

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

February 18, 1983

Afgo Engineering Corp.
287 Northern Blvd.
Great Neck, NY 11021

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
Paul J. Henry
c/o Breed, Abbott & Morgan
Citicorp Center, 153 E. 53rd Street
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
AFGO ENGINEERING CORP.	:	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 March 1, 1975	:	
through February 28, 1978.	:	

Petitioner, Afgo Engineering Corp., 287 Northern Boulevard, Great Neck, New York 11021, 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, 1975 through February 28, 1978 (File No. 27963).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1981 at 1:25 P.M. Petitioner appeared by Breed, Abbott & Morgan, Esqs. (Paul J. Henry, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the service of temporary heat provided during the construction of buildings is a detective or protective service subject to the New York City 4 percent sales tax.

II. Whether the service is part of the capital improvement and as such exempt from sales tax.

FINDINGS OF FACT

1. Petitioner applied for a refund of \$45,224.50 for sales taxes paid for the period March 1, 1975 through February 28, 1978. Part of the refund was

approved, but \$20,340.96 of the refund, based on sales taxes paid for "temporary heat", was denied for the period September 1, 1975 through February 28, 1978. The Audit Division's contention was that since the enactment by the City of New York of section 1212-A.(h)(2)(i)(B) of the Tax Law, effective September 1, 1975, "temporary heat" services were subject to a 4 percent sales tax as protective services. Petitioner contends that the "temporary heat" services are exempt from sales tax as an integral and essential part of the capital improvements.

2. Petitioner is a mechanical contractor.

3. A mechanical contractor is a contractor that installs heating, ventilating and air conditioning systems in buildings under construction.

4. The type of work involved in this case concerns the installation of heating systems in new high rise buildings.

5. "Temporary heat", which is the subject of the 4 percent City Sales Tax involved in this case, is a term used to describe the wages paid to a steamfitter to operate and maintain the heating system in order to provide temporary heat to a building during those periods during construction when it is necessary to have the temperatures above freezing so that certain finishing trades can perform their work.

6. The finishing trades that require temporary heat are known as wet trades. These include painting, spackling, tile laying, and any type of trade whose work cannot be performed when the temperature is below 40° to 50° fahrenheit.

7. Temporary heat service is not provided when the temperature is above these levels even though there is water in the system which could develop leaks or other problems.

8. Temporary heat is not provided so that the mechanical contractor can complete its work, but to enable other trades to do their work.

9. If temporary heat was not provided during cold weather, construction requiring so-called wet trades would have to stop, delaying completion and increasing construction costs.

10. At the time petitioner provides temporary heat, the system is not complete, the system has not been accepted by the owner or general contractor, and the system is not fully automatic.

11. The duties of the steamfitter who performs the temporary heat function are to operate the pumps, valves, etc. in the heating system.

12. Temporary heat is provided by petitioner rather than the owner or prospective tenant for the reason that it is needed prior to the time that a certificate of occupancy has been received, or the system accepted, together with the requirements of the Trade Agreement between the Mechanical Contractors Association of New York, Inc. and the union representing steamfitters.

13. In the construction of buildings, and as part of the construction, other temporary services besides heat are provided, including water, air conditioning and elevator.

14. The end result of temporary heat is to get a construction job completed as soon as possible.

15. Owners and general contractors consider the amounts paid to petitioner for temporary heat as part of the capital cost of construction.

16. In each instance involved in this case, petitioner had on file exemption certificates for capital improvements. Temporary heat was included as an element in the capital improvements. All the jobs (involved here) performed by petitioner were capital improvements.

17. The tax charged by petitioner on temporary heat was accrued on its books and paid to the State with the filing of its sales and use tax returns. The tax was not paid to petitioner by its customers since the customers were instructed by their professional association not to pay the tax.

CONCLUSIONS OF LAW

A. That the New York City Administrative Code, Chapter 46, Title BB, Sec. 46-2.0, adopted pursuant to section 1212-A.(h)(2)(i)(B) of the Tax Law, provides for the imposition of a four percent sales tax upon the following services:

"Protective and detective services...including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property..."

B. That the temporary heat furnished herein was for the exclusive purpose of construction and in no way constituted a protective or detective service within the meaning and intent of section 1212-A.(h)(2)(i)(B).


C. That in view of Conclusion of Law "B" above, the issue as to whether the end result of the service is a capital improvement is moot.

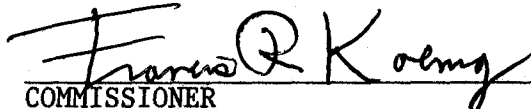
D. That the petition of Afgo Engineering Corp. is granted and the Audit Division is hereby directed to refund the taxes paid for temporary heat.

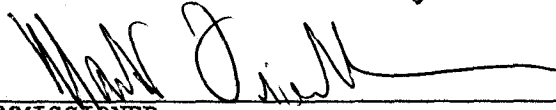
DATED: Albany, New York

FEB 18 1983

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Afgo Engineering 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 3/1/75-2/28/78. :

State of New York
County of Albany

David Parchuck, 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 18th day of February, 1983, he served the within notice of Decision by certified mail upon Afgo Engineering Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Afgo Engineering Corp.
287 Northern Blvd.
Great Neck, NY 11021

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
18th day of February, 1983.

David Parchuck

James P. Hegelund
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Afgo Engineering 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 3/1/75-2/28/78.

State of New York
County of Albany

David Parchuck, 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 18th day of February, 1983, he served the within notice of Decision by certified mail upon Paul J. Henry the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul J. Henry
c/o Breed, Abbott & Morgan
Citicorp Center, 153 E. 53rd Street
New York, NY 10022

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
18th day of February, 1983.

David Parchuck

Conrad P. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 389 758 604
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Paul J. Henry</i>	
Street and No. <i>10 Reed Abbott & Morgan</i>	
P.O., State and ZIP Code <i>Citico Center</i>	
Postage	<i>153 E. 53 St</i>
Certified Fee	<i>Plu York NY 10022</i>
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 389 758 603
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Algo Engineering Co.</i>	
Street and No. <i>287 Northern Blvd.</i>	
P.O., State and ZIP Code <i>Great Neck, NY 11021</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982