

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

February 4, 1983

Proctor Construction Co., Inc.
215 Rutger St.
Utica, NY 13501

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 Laws 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
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Armond J. Festine
213 Rutger St.
Utica, NY 13501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Proctor Construction Co., 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 6/1/73 - 5/31/76. :

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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Proctor Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Proctor Construction Co., Inc.
215 Rutger St.
Utica, NY 13501

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
4th day of February, 1983.

David Parchuck

Annie D. Hagellund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Proctor Construction Co., Inc. :
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 6/1/73 - 5/31/76. :
_____ :

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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Armond J. Festine the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Armond J. Festine
213 Rutger St.
Utica, NY 13501

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
4th day of February, 1983.

David Parchuck

Ann D. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PROCTOR CONSTRUCTION CO., 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 June 1, 1973	:	
through May 31, 1976.	:	

Petitioner, Proctor Construction Co., Inc., 215 Rutger Street, Utica, New York 13501, 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 June 1, 1973 through May 31, 1976 (File No. 22163).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on September 19, 1979 at 2:45 P.M. Petitioner appeared by John E. Flemma, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kathy Sanderson, Esq., of counsel). The hearing was continued on May 4, 1982 at 11:00 A.M. at Building #9, State Office Campus, Albany, New York. Petitioner appeared by the law firm of Kenneth P. Ray and Anthony J. LaFache (Armond J. Festine, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner was entitled to a determination on default upon the Law Bureau's failure to file an answer within 60 days from receipt of petitioner's perfected petition.

II. Whether the Audit Division properly asserted additional tax due on the purchase of certain materials used in a construction contract with the State of New York.

III. Whether certain contracts entered into by petitioner prior to September 1, 1974 with various tax exempt organizations were time and material contracts, thereby entitling petitioner to a refund of sales taxes paid on materials purchased for use in the performance of those contracts.

IV. Whether Notice No. 90,722,859 issued against petitioner on May 20, 1976 was paid and therefore should be cancelled.

V. Whether penalty and interest in excess of the minimum statutory rate should be abated.

FINDINGS OF FACT

1. On May 20, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Proctor Construction Co., Inc. covering the period April, 1973 through September, 1974. The Notice asserted tax due of \$1,404.00, plus penalty and interest of \$196.56, for a total due of \$1,600.56 (Notice No. 90,722,859). The Notice was issued for tax due on the lease of an excavator from CCO Equipment, Inc. Petitioner had issued a resale certificate under the name of Utica Gravel Supply Co., Inc. (a dormant corporation) using the address and identification number of Proctor Construction Co., Inc.

2. On February 17, 1978, as a result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Proctor Construction Co., Inc. covering the period June 1, 1973 through May 31, 1976 (Notice No. 90,742,514). The Notice asserted additional tax due of \$2,327.90, plus penalty and interest of \$1,246.16, for a total due of \$3,574.06.

3. On June 8, 1977, petitioner, by signature of its secretary-treasurer, Vincent A. Mazzei, executed a consent to extend the period of limitation for the issuance of an assessment for the period June 1, 1973 through May 31, 1974 to June 20, 1978.

4. Proctor Construction Co., Inc. timely filed its original protests of the notices issued. It later filed its perfected petition on May 8, 1979. The Law Bureau served its answer to the perfected petition on July 9, 1979. Petitioner made an oral motion at the initial hearing to hold the Audit Division in default for the late filing of the Law Bureau's answer beyond the 60 days directed by 20 NYCRR 601.6(a)(1). Decision was reserved on such motion.

5. On audit, the Audit Division found that petitioner paid sales tax to CCO Equipment, Inc. on total monthly leasing charges of \$35,100.00 for the excavator assessed under Notice No. 90,722,859 (Finding of Fact "1"). Upon issuance of the resale certificate, however, credit memorandums were issued by CCO Equipment, Inc. for the lease payments of \$35,100.00 and the sales tax paid thereon of \$1,404.00. On December 11, 1974, CCO Equipment, Inc. sold the excavator to Utica Gravel Supply Co., Inc. for \$40,300.00 without collection of sales tax thereon. Petitioner, Proctor Construction Co., Inc., paid for the excavator and recorded and depreciated same on its books.

It was the Audit Division's position that the purchase of the excavator was subject to tax under section 1105(a) of the Tax Law and proceeded to determine the additional tax due as follows:

Cost of Excavator		\$40,300.00
Lease Charges Previously Assessed ¹		35,100.00
Additional Charges		\$ 5,200.00
Tax Rate		4%
Additional Tax Due		<u>\$ 208.00</u>

¹ Notice No. 90,722,859 dated May 20, 1976.

The Audit Division then examined all other purchases made by petitioner for the period June 1, 1973 through May 31, 1976. It found that additional taxable purchases of \$38,434.00 were made without payment of sales tax. The Audit Division determined additional tax due thereon of \$2,119.90 and a total use tax deficiency of \$2,327.90 as a result of the field audit.

6. During the field audit, it was ascertained that petitioner paid sales tax on most of the highway construction materials consumed in the performance of its contracts with various state agencies and municipalities. The Audit Division requested copies of the contracts in order to determine the status of same and whether petitioner was entitled to any credits or refund of sales taxes paid. Petitioner was given approximately seven months to submit the contracts for examination prior to the issuance of the Notice as a result of the field audit. Petitioner did not file an application for credit or refund for any taxes paid.

