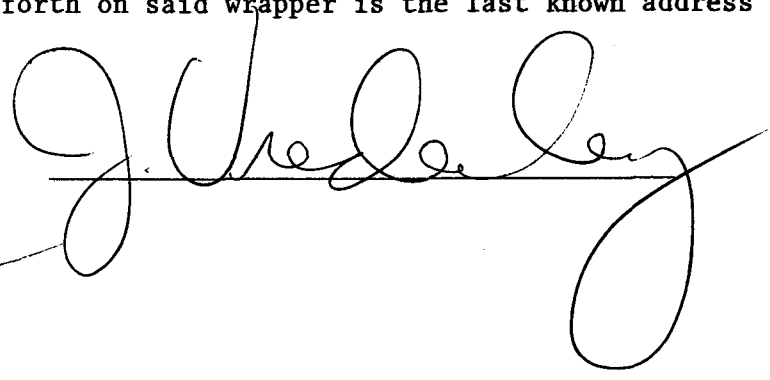
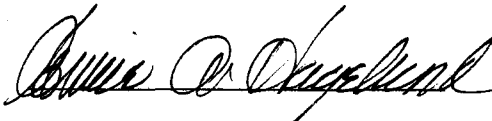
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Vermont Marble Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vermont Marble Co.  
c/o Douglas S. Stuart  
61 Main St.  
Proctor, VT 05765

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  
3rd 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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In the Matter of the Petition :  
of :  
Vermont Marble Co. :  
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 :  
Years 1972 - 1977. :  
\_\_\_\_\_

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 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Sidney N. Solomon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney N. Solomon  
Eisenberg, Solomon & Chekow  
3000 Marcus Ave.  
Lake Success, NY 11040

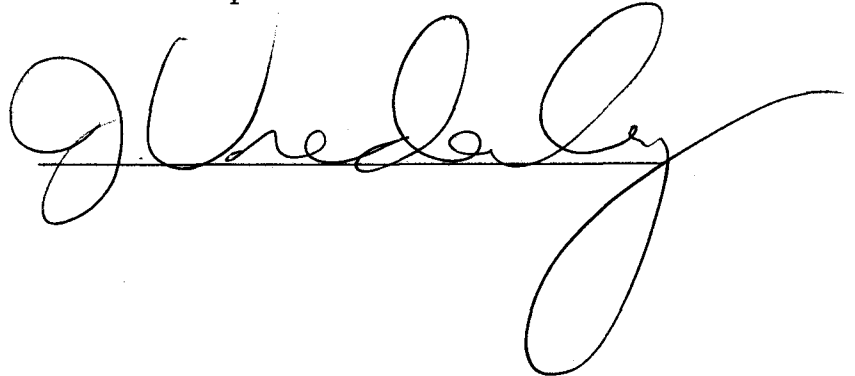
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
3rd day of December, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



**P 230 844 264**  
**RECEIPT FOR CERTIFIED MAIL**

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

PS Form 3800, Apr. 1976

SENT TO		<i>Sidney N. Solomon</i>		
STREET AND NO.		<i>1525 1/2 Solomon Rd</i>		
P.O., STATE AND ZIP CODE		<i>3000 Marina Ave</i>		
POSTAGE		<i>Rate Success, 7/4</i>		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE		<i>1.1040</i>	
	SPECIAL DELIVERY		¢	
	RESTRICTED DELIVERY		¢	
	OPTIONAL SERVICES 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 230 844 263**  
**RECEIPT FOR CERTIFIED MAIL**

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

PS Form 3800, Apr. 1976

SENT TO		<i>Vermont Marble Co.</i>		
STREET AND NO.		<i>100 Douglas &amp; Stewart</i>		
P.O., STATE AND ZIP CODE		<i>101 Main St</i>		
POSTAGE		<i>Rate 7/6 85765</i>		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE		<i>1.1040</i>	
	SPECIAL DELIVERY		¢	
	RESTRICTED DELIVERY		¢	
	OPTIONAL SERVICES 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				