

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

May 27, 1983

Portville Forest Products, Inc.  
c/o Earl Rogers, Jr., Pres.  
Whitehouse Rd.  
Portville, NY 14770

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  
James D. Linnan  
James D. Linnan & Associates, P.C.  
112 State St., Suite 1109  
Albany, NY 12207  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Portville Forest Products, Inc. :  
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 3/1/72-5/31/78. :  
\_\_\_\_\_ :

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 Portville Forest Products, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Portville Forest Products, Inc.  
c/o Earl Rogers, Jr., Pres.  
Whitehouse Rd.  
Portville, NY 14770

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. 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 :  
Portville Forest Products, Inc. :  
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 3/1/72-5/31/78. :  
\_\_\_\_\_ :

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 James D. Linnan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James D. Linnan  
James D. Linnan & Associates, P.C.  
112 State St., Suite 1109  
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  
27th day of May, 1983.

David Parchuck

James D. Linnan

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PORTVILLE FOREST PRODUCTS, 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, 1972	:	
through May 31, 1978.	:	

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Petitioner, Portville Forest Products, Inc., Whitehouse Road, Portville, New York 14770, 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, 1972 through May 31, 1978 (File No. 25779).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, State Office Campus, Albany, New York, on August 23, 1982 at 1:15 P.M., with all briefs to be submitted by November 19, 1982. Petitioner appeared by James D. Linnan & Associates, P.C. (James D. Linnan, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner's purchases of tangible personal property were exempt from tax by virtue of section 1115, subdivision (a), paragraph (12) of the Tax Law.

II. Whether petitioner's purchases of electricity for lighting and heating were exempt from tax by virtue of section 1115, subdivision (c) of the Tax Law.

III. Whether the Audit Division is foreclosed from litigating the taxability of petitioner's purchases of tangible personal property and electricity by application of the doctrines of res judicata and the law of the case.

IV. Whether taxes, penalty and interest assessed against petitioner for periods prior to 1977 must be cancelled because during such periods, no rules or regulations concerning exemptions from sales and use taxes were promulgated and filed by the Department of Taxation and Finance.

#### FINDINGS OF FACT

1. On April 10, 1979, the Audit Division issued to petitioner, Portville Forest Products, Inc., two notices of determination and demand for payment of sales and use taxes due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1972 through August 31, 1975 and September 1, 1975 through May 31, 1978 in the respective amounts of \$42,394.53 and \$45,855.93, plus penalty and interest. The assessments were issued as the result of a field audit, the procedures of which will be discussed in detail infra.

2. Petitioner, a New York corporation which owns and operates sawmills in Portville, New York and Little Marsh, Pennsylvania, is a completely integrated lumber company. The corporate officers are Frank Aloï and Earl Rogers, Jr.

3. Petitioner purchases standing timber and on occasion, the land upon which it is growing. Petitioner's crews sever the trees at the stump and strip off the branches and waste material. Timber jacks (or skidders) are used to drag the logs from deep in the woods to a central skidway, where they are loaded via a heel-boom loader onto a tractor-trailer combination. The tractor-trailer consists of a White tractor equipped with a headache bar to restrain the logs, and a pole trailer (or tree logger) which is specially designed for

hauling trees and cannot be used to haul any other product. This combination tractor-trailer is driven into the forest and transports the logs from the extraction site, over the logging roads and then the public highways, to petitioner's mill. At the mill, the logs are unloaded into the yard by a payloader and sorted by the payloader operator according to species, size and grade. The logs remain in storage until a sufficient number of a particular species are accumulated. The payloader then places the logs onto a conveyor which transports them directly into the sawmill. The milling process produces random widths and lengths of green, rough-sawed lumber. The lumber is weighed and converted into board feet by formula. Finally, the lumber is loaded onto flatbed trailers hauled by Freightliner tractors for delivery (free on board) to petitioner's customers, which include furniture manufacturers and flooring mills.

4. During the period under consideration, petitioner used exempt certificates to make all its purchases, based upon the belief that all tangible personal property and electrical power were used in its manufacturing process and thus exempt from tax.

5. On or about December 28, 1976, Audit Division representatives seized petitioner's sawmill and equipment for failure to file returns and to pay the tax required to be shown thereon. In order that it could resume business, petitioner remitted a check to the Audit Division in the amount of \$10,000.00 in partial payment of the taxes asserted to be due.

