

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

November 10, 1983

A. J. Cerasaro, Inc.
2 Page Ave.
Endicott, NY 13760

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Anne M. Reilly
Huber, Lawrence & Abell
99 Park Avenue
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
A. J. CERASARO, 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, 1973	:	
through May 31, 1976.	:	

Petitioner, A. J. Cerasaro, Inc., 2 Page Avenue, Endicott, New York 13760, 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, 1973 through May 31, 1976 (File No. 19284).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on January 24, 1983, at 1:30 P.M., with all briefs to be submitted by February 15, 1983. Petitioner appeared by Huber, Lawrence & Abell (Alan I. Appel, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether the materials purchased by petitioner for use in two contracts with New York State Electric & Gas Corporation were machinery or equipment used in the production of electricity.

II. Whether petitioner was entitled to rely on exempt use certificates issued by its customer in conjunction with capital improvement projects.

FINDINGS OF FACT

1. On January 28, 1977, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, A. J. Cerasaro, Inc., in the amount of \$22,592.97, plus penalty and interest of \$8,250.62, for a total due of \$30,843.59 for the period June 1, 1973 through May 31, 1976.

2. Petitioner, by its president, A. J. Cerasaro, executed two consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1973 through November 30, 1973 to January 31, 1977.

3. Pursuant to a pre-hearing conference, petitioner filed a partial withdrawal of petition leaving \$14,520.57 of the assessment contested. Of the remaining \$8,072.40, \$1,523.50 was cancelled and \$6,548.90 was sustained by the conferee and uncontested by petitioner.

4. Petitioner is a general contractor in the areas of road building, pipeline installation, site development and excavation primarily for governmental and industrial organizations. On November 5, 1974, petitioner entered into a contract with the New York State Electric & Gas Corporation ("NYSEG") to construct a fuel oil system at NYSEG's Milliken Station in Lansing, New York. On July 29, 1975, petitioner entered into another contract with NYSEG to construct a water treatment plant at NYSEG's Milliken Station. Petitioner's purchases of materials with respect to the aforementioned contracts were the subject of the contested portion of the January 28, 1977 assessment.

5. The fuel oil system construction consisted of the installation of a set of fuel oil storage tanks. The system was constructed pursuant to an order from the New York State Department of Environmental Conservation ("EnCon") directing NYSEG to cease and abate discharges into the waters of New York State. NYSEG purchased machinery and equipment from various vendors and

petitioner performed the required excavation and installation of the system. NYSEG purchased the equipment separately because it wanted full control over the type of equipment used and also because the equipment was required prior to construction so that NYSEG could complete the detailed design of the facility.

6. In constructing the oil storage system, petitioner provided a concrete drip mat and neoprene basin to catch oil spills. Petitioner also built a stairway to the tank area from the truck parking area. Petitioner built an electrically charged fence system around the area with insulated panels on the fence sections to keep one section of the fence from charging the other. To keep the tanks from floating in case of an oil spill, petitioner supplied and installed concrete weights to hold the tanks down. Additionally, petitioner installed a lighting system for the tank storage area.

7. The water treatment plant was also built pursuant to the EnCon order. The water treatment plant consisted of a large concrete structure containing devices to remove oil and solids from water which was contaminated during the process of generating electricity. Petitioner furnished the concrete and metal reinforcements for construction of three oil separators. Petitioner installed the pumps, force main, pipes, stairs, ladders and catwalks. The pumps, force main and part of the piping were supplied by NYSEG. Petitioner did all the required excavation of the site and furnished the building to house the plant. All technical equipment such as pumps, filters, control valves and instrumentation were purchased from other vendors by NYSEG which again wanted full control over the type of equipment used.

8. Both the fuel oil system and the water treatment plant were essential components of the electricity production process. Oil and water were used

throughout the process and without the two structures the generating plant would be unable to function.

