

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

May 27, 1983

Micheli Contracting Corporation
95 Lawrence St.
Rensselaer, NY 12144

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
Jeremiah F. Manning
Ainsworth, Sullivan, Tracy & Knauf
75 State St., P.O. Box 1590
Albany, NY 12201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Micheli Contracting Corporation :
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 12/1/72 - 8/31/75. :
_____ :

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 Micheli Contracting Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Micheli Contracting Corporation
95 Lawrence St.
Rensselaer, NY 12144

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. Berglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Micheli Contracting Corporation :
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 12/1/72 - 8/31/75. :

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 Jeremiah F. Manning the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jeremiah F. Manning
Ainsworth, Sullivan, Tracy & Knauf
75 State St., P.O. Box 1590
Albany, NY 12201

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

James A. Haysland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MICHELI CONTRACTING CORPORATION	:	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 December 1, 1972	:	
through August 31, 1975.	:	

Petitioner, Micheli Contracting Corporation, 95 Lawrence Street, Rensselaer, New York 12144, 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 December 1, 1972 through August 31, 1975 (File No. 18370).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on March 23, 1982 at 9:15 A.M., on May 26, 1982 at 9:15 A.M., and continued to its conclusion on June 23, 1982 at 9:30 A.M. with all briefs to be submitted by November 30, 1982. Petitioner appeared by Ainsworth, Sullivan, Tracy & Knauf (Jeremiah F. Manning and Joseph M. McCoy, Esqs., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether the resale exclusion under the Sales Tax Law mandates exclusive use of property for resale.

II. Whether equipment leased or purchased by petitioner which was rented or leased to others is subject to the compensating use tax determined due on audit.

III. Whether 50 percent of petitioner's purchases of fuel, repairs and parts used in/on equipment rented or leased to others should be excluded from the compensating use tax determined due on audit as purchases for resale.

IV. Whether the Audit Division is estopped from asserting tax due from petitioner based on alleged prior agreements reached at the conclusion of two prior audits regarding the above issues.

V. Whether certain other phases of the audit whereby additional sales and other purchases were held subject to sales and use tax were proper.

VI. Whether penalty and interest in excess of the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. On March 19, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Micheli Contracting Co. [sic] covering the period December 1, 1972 through February 28, 1973. The Notice asserted sales and use tax due of \$3,397.75, plus penalty and interest of \$1,359.10, for a total of \$4,756.85. The Notice was issued prior to completion of a field audit in progress.

2. On September 17, 1976, after conclusion of the field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Micheli Contracting Co. [sic] covering the period March 1, 1973 through August 31, 1975. This Notice asserted sales and use tax due of \$28,125.44, plus penalty and interest of \$12,850.08, for a total of \$40,975.52.

3. Petitioner, by signature of its president, Elio M. Micheli, executed a consent to extend the period of limitation for the issuance of an assessment for the period March 1, 1973 through May 31, 1973 to September 20, 1976.

4. Petitioner is a construction contractor which also rented or leased out construction equipment to other contractors. Aside from equipment already owned, petitioner rented or leased additional equipment on a month-to-month basis for re-rental, re-lease or self use and, if economically feasible, eventually purchased said equipment. A separate equipment rental company was not established, but rather the rental and lease activity was accounted for through the books of the construction company.

Petitioner's sources of income were threefold:

- (a) Lump-sum construction contracts;
- (b) Equipment rental, which usually included an operator; and
- (c) Time and material contracts which included labor, materials and equipment rentals.