6. Petitioner and Mr. Earl Rogers, Jr. were indicted by the grand jury of Albany County, for failure to file sales and use tax returns for the period March 1, 1974 through May 31, 1975 in violation of section 1145, subdivision (b) of the Tax Law. On January 20, 1977, all six counts of the indictment were

dismissed on the failure of proof as to both defendants in the county court of Albany County. The Appellate Division, Third Department dismissed the prosecution's appeal of that dismissal (59 A.D.2d 217).

7. On February 24, 1978, petitioner made an application to the Supreme Court, County of Albany, for a judgment pursuant to Article 78 of the Civil Practice Law and Rules, enjoining the Department of Taxation and Finance from continuing its assessments and warrants against petitioner, compelling the Department to vacate or to mark satisfied tax liens against the property of petitioner, and further compelling the Department to return to petitioner the bond posted. The proceeding was stayed by stipulation of the parties upon the following conditions, among others: (1) that petitioner post \$15,000.00 in an interest-bearing account in trust for the Tax Commission; and (2) that the Tax Commission forthwith commence an audit for the purpose of determining any sales or use tax due from petitioner for the period March 1, 1972 through the date of the stipulation (April 4, 1978), generally following the "Timber Harvesters' Guide to the Sales and Use Tax Law of New York State and Annex 1". The stipulation provides, in pertinent part:

"It is further understood that this Timber Harvesters' Guide has not been filed with the Secretary of State of the State of New York and is not an official rule or regulation of the New York State Sales and Use Tax Law. It is further understood that Portville Forest Products, Inc. and its agents do not concur in the opinions set forth in said Guide nor do they accept same as a valid interpretation of the Sales and Use Tax Law."

8. In accordance with the conditions and terms of the stipulation, two sales tax examiners observed petitioner's operation in Portville, which observations included visiting the Deep Snow Road extraction site, and reviewed petitioner's books and records. The examiners determined that petitioner's

sales were not subject to tax but that use tax was due on certain capital acquisitions, recurring purchases and purchases of electrical power.

(a) Capital acquisitions. The examiners reviewed petitioner's capital acquisitions in detail for the entire audit period. They considered certain pieces of equipment, such as the timber jacks, heel-boom loader and payloader, as used directly and exclusively (before September 1, 1974) or directly and predominantly (after August 31, 1974) in petitioner's production and the acquisition thereof thus exempt from tax. (The acquisition of one Hough payloader on June 18, 1974 was considered a taxable purchase, due to petitioner's failure to document that it was used exclusively in production.) The examiners deemed other acquisitions subject to tax, including: (1) White tractors and pole trailers; (2) Freightliner tractors and flatbed trailers; (3) pick-up trucks used to carry the crews and supplies to extraction sites; (4) a sawdust truck for delivery of sawdust sold by petitioner to farmers; (5) automobiles which provided transportation for supervisory personnel; (6) a set of law books; (7) furniture and office equipment located in the sawmill business office; and (8) a stereo system situated in the office waiting room.

(b) Recurring purchases. The examiners reviewed petitioner's cash disbursements for the fiscal year ended September 30, 1976 (by reference to petitioner's account at Manufacturers Hanover, its account at First National and the cash disbursements journal) in account categories which, in their opinion, contained entries subject to tax, e.g., tool rentals, office expenses, oil and gasoline, and vehicle maintenance. After testing such accounts for each fiscal year, the examiners concluded that fiscal year 1976 was representative, and petitioner so agreed. Petitioner having agreed that fiscal year 1976



was representative of all the years under review, it is reasonable to infer that petitioner agreed to the examiners' employment of 1976 as a test period.

Deemed taxable were repair services performed on vehicles exempt from tax; repair services performed on and replacement parts for taxable vehicles; fuel oil; leather aprons for mill workers; and tools used by petitioner's mechanics to repair vehicles and sawmill machinery. The examiners calculated an error rate for recurring purchases in fiscal year 1976 and applied such error rate to the years in the audit period to determine tax due on recurring purchases.

(c) Electrical power. Niagara Mohawk Power Corporation computed the electrical power required to operate the illumination and heating equipment located in petitioner's plant, and determined that 6.87 percent of petitioner's electricity consumption during calendar year 1978 was used for heating and lighting. Applying such percentage to petitioner's total power purchases made during the audit period, the examiners calculated \$7,965.01 in taxable power purchases.