9. In connection with both contracts, NYSEG provided petitioner with capital improvement certificates and exempt use certificates. The capital improvement certificates were intended to cover any capital improvements performed by petitioner and the exempt use certificates were intended to cover any machinery or equipment which might have been provided by petitioner. Petitioner gave copies of the exempt use certificates to its suppliers in order to avoid paying sales tax on its purchases.

10. On audit, the Audit Division determined that use tax was due on the purchases made in connection with both contracts by reason of the fact that it did not consider the materials purchased to be machinery or equipment. The Audit Division, therefore, considered petitioner liable for tax since the building materials were used or consumed by petitioner in the performance of a capital improvement project.

11. Petitioner argued that it was entitled to rely on the exempt use certificates which it received in good faith from NYSEG and as a result was under no obligation to determine whether or not such certificates were correctly issued. Alternatively, petitioner argued that if it was not entitled to rely on the certificates its purchases should be tax exempt in any event, because the items supplied to NYSEG were machinery or equipment for use or consumption directly and predominantly in the production of electricity for sale.

CONCLUSIONS OF LAW

A. That section 1101(b)(4) of the Tax Law defines a retail sale, in pertinent part, as a "sale of any tangible personal property to a contractor... for use or consumption in erecting structures or buildings, or building on, or

otherwise adding to, altering, improving...real property, property or land, as the terms real property, property or land are defined in the real property tax law...".

B. That section 1115(a)(12) of the Tax Law provides for an exemption from sales and use tax for receipts from the sale of "[m]achinery or equipment for use or consumption directly and predominantly in the production of...electricity ...for sale...by generating...".

C. That the difference between tangible personal property used for a capital improvement and machinery or equipment used in production is that the term "equipment" as used in section 1115(a)(12) "means 'only such personalty as has an identifiable character as equipment at the time of purchase at retail... which is adapted by its design to perform either in conjunction with machinery or otherwise, some particular function in a stage of the generating process'" (emphasis added) (citation omitted) (Slattery Associates Inc., v. Tully, 79 A.D.2d 761 aff'd 54 N.Y.2d 711).

D. That petitioner's own witness indicated that NYSEG supplied all the technical equipment and instrumentation necessary to the projects. The concrete, metal reinforcement, fencing, stairways, ladders, and lighting supplied by petitioner "clearly did not possess the requisite 'identifiable character' as machinery or equipment at the time of their purchase at retail to qualify for the exemption" (Slattery Associates, Inc., supra).

E. That petitioner was entitled to use the exempt use certificates only for purchases of machinery or equipment and petitioner could only rely on representations made on such certificates insofar as the certificates were used to purchase machinery and equipment. Inasmuch as petitioner did not purchase any machinery or equipment possessing an identifiable character as such for

installation in the NYSEG projects, it misused the exempt use certificates supplied by NYSEG when it purchased construction materials without paying sales tax thereon. The Audit Division, therefore, properly assessed use tax on the construction materials purchased by petitioner for use in the NYSEG projects.


F. That, except as indicated in Finding of Fact "3", the petition of A. J. Cerasaro, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 28, 1977 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
A. J. Cerasaro, 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 8/31/73-5/31/76. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon A. J. Cerasaro, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A. J. Cerasaro, Inc.
2 Page Ave.
Endicott, NY 13760

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
10th day of November, 1983.

Martha L. Drunelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
A. J. Cerasaro, 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 8/31/73-5/31/76. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Anne M. 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:

Anne M. Reilly
Huber, Lawrence & Abell
99 Park Avenue
New York, NY 10016

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
10th day of November, 1983.

Martha L. Brunelle

Connie A. Hagelund

P 470 315 095
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
A.J. Cerasaro, Inc.	
Street and No.	
2 Page Ave.	
P.O., State and ZIP Code	
Endicott, NY, 13760	
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

P 470 315 096
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Anne M. Bailey	
Street and No.	
99 Park Ave.	
P.O., State and ZIP Code	
NY, NY 10016	
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