5. The Audit Division performed a field audit on the books and records of Micheli Contracting Corporation for the period December 1, 1972 through August 31, 1975. The books and records were reviewed in their entirety. Based on the audit, the Audit Division concluded the following taxes were due:

		<u>TAX DUE</u>
(a) Additional Taxable Sales	\$68,885.15	\$ 3,057.36
Purchases Subject to Use Tax:		
(b) Fuel Purchases	40,837.04	2,756.33
(c) Vehicle Expenses (Parts & Repairs)	97,146.65	6,557.39
(d) Operating Expenses	8,539.97	512.36
(e) Materials	93,078.60	6,515.51
(f) Equipment Rental	67,297.30	4,044.52
(g) Equipment Purchases	88,093.40	5,956.51
(h) Miscellaneous Purchases	12,488.11	749.27
(i) Purchases - 4% tax paid,		
Additional 3% tax due	44,396.50	1,331.84
Total Sales and Use Tax Due		<u>\$31,481.09</u>

6. Based on the completed audit findings, the tax due for the period December 1, 1972 through February 28, 1973 was reduced to \$3,355.65. (Notice issued March 19, 1976.)

7. It was the Audit Division's position that equipment rental and purchases held taxable in Findings of Fact "5(f)" and "5(g)" were used by Micheli Contracting Corporation in the fulfillment of its contract obligations and therefore not entitled to a resale exclusion. The Audit Division did exclude from the audit findings (prior to assessment) some equipment rental where substantiation of re-rental or re-lease was made; namely, a total of \$37,500.00 in lease payments made by petitioner for equipment re-leased to H. J. O'Connell Associates, for use at the construction site of Clifton Park Shopping Center.

8. In order to show the significance of its rental and lease income to its overall business income, petitioner submitted a self-prepared analysis of its income for the year ended November 30, 1973. This analysis compared income derived from construction contracts with income derived from equipment rental and time and material contracts. Petitioner argued that although lump-sum construction income constituted 80 percent of its entire gross income, equipment rental and time and material contracts generated a 30 percent net income as opposed to a 5 percent net income from lump-sum construction.¹

By virtue of its recomputations to tax conceded due, petitioner is in agreement with \$22,213.20 in lease payments held subject to use tax on audit (Finding of Fact "5", item (f)).

Petitioner submitted evidence sufficient to delete \$2,400.00 in lease payments held subject to use tax as having been equipment re-rented to A. L. Van Buskirk where sales tax was collected and remitted thereon. An additional \$8,375.00 in lease payments held subject to use tax on audit were for equipment re-leased to H. J. O'Connell Associates in Clifton Park.

¹ The dollar amount of net income was approximately 50 percent from each source.

Of the remaining equipment rental held subject to use tax, petitioner contended that \$15,500.00 in lease payments were also for equipment re-leased to H. J. O'Connell Associates. The lease agreement with H. J. O'Connell Associates, which was submitted as a result of the hearing, commenced on July 8, 1974 for equipment used at the Clifton Park Shopping Center. Petitioner did not submit any lease agreement between itself and H. J. O'Connell Associates for use of equipment at Clifton Knolls during the period December, 1972 through October, 1973 for which petitioner's lease payments were held subject to use tax.

Petitioner contended that \$11,888.12 in additional lease payments were for equipment re-rented; however, no evidence was submitted to show the re-rental of same and the proper collection of sales tax thereon. Petitioner acknowledged that \$6,920.98 in equipment rental payments were made for equipment that was not re-rented and remained idle.

Petitioner was in agreement that \$63,165.40 in equipment purchases held subject to use tax was due (Finding of Fact "5", item (g)).

The same equipment held subject to use tax on lease payments at the Clifton Knolls site (purportedly a re-rental to H. J. O'Connell) was purchased by petitioner for the additional sum of \$3,668.00 and held taxable on audit. Petitioner failed to document the re-rental of same. No evidence was adduced to support the re-rental of the balance of the equipment purchased and held subject to use tax on audit.

9. Petitioner estimated that 50 percent of its purchases of fuel, parts and repairs were consumed in construction equipment rental and therefore should be afforded the resale exclusion (Items (b) and (c) of Finding of Fact "5").

Petitioner did not submit any records (nor offer testimony that records were kept) to confirm the amount of fuel purchases for resale or the use of parts and repairs to construction equipment on rental.

The income analysis submitted by petitioner (Finding of Fact "8") disclosed that 20 percent of the direct costs of equipment rental and trucking and equipment operating expenses were attributable to equipment rental and lease income.

