

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

August 17, 1983

Pompa Brothers
RD #5 Malta Ave.
Ballston Spa, NY 12020

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
Eugene Steiner
Steiner and Steiner
90 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Pompa Brothers

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 3/1/77 - 2/29/80.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon Pompa Brothers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Pompa Brothers
RD #5 Malta Ave.
Ballston Spa, NY 12020

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
17th day of August, 1983.

Jan A. Schultz

Connie R. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Pompa Brothers :

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 3/1/77 - 2/29/80. :
_____:

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1983, she served the within notice of Decision by certified mail upon Eugene Steiner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene Steiner
Steiner and Steiner
90 State St.
Albany, NY 12207

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
17th day of August, 1983.

Jean A. Schultz

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| POMPA BROTHERS | : | 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, 1977 | : | |
| through February 29, 1980. | : | |

Petitioner, Pompa Brothers, RD #5 Malta Avenue, Ballston Spa, New York 12020, 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, 1977 through February 29, 1980 (File No. 35025).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on April 18, 1983 at 9:15 A.M. Petitioner appeared by Steiner and Steiner (Eugene Steiner, Esq. of counsel). The Audit Division appeared by John P. Dugan, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether petitioner's purchase of a Barber-Greene silo is exempt machinery or equipment under section 1115(a)(12) of the Tax Law.

II. Whether petitioner's purchase of a Caterpillar wheel loader is exempt machinery or equipment under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. On September 20, 1980, the Audit Division issued a timely Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner,

Pompa Brothers, assessing estimated sales and use tax of \$46,723.82, plus interest of \$11,958.84, for the period March 1, 1977 through February 29, 1980.

2. As the result of a subsequent audit, the sales and use tax assessed by the aforementioned notice was revised to \$3,599.49. This reflected the auditor's determination that \$9,199.49 tax was due on unreported sales, recurring purchases and equipment purchases and that a \$5,600.00 credit was due petitioner on equipment rentals.

3. On December 19, 1980, petitioner remitted a check for \$4,391.74 in full payment of the revised sales and use tax plus interest.

4. The amount of sales and use tax in dispute is \$7,215.17 and represents the tax which the auditor determined was due on petitioner's equipment purchases of a Barber-Greene silo (\$3,895.17) and a Caterpillar wheel loader (\$3,320.00).

5. During the period in issue, petitioner, Pompa Brothers, mined stone and gravel and produced crushed stone, asphalt and sand for sale to the public.

6. On or about July 8, 1977, petitioner purchased a Barber-Greene silo from Capitol Equipment Co. Said silo was purchased without the service of installation and consisted of the following equipment:

- 1 Barber-Greene Model AE-120 portable buck elevator with 300-ton per hour capacity, 26" x 50" housing, complete with drives, motor and guards.
- 1 200-ton capacity Barber-Greene surge silo complete with $\frac{1}{4}$ " steel plate walls, anti-segregation batcher type "gob hopper", 2" thick spun fiberglass insulation on walls. Double clamshell discharge gates, handrails and walkways, air piping, all factory-installed wiring, complete controls consisting of remote box including start-stop switch on elevator, silo high and low indicators, gob hopper function light, manual silo discharge button and signal horn button.
- 1 Electric silo cone heater.

7. Petitioner purchased the Barber-Greene silo for use in conjunction with its sale of sand and asphalt. Petitioner testified that sand removed from

its sand bank was processed through the asphalt plant to produce dry sand. This dry sand was stored in the Barber-Greene silo in a warm and dry condition until the arrival of tanker trucks into which the sand was loaded for delivery to the customer. Additionally, asphalt manufactured in the asphalt plant was stored in the Barber-Greene silo up to the time that a truck arrived for loading. While retained in the silo, the asphalt was maintained at the temperature that was prescribed by State specifications.

