

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

December 14, 1982

Werner Spitz Construction Co., Inc.
11 Comfort St.
Rochester, NY 14620

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
Robert W. Wild
Nixon, Hargrave, Devans & Doyle
P.O. Box 1051
Rochester, NY 14603
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WERNER SPITZ CONSTRUCTION CO., 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, 1979.	:	

Petitioner, Werner Spitz Construction Co., Inc., 11 Comfort Street, Rochester, New York 14620, 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, 1979 (File No. 28134).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on January 19, 1982 at 2:45 P.M. Petitioner appeared by Robert W. Wild, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether petitioner paid sales taxes to certain vendors of tangible personal property.

II. Whether petitioner is liable for sales or use tax on certain purchases where the vendor failed to collect tax.

FINDINGS OF FACT

1. Petitioner, Werner Spitz Construction Co., Inc. was a general contractor engaged in commercial construction contracts during the period at issue.

2. On August 21, 1979, 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 petitioner covering the period September 1, 1975 through November 30, 1978 for taxes due of \$10,535.93, plus minimum statutory interest of \$2,502.31, for a total of \$13,038.24.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1975 through May 31, 1976, to September 20, 1979.

4. On audit, the Audit Division examined petitioner's purchase invoices in detail for the entire audit period and found that sales tax was not paid on certain expense purchases totaling \$135,582.76. Petitioner agreed to and paid the taxes due of \$9,048.68 on said purchases.

The audit also disclosed that certain invoices for material purchases totaling \$150,513.25 did not indicate any sales tax collected by the vendor or the invoice stated that the total price included sales tax. The Audit Division did not consider that sales tax was paid on these purchases and held petitioner liable for taxes due thereon of \$10,535.93.

5. Following the audit, petitioner contacted some of the suppliers by letter requesting confirmation that sales tax was part of the total price and was paid over to New York State. From the responses received, the Audit Division revised the tax due to \$6,975.63 which counsel for the Audit Division conceded was the amount at issue.

6. Petitioner requested that bids for materials be submitted with sales tax included in the total price. The invoices, which are the subject of this proceeding, set forth a lump sum amount and with one exception, made no reference to sales tax.

7. Petitioner never intended the transactions to be nontaxable and it paid the vendors on the basis that tax was included in the bid price.

Petitioner argued that the liability provisions of the Tax Law are designed to place primary liability on the vendor, since it is the sole responsibility of the vendor to collect the tax and comply with the statutory requirement that the tax be shown separately.

8. Petitioner adduced no conclusive evidence to show that sales tax was paid to or by the vendors or that sales tax was an element of the purchase price.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides that every person required to collect tax shall be personally liable for the tax imposed, collected or required to be collected. Section 1133(b) of the Tax Law makes the purchaser liable if he has failed to pay a tax imposed to the person required to collect the same.

That the sales tax is a "consumer tax", that is, the tax is imposed on the retail sale of tangible personal property and certain services and is collected from the person who purchases at retail - the consumer. The consumer cannot shift the liability for payment of the tax to another person nor otherwise relieve himself of such liability, although the vendor is personally liable for the tax he was responsible for collecting [20 NYCRR 525.2(a)(4)].

B. That petitioner failed to establish that sales taxes of \$6,975.63 were paid to the vendors and therefore is liable for the payment of such taxes pursuant to sections 1133(b) and 1110 of the Tax Law.

C. That the petition of Werner Spitz Construction Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due

issued August 21, 1979, as revised in accordance with Finding of Fact "5" is 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 :
Werner Spitz Construction Co., Inc. :
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 6/1/75-2/28/79. :
_____ :

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Werner Spitz Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Werner Spitz Construction Co., Inc.
11 Comfort St.
Rochester, NY 14620

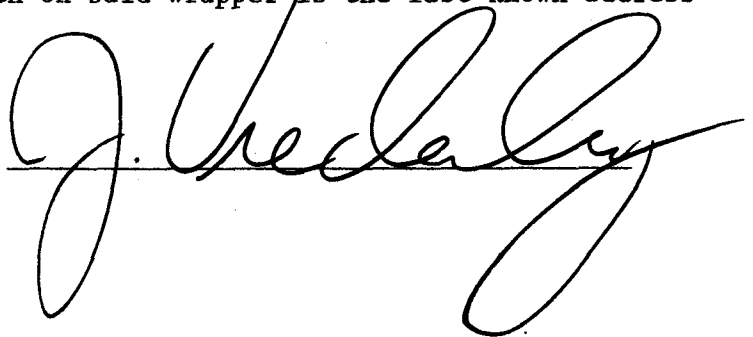
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 :
Werner Spitz Construction Co., 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 6/1/75-2/28/79. :

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 Robert W. Wild the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

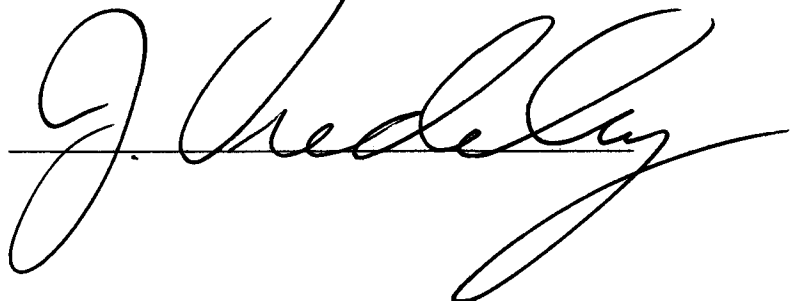
Robert W. Wild
Nixon, Hargrave, Devans & Doyle
P.O. Box 1051
Rochester, NY 14603

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 230 844 320
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Robert W. Wild	
STREET AND NO.		N. 1000 Hargrave Devenst Doyle	
P.O. BOX		1051	
P.O., STATE AND ZIP CODE		Rochester N.Y. 14603	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
		SPECIAL DELIVERY	\$
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	\$
		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 230 844 319
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Werwen Spitz Construction Co.	
STREET AND NO.		11 Confort St	
P.O., STATE AND ZIP CODE		Rochester N.Y. 14620	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
		SPECIAL DELIVERY	\$
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	\$
		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			