

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

September 28, 1983

North Shore Iron Works, Inc.  
Richard Fanning & Lawrence Jacobson, Individ. & as Officers  
2416 Chestnut Ave.  
Ronkonkoma, NY 11770

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  
Gerald W. Cunningham  
Lee, Meagher, Cunningham & Lee  
26 Court St.  
Brooklyn, NY 11242  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
North Shore Iron Works, Inc. :  
Richard Fanning & Lawrence Jacobson, :  
Indiv. & as Officers : 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 12/1/69-5/31/74. :

---

State of New York  
County of Albany


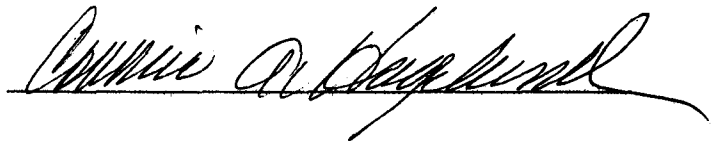
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon North Shore Iron Works, Inc., Richard Fanning & Lawrence Jacobson, Indiv. & as Officers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

North Shore Iron Works, Inc.  
Richard Fanning & Lawrence Jacobson, Indiv. & as Officers  
2416 Chestnut Ave.  
Ronkonkoma, NY 11770

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  
28th day of September, 1983.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_ :  
In the Matter of the Petition :  
of :  
North Shore Iron Works, Inc. :  
Richard Fanning & Lawrence Jacobson, :  
Indiv. & as Officers :  
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 12/1/69-5/31/74. :  
\_\_\_\_\_ :

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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Gerald W. Cunningham the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald W. Cunningham  
Lee, Meagher, Cunningham & Lee  
26 Court St.  
Brooklyn, NY 11242

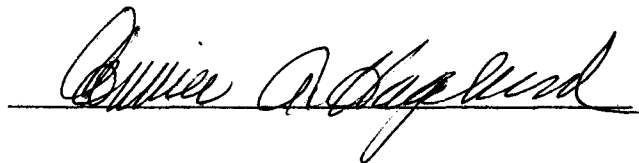
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
28th day of September, 1983.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petitions  
of  
NORTH SHORE IRON WORKS, INC.  
RICHARD FANNING and LAWRENCE JACOBSON,  
Individually and as Officers  
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, 1969  
through May 31, 1974.

---

DECISION

Petitioners, North Shore Iron Works, Inc., Richard Fanning and Lawrence Jacobson, individually and as officers, 2416 Chestnut Avenue, Ronkonkoma, New York 11770, filed petitions 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, 1969 through May 31, 1974 (File No. 10247).

A formal hearing was held before Neil Fabricant, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 21, 1977 at 9:15 A.M. and continued to conclusion at the same location on September 29, 1977 at 11:45 A.M. Petitioners appeared by Lee, Meagher, Cunningham & Lee, Esqs. (Gerald W. Cunningham, Esq., of counsel). The Audit Division appeared by Peter Crotty, Jr., Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether corporate petitioner's purchases of fabrication services from a related corporation were subject to sales and use tax.

II. Whether corporate petitioner's purchases of materials that were incorporated in capital improvements projects of exempt organizations were subject to sales and use tax.

III. Whether the Audit Division properly used test periods to determine corporate petitioner's sales and use tax liability.

FINDINGS OF FACT

1. Petitioner, North Shore Iron Works, Inc. ("North Shore") by Richard Fanning, President, and Lawrence Jacobson, Vice-President, executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1969 through November 30, 1972 to September 20, 1975.

2. On September 19, 1975 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 petitioners, North Shore Iron Works, Inc. and Richard Fanning and Lawrence Jacobson, individually and as officers, in the amount of \$119,993.91, plus penalty and interest, for the period December 1, 1969 through May 31, 1974.