#### CONCLUSIONS OF LAW

A. That the trial order of dismissal in People v. Rogers does not foreclose the Department of Taxation and Finance from litigating the taxability of petitioner's purchases of tangible personal property and electrical power at issue herein, nor does it bar a finding that sales and use taxes are due and owing from petitioner for the period covered by the indictment. A trial order of dismissal dismisses one or more counts of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense. Criminal Procedure Law section 290.10(1). As the Appellate Division stated in dismissing the prosecution's appeal (for

the reason that the prosecution had no right of appeal), the trial court found the record contained no evidence that returns were not filed and believed the proof did not adequately demonstrate that the defendants were required to file returns. 59 A.D.2d 217 (3d Dept.). This failure of proof beyond a reasonable doubt, however, is not a conclusive finding in a subsequent civil action that petitioner was not required to file returns and pay taxes. Perry v. Blair, 64 A.D.2d 870 (4th Dept.); Richardson on Evidence (Prince, 10th ed.) §348.

"There are substantial reasons for different treatment of judgments of conviction and acquittal. For example, the quantum of proof required in a criminal case, i.e. proof beyond a reasonable doubt, may result in an acquittal upon evidence which falls short of that requirement while it would be sufficient in a civil case. All a judgment of acquittal may signify is the negative result that proof for a conviction did not exist." Etheridge v. City of New York, 121 N.Y.S.2d 103 (Sup. Ct. N.Y. Co.), affd., 283 A.D. 867 (1st Dept.).

B. That subdivision (a) of section 1115 of the Tax Law exempts certain receipts from the tax on retail sales and the compensating use tax, including receipts from the following:

"(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property...for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, ...but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus."

Chapter 851 of the Laws of 1974, effective September 1, 1974, substituted "predominantly" for "exclusively" in the above-quoted paragraph. Petitioner broadly construes section 1115(a)(12) to exempt from taxation all of its purchases, as items used in the production of other tangible personal property for sale.

Clearly, the pick-up trucks, automobiles, law books, office furniture and equipment, and the stereo system were not used directly in petitioner's production of rough-sawed lumber and were properly considered taxable by the

Audit Division. The Freightliner tractors, flatbed trailers and sawdust trucks, used to deliver goods to petitioner's customers after the production process was complete, were also properly taxable. Finally, the connection of the White tractors and pole trailers with the production phase was so attenuated that the vehicles cannot be said to have been directly used in production, but rather were used in transportation. Cf. Matter of Sandy Hill Corp. v. State Tax Comm., 61 A.D.2d 550 (3d Dept.), wherein the Appellate Division confirmed a determination of the Commission, holding taxable purchases of material used to build a waste transport facility.

Regarding the recurring purchases held taxable, parts with a useful life of one year or less and tools and supplies used in connection with production machinery were specifically excluded from section 1115(a)(12) by the statutory language; repair services were taxable within the ambit of section 1105(c)(3). The entire assessment for recurring purchases, both the portion founded upon actual review of petitioner's cash disbursements as well as the portion projected by application of the error rate determined for 1976, is sustained. Petitioner agreed to the test-period procedure at the time of its use and has raised no objection thereto in this proceeding. Petitioner's arguments concern entitlement to the exemptions of sections 1115(a)(12) and 1115(c).

C. That subdivision (c) of section 1115 provides:

"Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

The electricity used to illuminate and heat petitioner's sawmill did not qualify for the above-quoted exemption and was thus properly considered taxable under section 1105(b). Matter of Ellenville Handle Works, Inc., State Tax Comm., October 17, 1980.

D. That petitioner's final argument, that all taxes, penalty and interest assessed for periods prior to 1977 must be cancelled because of the absence during such period of any regulations concerning exemptions from sales and use taxes, is without merit. Whether the purchases at issue were taxable or exempt from taxation can be determined by reference to the relevant statutory language. Furthermore, petitioner has demonstrated no other, good reason for its failure to file returns before May 31, 1975 or to pay taxes for periods subsequent thereto.

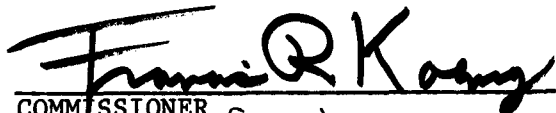
E. That the petition of Portville Forest Products, Inc. is denied, and the notices of determination and demand issued on April 10, 1979 are in all respects sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 481 207 906

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Portville Forest Products, Inc.</u>	
<u>10 Earl Rogers, Jr., Pres.</u>	
Street and No. <u>Whitehouse Rd.</u>	
P.O., State and ZIP Code <u>Portville, NY 14770</u>	
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 481 207 907

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>James P. Linnan</u>	
<u>James D. Linnant Associates, Pk.</u>	
Street and No. <u>112 State St., Suite 1109</u>	
P.O., State and ZIP Code <u>Albany, NY 12207</u>	
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