8. The sand and asphalt which petitioner manufactured was in a saleable state upon discharge from its asphalt plant. In fact, petitioner, during 1978 and 1979, manufactured asphalt on a demand basis and asphalt was loaded directly from the plant onto customers' trucks.

9. On or about August 1, 1979, petitioner purchased a Model 966C Caterpillar wheel loader from Southworth Machinery, Inc.

10. In petitioner's manufacture of stone, it produced an excessive quantity of the larger graded stones [one's and two's] on the first pass of the rock through the crusher. Petitioner purchased the Caterpillar wheel loader for the purpose of loading the larger graded stone back into the crusher for further processing to smaller graded stone [one A's and dust]. Petitioner further used the Caterpillar wheel loader to load the stone destined for use in its manufacture of asphalt onto trucks. These trucks dumped the stone directly into the stone hopper of the asphalt producing equipment. Petitioner's stone and asphalt facilities were located in one location on Malta Avenue, in Ballston Spa, New York.

11. The Caterpillar wheel loader loaded stone on the trucks of a customer in emergency cases (one to three days a year) when the loader normally used for such purposes was being repaired. Petitioner did not register the Caterpillar

wheel loader with the Department of Motor Vehicles as its use was restricted to off-highway activities.

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, processing, ...mining or extracting..."

B. That in determining whether machines or equipment used in handling, storing or transporting raw materials fall under the sales and use tax exemption, attention must be given to the nexus extant between the end product and the machinery or equipment so as to ascertain if the bond or union between them is such that it can be said that the machinery or equipment is necessary and essential to production. [Rochester Independent Packer, Inc. v. Heckelman, 83 Misc.2d 1064.]

C. That 20 NYCRR 528.13(b)(1)(ii) defines production as including "the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale".

D. That 20 NYCRR 528.13(c)(1)(ii) defines "directly" to mean that the machinery or equipment must, during the production phase of a process, "have an active causal relationship in the production of the product to be sold".

E. That the Barber-Greene silo purchased and erected by petitioner does not have an active causal relationship in the production of the product to be sold in that the asphalt and sand is finished and ready for sale prior to placement in storage in the silo. [Matter of Colarusso Blacktop Corporation, State Tax Commission, July 18, 1980.]

F. That the Caterpillar wheel loader purchased and used to handle raw materials is necessary and essential to the production of stone and asphalt for sale and is exempt from sales and use tax pursuant to section 1115(a)(12) of the Tax Law.

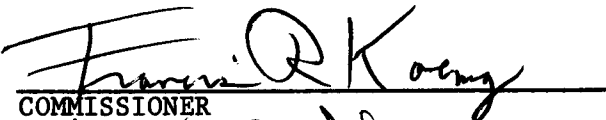
G. That the petition of Pompa Brothers is granted pursuant to Conclusion of Law "F" above; that the Audit Division is hereby directed to refund the tax paid by petitioner on the Caterpillar wheel loader, together with such interest as may be lawfully owing; and that except as so granted, the petition is in all other respects denied.

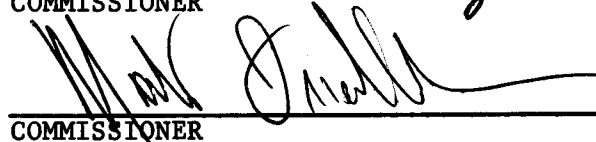
DATED: Albany, New York

STATE TAX COMMISSION

AUG 17 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 208 348

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|--------------|
| Sent to <i>Roman Bratko</i> | |
| Street and No. <i>R.D. #5 Maltra Ave</i> | |
| P.O. State and ZIP Code <i>Babylon N.Y.</i> | |
| Postage | <i>12.20</i> |
| 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 481 208 349

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|---------------------------|
| Sent to <i>Eugene Steiner</i> | |
| Street and No. <i>Steiner & Steiner</i> | |
| P.O. State and ZIP Code <i>90 State St</i> | |
| Postage | <i>Liberty N.Y. 12.20</i> |
| 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