7. As a result of a conference held, the Audit Division conceded that the additional tax asserted due as a result of the field audit (Notice No. 90,742,514) should be reduced to \$1,659.91. This amount includes, but is not limited to, the additional tax asserted on audit for the purchase of the excavator from CCO Equipment, Inc. (Finding of Fact "5") and tax due on the purchase of materials from Signacon Controls, Inc. in the amount of \$3,262.00 on which tax was asserted due of \$130.48.

8. On August 5, 1975, petitioner purchased paving material from Signacon Controls, Inc. in the amount of \$3,262.00 and was billed 7 percent sales tax thereon. This material was used in the performance of a contract with New York State Department of Transportation for which petitioner was reimbursed on a cost plus 20 percent profit basis. Petitioner did not pay the sales tax billed

by its supplier, but did include the sales tax in its billing to and was reimbursed by the Department of Transportation.

9. Petitioner submitted data for the following contracts entered into prior to September 1, 1974 for perusal in the determination of their status and determination regarding the taxability of its materials purchases:

<u>Contract No.</u>	<u>Contracting Party</u>	<u>Type of Contract</u>
(a.) 72-2	County of Oneida	Unit Price -
		Lump Sum
(b.) 72-3	Burnet Installations, Inc. for work on Ilion Urban Renewal Agency contract	Lump Sum
(c.) 72-5	Arnold M. Diamond, Inc. for sub-contract work on Griffis Air Force Base	Lump Sum
(d.) 72-11	City of Rome	Unit Price -
		Lump Sum
(e.) 72-13	Proposal package for New York State Department of Transportation. Unsigned, no indication of bid or award.	
(f.) 73-2	City of Utica	Lump Sum
(g.) 73-3	William H. Lane, Inc. for work on ¹ Martin Luther Nursing Home, Inc.	
(h.) 73-4	New York State Department of Transportation	Unit Price -
		Lump Sum
(i.) 73-6	Village of New York Mills	Lump Sum
(j.) 73-7	City of Utica	Lump Sum
(k.) 73-9	City of Utica	Lump Sum
(l.) 73-11	Village of New York Mills	Lump Sum
(m.) 73-12	Oneonta Urban Renewal Agency	Unit Price -
		Lump Sum
(m.) 73-13	New York State Department of Transportation	Unit Price -
		Lump Sum
(o.) 74-1	New York State Department of Transportation	Unit Price -
		Lump Sum
(p.) 74-3	New York State Department of Transportation	Unit Price -
		Lump Sum
(q.) 74-4	New York State Department of Transportation	Lump Sum
(r.) 74-6	New York State Department of Transportation	Unit Price -
		Lump Sum

¹ Petitioner submitted a Contractor Exempt Purchase Certificate issued by William H. Lane, Inc. No evidence was submitted that the nursing home was an organization exempt from tax under section 1116 of the Tax Law; no copy of the contract or sub-contract with the general contractor was submitted for review; and no evidence was submitted indicating any amounts of tax paid on materials used in the performance of such contract.

10. None of the contracts entered into above were time and material contracts nor was there any indication by the organizations of an intent to take advantage of an exemption. Petitioner offered no evidence that the actual contract prices were reduced by the amounts of any tax exemptions. Petitioner failed to submit any additional contracts for review within the allocated time following the hearing.

11. Petitioner contended that the tax due assessed on Notice No. 90,722,859 had been paid; however, at the time of hearing, there was no indication in petitioner's file that such payment was received by the Audit Division. Petitioner failed to submit any evidence of such payment within the allocated time following the hearing.

12. Petitioner did not show reasonable cause for the abatement of penalty and interest above the statutory rate.

CONCLUSIONS OF LAW

A. That the Law Bureau's failure to file an answer in response to the perfected petition within 60 days pursuant to 20 NYCRR 601.6(a)(1) does not justify a decision in favor of petitioner. The requirement should not be regarded as mandatory but is directory only. (Matter of Santoro v. State Tax Commission, Albany County Special Term, Conway, J., January 4, 1979; Matter of Jay S. and Rita T. Hamelburg, Albany County Special Term, Prior, Jr., D. H., December 6, 1979).

B. That prior to September 1, 1974, tax exemption from sales and use taxes under section 1115(a)(15) of the Tax Law required contracts with exempt organizations to be in a time and material form. They had to clearly provide for the resale of the material by the contractor to the exempt organization prior to the incorporation of the material into the real property (Matter of Sweet Assoc. v. Gallman, 29 N.Y.2d 902). No evidence exists that any of the

organizations in Finding of Fact "9" benefited from a tax exemption since petitioner had already paid the tax on the material which was likely included in its bids. Petitioner is therefore not entitled to any refund of sales taxes paid.

Petitioner was clearly reimbursed for sales taxes billed on materials in Finding of Fact "8" even though the tax was never paid over to its supplier. Accordingly, the tax determined due on such materials is sustained.

C. That absent any proof of payment of Notice No. 90,722,859 issued May 20, 1976, it is sustained.

D. That the petition of Proctor Construction Co., Inc. is granted to the extent indicated in Finding of Fact "7"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 17, 1978 to conform to Finding of Fact "7"; and that, except as so granted the petition is in all other respects denied.

DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

P 278 401 761
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		Proctor Construction Co. Inc.	
STREET AND NO.		215 Rutger St	
P.O., STATE AND ZIP CODE		Litica N.Y. 13501	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

P 278 401 762
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		Diamond P. Festere	
STREET AND NO.		213 Rutger St	
P.O., STATE AND ZIP CODE		Litica N.Y. 13501	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			