3. North Shore was a corporate subcontractor engaged in the business of installing ornamental iron work for various general contractors. North Shore's principal products were structural steel, indoor stairwell railings and indoor railings for banks. North Shore incorporated in New York in 1962. On December 15, 1969, because of union problems and for pension planning reasons, a second corporation, North Shore Fabricators and Erectors, Inc. ("Fabricators"), was incorporated in New York. North Shore's officers were also officers of Fabricators and all operations of both corporations continued to be carried on on the same premises. Fabricators functioned as a sub-subcontractor which fabricated North Shore's iron products and also erected the finished products at the field

sites. North Shore and Fabricators did not enter into any formal contracts and there was no formal billing procedure between the two. North Shore's accountant merely took Fabricators' entire labor cost, added five percent for administrative costs and transferred this amount from North Shore's books to Fabricators' books.

4. On audit, the Audit Division determined that the labor costs of Fabricators, which were paid by North Shore by means of the book transfers, were subject to the compensating use tax. The total purchases by North Shore from Fabricators amounted to \$1,154,285.00 for the audit period. In arriving at this figure, the auditor failed to take into account that \$341,495.00 of the aforementioned amount was for field labor involving erecting and installing the iron products at the work sites.

5. The Audit Division also conducted a one month test period audit of material purchases for use in capital improvement contracts. The results of the test indicated that North Shore had failed to pay tax on 56.64 percent of said purchases. Because the aforesaid percentage appeared to be high, the auditor selected three additional months for testing. The four month test indicated that North Shore had not paid tax on 48.69 percent of the \$119,607.00 in purchases tested. This percentage was applied to the total material purchases for the audit period resulting in material purchases of \$705,232.00 which were subject to use tax. The auditor utilized the test period in spite of the availability of all the contracts in issue and the presence of a complete set of books and records from which a complete audit could have been conducted.

6. The auditor also conducted a one month test period audit of shop purchases. Shop purchases were purchases for use in North Shore's shop rather than for resale or for use in capital improvement contacts. The results of the

shop purchase test indicated that North Shore failed to pay tax on 34.7 percent of the \$3,363.00 in shop purchases tested. This percentage was applied to total shop purchases for the audit period resulting in purchases of \$68,148.00 which were subject to use tax. North Shore did not agree to the use of the one month test period and, moreover, the Audit Division again utilized a test period in spite of the fact that North Shore maintained a complete and accurate set of books and records.

7. The Audit Division also analyzed cash sales of uninstalled iron work for the period and determined that \$845.44 in tax was due on said sales. At the hearing, North Shore conceded that the aforementioned amount was due.

8. North Shore argued that, with respect to the purchases of fabrication labor from Fabricators, such labor was not taxable to it because Fabricators was merely a "shell" corporation set up for the purpose of resolving union problems. In addition, North Shore argued that the amount claimed to be fabrication labor was excessive in that it included office and supervisory labor as well as labor performed in erecting and installing the finished iron products at the work sites. Fabricators, however, had filed a certificate of incorporation and maintained separate books and separate payroll from that of North Shore.

9. North Shore further argued that, with respect to the materials purchased for capital improvement projects, the majority of said purchases were for use on jobs for exempt organizations and were, therefore, not taxable. North Shore and the Audit Division jointly prepared a list of the contracts for which purchases were made during the audit period. Of the contracts submitted, the Audit Division conceded that tax was not due on purchases for seven contracts totalling \$115,715.00 and designated "List III", since said contacts were time

and materials contracts with exempt organizations. The Audit Division also conceded that no tax was due on purchases totalling \$13,080.00 which were for uninstalled materials purchased for resale and contained on a list designated "List IA". North Shore also submitted fourteen contracts totalling \$172,305.00 and designated "List V", which separately stated labor and materials costs and expressed an intent to take advantage of the tax exemption. All other contracts submitted neither separately stated time and materials nor expressed an intent to take advantage of the exemption.