10. Petitioner had undergone two prior audits conducted by the Audit Division sometime during 1969 and 1972. Petitioner alleged that these audits were instructional in nature, that certain conclusions of law were reached which differed from the current audit results, and that compromises were made. Petitioner further alleged that the records were established relying on prior compromises made, and therefore petitioner did not establish a separate equipment rental company. Petitioner therefore argued that the State is estopped from performing the current audit based on different standards and conclusions from those of the previous audits.

Petitioner testified as to the instructions it received from the Audit Division regarding the treatment of equipment for rental purposes. Petitioner was aware that equipment was not taxable on the initial lease payment if the equipment was for re-rental. Petitioner was also aware that equipment leased or purchased and used on its own lump-sum construction jobs was taxable.

11. Petitioner argued that the Audit Division never regarded exclusivity as a factor in determining the tax status of its equipment leases or purchases on prior audits and should be prevented from doing so now. Petitioner maintained that its business activity was the same during the audit period at issue as it was in the prior audit periods.

12. Most of the materials held subject to use tax on audit (Finding of Fact "5", item (e)) were consumed in the construction of sanitary sewer systems. Petitioner maintained that even though its contracts might have been with developers, the Towns of Bethlehem, Guilderland and the City of Albany were the beneficiaries of the construction, and the work had to meet their conditions of approval as well as that of the Department of Health. Petitioner therefore contended that these materials should be exempt from tax.

Petitioner held no contracts with the aforesaid Towns or City for this construction. Petitioner offered no evidence that the individual developers did so showing that any tax savings were passed on to the appropriate exempt organizations.

13. General operating expenses (Item (d) of Finding of Fact "5") were not contested.

Miscellaneous purchases held subject to use tax on audit (Item (h), Finding of Fact "5") were agreed to by petitioner in the amount of \$2,403.66. Of the remaining purchases of \$10,084.45, \$3,389.00 were purchases of additional material consumed in the construction of sewers (Finding of Fact "12"). The exempt use of the balance of \$6,695.45 was unsubstantiated.

Of the purchases totaling \$44,396.50 which were held subject to an additional use tax of 3 percent (Finding of Fact "5", item (i)), \$1,880.62 was for materials consumed by petitioner in Albany County. The balance of \$42,515.88 in purchases was of items of supply, repairs and equipment leased or purchased on which 4 percent tax had been paid. No evidence exists that any of these supplies, repairs or equipment were later transferred to a higher taxing jurisdiction.

14. Petitioner submitted two customers' resale certificates substantiating that sales made totaling \$3,875.00 were not subject to tax. This amount was

included in the additional taxable sales of \$68,885.15 (Finding of Fact "5", item (a)). Petitioner conceded to additional taxable sales of \$7,539.15.

Of the remaining sales, petitioner contended that \$57,300.00 in sales to Kaydeross Homes in August, 1975, which was billed as equipment rental, was merely an accounting entry for the purpose of allocating cost to the project of constructing the Creek and Pines Mobile Home Park. Kaydeross Homes is related to Micheli Contracting Corporation in that the principals are the same, and Micheli Contracting Corporation borrowed the funds for the construction from Citibank. Petitioner submitted the mortgage dated December, 1973, in the amount of \$350,000.00. The mortgage was subsequently discharged in December, 1975. Petitioner failed to fully explain, however, how the billing to Kaydeross Homes under invoice #71102 reflecting bare rental² of equipment was not actually for equipment rental.

No evidence was submitted to dispute the balance of the sales held taxable on audit.

15. Petitioner did not report any purchases subject to use tax on its sales and use tax returns filed during the audit period. By Mr. Micheli's testimony, petitioner was aware of its obligations under the Sales and Use Tax Law.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i) of the Tax Law defines retail sales as "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property...".

² Bare rental of equipment, as explained by petitioner, is without an operator.

