

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

October 7, 1983

Hopkins & Blemel, Inc.
P.O. Box 8
West Falls, NY 14170

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
Thomas J. Filipski
6465 Transit Rd.
East Amherst, NY 14051
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Hopkins & Blemel, 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 3/1/74-2/28/77. :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Hopkins & Blemel, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hopkins & Blemel, Inc.
P.O. Box 8
West Falls, NY 14170

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
7th day of October, 1983.

Susan Powell

Connie P. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Hopkins & Blemel, 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 3/1/74-2/28/77. :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Thomas J. Filipski the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas J. Filipski
6465 Transit Rd.
East Amherst, NY 14051

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
7th day of October, 1983.

Susan Powell

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HOPKINS & BLEMEL, 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 March 1, 1974
through February 28, 1977. :

Petitioner, Hopkins & Blemel, Inc., P.O. Box 8, West Falls, New York 14170, 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, 1974 through February 28, 1977 (File No. 20865).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 12, 1982 at 1:15 P.M. with all briefs to be submitted by April 30, 1983. Petitioner appeared by Thomas J. Filipski, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the work performed by petitioner constituted the installation of tangible personal property or whether such work was on-site assembly.

FINDINGS OF FACT

1. Petitioner, Hopkins & Blemel, Inc., was engaged in the sale and installation of dairy, cheese and food processing equipment.
2. On September 2, 1977, 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 March 1, 1974 through February 28,

1977 for taxes due of \$18,558.34, plus penalty and interest of \$8,163.22, for a total of \$26,721.56.

3. On audit, the Audit Division examined petitioner's sales invoices for 1976 and found that sales tax was not charged to four of petitioner's customers, namely Fiorlat Dairy, Pollio Dairy Products, Sano Cheese and Sorrento Cheese. Sales tax was properly collected on all other sales. A detailed audit of all sales made to the foregoing customers resulted in unsubstantiated exempt sales of \$265,119.19 and taxes due thereon of \$18,558.34.

Petitioner agreed that \$73,868.89 of such sales was taxable repair work on which \$5,170.82 plus interest has been paid to New York State.

4. Petitioner designs a processing system to the needs of a specific customer. The necessary equipment is either purchased by petitioner and resold to the customer or the customer provides the equipment. In certain instances, petitioner modified or rehabilitated used equipment and also fabricated new equipment on the site of the installation.

In a typical installation, petitioner put the equipment in place, determined the location of pumps, installed the pumps and connected the component parts with stainless steel piping which takes the product through the various processing stages.

5. Petitioner invoices the customer weekly on a time and material basis. The invoice frequently used the term "installation" to describe the work performed. Petitioner explained that such term in most cases was not an accurate representation of the nature of the work. Petitioner's position is that the "installation" charge was on-site assembly labor which is not subject to sales tax.

6. The policy of the Audit Division with respect to on-site assembly (STM 74-32) is that such assembly will be recognized as a continuation of the manufacturing process in those instances where it is demonstrated that the tangible personal property, by virtue of its size, weight, etc. could not be completely assembled prior to delivery to the customer. When on-site assembly is considered to be a continuation of the manufacturing process, the cost of such assembly becomes part of the selling price of the tangible personal property and the taxability of the assembly cost is determined by the sales tax status of the tangible personal property.

7. Counsel for the Audit Division conceded that sales amounting to \$9,442.56 were nontaxable.

8. Reasonable cause existed for petitioner's failure to collect the taxes at issue.

CONCLUSIONS OF LAW

A. That for on-site assembly to be deemed a continuation of the manufacturing process, the assembly labor must be performed by employees of the manufacturer of the equipment being installed and cost for the assembly included in the selling price of the equipment.

That petitioner did not manufacture the equipment it installed and therefore under no circumstances can its labor charges be considered a continuation of the manufacturing process.

B. That the labor charges at issue constituted either 1) the installation of tangible personal property or 2) fabricating tangible personal property performed for a person who directly or indirectly furnishes the tangible personal property, both of which are services subject to the taxes imposed under sections 1105(c)(3) and 1105(c)(2) of the Tax Law, respectively.

C. That in accordance with Finding of Fact "7", the additional taxable sales shall be reduced by \$9,442.56. Moreover, the Notice shall be adjusted to reflect the payment indicated in Finding of Fact "3".


D. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

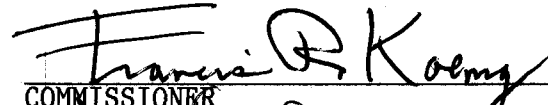
E. That the petition of Hopkins & Blemel, Inc. is granted to the extent indicated in Conclusions of Law "C" and "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 2, 1977; and that, except as so granted, the petition is in all other respects denied.

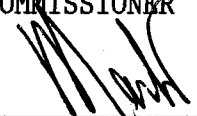
DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 110

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Hopkins & Blemel Inc.</i>	
Street and No. <i>PO Box 8</i>	
P.O., State and ZIP Code <i>West Falls NY 14170</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

P 470 316 111

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Thomas J Filipski</i>	
Street and No. <i>6465 Tamarack Rd</i>	
P.O., State and ZIP Code <i>Elmhurst NY 11051</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