10. North Shore also argued that use of the test periods was not an accurate reflection of its actual tax liability. With respect to the one month test period for shop purchases, North Shore argued that there were extraordinary purchases made in that month which distorted the percentage of purchases subject to tax. As to the four month test period for the purchases made in performance of capital improvement contracts, North Shore maintained that the percentage of contracts found to be non-exempt was excessive and unreasonable.

11. Petitioners acted in good faith at all times and there was no intent to evade the tax.

#### CONCLUSIONS OF LAW

A. That ordinarily the corporate entity will not be disregarded in the absence of fraud, illegality, or wrongdoing (13 N.Y. Jur. 2d, Business Relationships §26). North Shore and Fabricators were validly formed corporations and no reason was given why their status as corporations should be disregarded. Sales by one related corporation to another related corporation, not otherwise exempt, are retail sales, and taxable to the extent of the consideration paid.

B. That section 1105(c)(2) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the service of fabricating tangible



personal property, "performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed." Moreover, expenses incurred by a vendor in making a sale, regardless of whether they are billed to a customer, are not deductible from receipts [see Tax Law §1101(b)(3)]. However, section 1105(c)(3) provides that receipts from the sale of the service of installing tangible personal property "which, when installed, will constitute an addition or capital improvement to real property..." are not subject to sales and use tax.

C. That the purchase of the fabrication service by North Shore from Fabricators was subject to tax. Moreover, the office expenses which were paid for by North Shore were properly included as part of the receipts subject to tax within the meaning and intent of section 1101(b)(3) of the Tax Law. However, the installation and erection services provided by Fabricators at the work site were not subject to tax. Therefore, the \$1,154,285.00 in purchases from Fabricators is to be reduced by the \$341,495.00 charge for field labor for a total subject to tax of \$812,790.00.

D. That section 1116(a)(4) of the Tax Law provides, in pertinent part, that, subject to certain limitations, sales by or to organizations operated "exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes..." will not be subject to sales and use taxes.

E. That where contracts with exempt organizations separately list time and materials charges, express an intent to take advantage of the tax exempt status and sales tax is not included in the bid or contract price, no sales tax is applicable to purchases (Sweet Associates, Inc. v. Gallman, 36 A.D.2d 95, aff'd, 29 N.Y.2d 902). Accordingly, purchases made in performance of the

contracts described in Finding of Fact "9" and designated as Lists III and V are exempt from tax. Moreover, the purchases totalling \$13,080.00 listed on List IA, which were for uninstalled materials purchased for resale, are also exempt.

F. That in view of the fact that North Shore maintained a complete set of books and records, the Audit Division's resort to a four month test period with respect to materials purchased for capital improvement contracts and a one month test period with respect to shop purchases in computing unpaid sales tax on said purchases was unwarranted (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Therefore, the tax due on materials purchased for use in capital improvement contracts is reduced to the amount due on the \$119,607.00 in purchases for the months of June, 1970, March, 1971, September, 1972 and April, 1974, and tax due on shop purchases of \$3,363.70 for the month of September, 1972.

G. That penalty and interest in excess of the minimum prescribed by section 1145(a) of the Tax Law are waived.

H. That the petitions of North Shore Iron Works, Inc., Richard Fanning and Lawrence Jacobson, individually and as officers, are granted to the extent indicated in Conclusions of Law "C", "E", "F" and "G" above; 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 19, 1975; and, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

*Rodwin A. Allen*  
PRESIDENT

*Francis R. Koehn*  
COMMISSIONER

*Mark J. [Signature]*  
COMMISSIONER

P 481 208 295

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to North Shore Iron Works, Inc. Richard Fanning & Lawrence Jacobson, Endry & 25 Officers	
Street and No. 2416 Chestnut Ave.	
P.O., State and ZIP Code Ronkonkoma, NY 11770	
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 481 208 296

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Gerald W. Cunningham Lee, Meagher, Cunningham & Lee	
Street and No. 26 Court St.	
P.O., State and ZIP Code Brooklyn, NY 11242	
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