That 20 NYCRR 526.6(c) explains the resale exclusion as follows:

"(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer. This resale exclusion is based on the theory that property or services should be taxed only once, at the time of the retail sale, and pyramiding of the tax on that specific property or service is to be avoided." (Emphasis added.)

Reference to exclusivity is found in Opinion of Counsel dated August 13, 1965 regarding purchases for rental purposes. Exclusivity has additionally been determined to be a factor in the resale exclusion whereby a purchase of excavation equipment by a contractor was held subject to tax because it was not purchased exclusively for resale or rental. (Matter of Joseph Beaton & Sons, Inc., State Tax Commission, April 6, 1972.)

B. That petitioner has shown that \$10,775.00 in lease transactions held subject to use tax on audit were made for the exclusive purpose of rental or lease to other contractors (Finding of Fact "8", third paragraph). These transactions were on a month-to-month basis, therefore, the rental payments were not subject to tax. (Matter of Vincent S. Jerry & Sons, Inc., State Tax Commission, February 22, 1980.)

C. That in view of the fact that equipment re-rentals and re-leases did occur at Micheli Contracting Corporation, fuel, repairs and parts used in that equipment are eligible for the resale exclusion (Items (b) and (c) of Finding of Fact "5"). An exact amount of such use, however, could not be determined from petitioner's records. That based on the income analysis submitted by petitioner (Finding of Fact "9"), 20 percent of such purchases were for resale and are deleted from the audit findings. Exactness is not required where it is

the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability. (Markowitz v. State Tax Commission, 54 A.D.2d 1023, 44 N.Y.2d 684).

D. That petitioner was not prejudiced by any prior actions of the Audit Division which might have led to not funding a separate equipment leasing company. The fact that the books and records of petitioner have been periodically audited and certain concessions made does not create a ruling or binding interpretation. (Gordon v. Gerosa, 16 Misc.2d 710, 185 N.Y.S.2d 329 (1959).) Moreover, petitioner has not shown the elements necessary to give rise to an estoppel. (Colgate-Palmolive-Peet v. Joseph, 308 N.Y. 333 (1955).)

E. That section 1132(c) of the Tax Law provides:

"[f]or the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services...are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax or the customer... Provided however, the tax commission may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquisition to determine the manner in which tangible personal property or services will be used, to pay the tax directly to the tax commission and waive the collection of the tax by the vendor... No such authority shall be granted or exercised except upon application to the tax commission, and the issuance by the tax commission, in its discretion, of a direct payment permit."

Petitioner had an option available to it under Tax Law § 1132(c) in applying for a direct payment permit. Apparently, petitioner chose not to exercise that option.

F. That purchases totaling \$42,515.88 held subject to additional use tax of 3 percent were not used in any jurisdiction imposing a higher tax rate than

that which was paid (Finding of Fact "13", third paragraph). The additional use tax due on these purchases is hereby cancelled.

That petitioner sustained its burden of proof under Tax Law § 1132(c) to show that sales totaling \$3,875.00 were not taxable (Finding of Fact "14"). The additional sales tax determined due on those sales is cancelled.

G. That petitioner failed to show that it acted in good faith to warrant any reduction of penalty or interest. Petitioner did not report any use tax on its returns filed even though it was aware of its tax obligations. Petitioner apparently chose to await audit before paying any use taxes due.


H. That the petition of Micheli Contracting Corporation is granted to the extent indicated in Conclusions of Law "B", "C" and "F"; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued March 19, 1976 and September 17, 1976 with applicable penalty and interest thereon; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

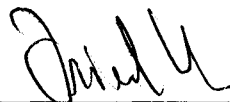
STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER



P 481 207 834

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to <i>Michell Contracting Corporation</i>	
Street and No. <i>95 Lawrence St.</i>	
P.O., State and ZIP Code <i>Rensselaer, NY 12144</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	

P 481 207 835

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to <i>Jeremiah F. Manning</i>	
Street and No. <i>Ainsworth, Sullivan, Tracy & Knapp</i>	
P.O., State and ZIP Code <i>75 State St. P.O. Box 1590</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	