

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

May 27, 1983

Lawrence Hunter (Purchaser)
c/o McCreary Metals, Inc.
10 Railroad Ave.
Albany, NY 12205

Dear Mr. Hunter:

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
Donald A. Wilson
18 Seneca St.
Cohoes, NY 12047
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lawrence Hunter (Purchaser) :
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 9/1/80-11/30/80. :
_____ :

AFFIDAVIT OF MAILING

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Lawrence Hunter (Purchaser), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence Hunter (Purchaser)
c/o McCreary Metals, Inc.
10 Railroad Ave.
Albany, NY 12205

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
27th day of May, 1983.

David Parchuck

James A. Skye-lund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lawrence Hunter (Purchaser) :
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 9/1/80-11/30/80. :
:

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Donald A. Wilson the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald A. Wilson
18 Seneca St.
Cohoes, NY 12047

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
27th day of May, 1983.

David Parchuck

Conrad P. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LAWRENCE HUNTER (PURCHASER)	:	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, 1980	:	
through November 30, 1980.	:	

Petitioner, Lawrence Hunter (Purchaser), c/o McCreary Metals, Inc., 10 Railroad Avenue, Albany, New York 12205, 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, 1980 through November 30, 1980 (File No. 34833).

A small claims hearing was held before John Watson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on December 9, 1982 at 1:15 P.M. Petitioner appeared by Donald A. Wilson, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner's purchase of machinery and equipment was exempt under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. On July 10, 1981, 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 the petitioner, Lawrence Hunter, for \$5,530.00 in tax due, plus \$260.69 in simple interest, for a total due of \$5,790.69.

2. Petitioner timely filed a petition for a hearing to review the notice of determination. At the hearing, petitioner conceded that \$1,190.00 of the tax assessed was due and payable.

3. On October 31, 1980, petitioner purchased McCreary Metals, Inc. from Donald McCreary who was the sole owner of said corporation. Under the terms of the sales agreement, petitioner paid \$79,000.00 for assets consisting of office furniture, motor vehicles, and machinery and equipment. Petitioner attributes \$62,000.00 thereof to the following equipment which is the issue of this hearing:

- a) Roto - Die Hydraulic Bender
Model #10 Serial #80118
- b) Welty - Way 5' Roll Capacity
Serial #56408
- c) Peck - Stow & Wilcox 6' Power Shear
Model #U-172-H Serial #636397
- d) Chicago Power Brake 8' Long
Preis & Krup Manufacturing Company
Model #68-B Serial #L-18082
- e) Lennox Power Brake 10' Long
Model #65-10 - 10 Gauge
- f) Peck, Stow & Wilcox Company 10' Power Shear
Model #10-U-10 Serial #62317
Capacity 10 Gauge

It is petitioner's contention that the above articles of machinery and equipment are exempt from taxation because McCreary Metals, Inc., under petitioner's ownership, produces tangible personal property by manufacturing.

4. McCreary's production process, as described by petitioner, begins with the receipt of sheet metal in roll form. Material is cut from the rolls and it is flattened. A pattern of the item to be produced is laid out on the material. The material is further cut to plan, bent to the prescribed shape and crimped

or welded to retain its form. Typical sheet metal products produced by McCreary included heating and air conditioning duct work, diffusers and grates for buildings, as well as battery storage units and heat exchangers for diesel engines.

5. Petitioner offered further testimony that prior to his acquisition, McCreary Metals, Inc. operated the machinery and equipment at 20 percent of its efficiency and installed all the sheet metal products which it produced in capital improvement construction projects. It was petitioner's intention to increase productivity and make McCreary Metals, Inc. a local manufacturer. In pursuit of this goal, petitioner has offered his products for sale installed or uninstalled.

6. No evidence was offered about detailed time records being maintained by petitioner over the period of his ownership of McCreary Metals, Inc. which show the number of hours that each of the various machines were used to produce tangible personal property for sale on an uninstalled basis.

7. The Audit Division maintained that petitioner produced his product by fabrication rather than manufacturing. The Audit Division relied upon the definitions for fabrication and manufacturing provided under 20 NYCRR 531.2.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law exempts from sales and use tax:

"Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property... for sale, by manufacturing...".

B. That 20 NYCRR 531.2 provides definitions of fabrication and manufacturing relative to the base for the imposition of self-use tax under section 1110(B) of the Tax Law. Said special provision of section 1110 for items which a

contractor fabricates was intended to be a limitation on the application of the self-use tax to items already classified as "manufactured, processed or assembled" and the concept of fabrication was encompassed within the concept of manufacturing, processing and assembling (Matter of Cardinal Kitchens, Inc., State Tax Commission, September 28, 1976).

C. That "while 'manufacture' and 'fabricate' have meaning and applications which may differ,... they often are, and in their broadest sense, interchangeable in meaning, and that the definition in any particular instance must depend upon the environment of the particular use of either." (Union Wire Rope Corporation v. Atchinson, T. & S. Ry Co., 66 F(2d) 965, 970).

That petitioner's process of converting rolled sheet metal into a finished sheet metal product constitutes manufacturing within the meaning and intent of section 1115(a)(12) of the Tax Law.

D. That machinery and equipment, to be exempt under section 1115(a)(12), must be used directly and "predominantly" in the production of tangible personal property for sale.

That "(m)achinery or equipment is used predominantly in production, if over 50% of its use is directly in the production phase of a process." (20 NYCRR 528.13(c)(4)).

That an exemption from taxation must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption (Grace v. N.Y.S. Tax Commission, 37 N.Y.2d 193, 196).

That petitioner failed in its burden of proof to show that its equipment was used at least 50 percent of the time in producing tangible personal property for sale on an uninstalled basis.

E. That the petition of Lawrence Hunter is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 10, 1981 is sustained.

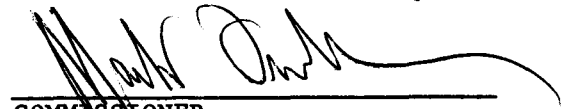
DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 845

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Lawrence Hunter (Purchase)	
c/o McCreary Metals, Inc.	
Street and No.	
10 Railroad Ave.	
P.O., State and ZIP Code	
Albany, NY 12205	
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 481 207 846

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Donald A. Wilson	
Street and No.	
18 Seneca St.	
P.O., State and ZIP Code	
Cohoes, NY 12047	
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