

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jack W. Miller, Excavating Contractor, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 3/1/75-2/28/78. :
_____ :

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Jack W. Miller, Excavating Contractor, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack W. Miller, Excavating Contractor, Inc.
500 Farrell Rd. Ext.
W. Henrietta, NY 14586

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Donald A. Kohler, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald A. Kohler
Merkel, Passero, Byrnes & Kohler
524 Mount Hope Ave.
Rochester, NY 14620

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

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

December 31, 1984

Jack W. Miller, Excavating Contractor, Inc.
500 Farrell Rd. Ext.
W. Henrietta, NY 14586

Dear Mr. Miller:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Donald A. Kohler
Merkel, Passero, Byrnes & Kohler
524 Mount Hope Ave.
Rochester, NY 14620
Taxing Bureau's Representative

110. *Chrysomelidae* (continued)

Journal of Management Inquiry 18(6)

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information. It is not to be used for any other purpose than that for which it was obtained.

1. The first step is to identify the problem. This involves understanding the symptoms and the context in which they are occurring.

Journal of Management Education 30(6)

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1. The first step is to identify the problem. This involves understanding the situation and the goals that need to be achieved.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JACK W. MILLER,
EXCAVATING CONTRACTOR, 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, 1975
through February 28, 1978

Petitioner, Jack W. Miller, Excavating Contractor, Inc., 500 Farrell Road, Ext., West Henrietta, New York 14586, 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, 1975 through February 28, 1978 (File No. 40590).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on March 14, 1984 at 1:15 p.m., with all briefs to be submitted by July 16, 1984. Petitioner appeared by Merkel, Passero, Byrnes & Kohler, Esqs. (Donald A. Kohler, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether the Audit Division, in determining petitioner's additional sales tax due, properly disallowed farmer's exemption certificates received by petitioner from its customers.

II. Whether petitioner, having separately stated the charges for gravel and loading on its invoices, properly collected sales tax on the charges for the gravel only.

III. Whether certain purchases made by petitioner were of machinery or equipment for use or consumption directly and predominantly in the production of gravel and thus exempt from sales and use tax.

FINDINGS OF FACT

1. Following a field audit, petitioner, Jack W. Miller, Excavating Contractor, Inc., had executed a Consent to Fixing of Tax Not Previously Determined and Assessed and, accordingly, on July 10, 1978, a Notice and Demand for Payment of Sales and Use Taxes Due was issued in the amount of \$21,750.26 plus interest of \$3,098.67 for a total due of \$24,848.93 for the period March 1, 1975 through February 28, 1978. Petitioner then sought an order in Supreme Court, Albany County, compelling the State Tax Commission to grant it a hearing on the assessment claiming that the consent had been illegally, fraudulently and deceitfully obtained. The Supreme Court decided to refer the matter to trial for determination unless the State Tax Commission voluntarily stipulated to hold the hearing. The Commission elected to hold the hearing.

2. On March 19, 1981, as the result of a courtesy conference, the Audit Division reduced the assessment to \$16,468.00 plus interest of \$6,119.90 for a total due of \$22,587.90. At the hearing, the Audit Division conceded that a test period audit should not have been performed in view of petitioner's complete books and records and agreed to a further reduction of the assessment to \$6,107.11 plus interest.

3. Petitioner was engaged in the business of excavating and selling bank run gravel as well as snow plowing during the winter months. Bank run gravel is a mix of stones and sand which is often used as a road base. A portion of petitioner's customers were farmers who used the gravel for filling in barnyards and farm laneways as a footing for animals. Most of petitioner's farm customers

were dairy farmers. When farmers bought gravel from petitioner, they would usually present farmer's exemption certificates certifying that the gravel was for use or consumption directly and predominantly in the production for sale of tangible personal property by farming. When customers presented such certificates, petitioner did not charge sales tax on the sale.

5. In billing its customers for gravel sales, petitioner separately stated a charge for the gravel and a charge for loading. Customers drove their trucks into the gravel pit and petitioner loaded the gravel into the truck using a front end loader. The loading charge was always included in the bill; customers could not go to the pit and load their own gravel. To determine the loading charge, petitioner would determine its overall selling price per yard of gravel and subtract the current rate per yard for gravel taken from other local pits which did not provide a loading service. Petitioner collected sales tax only on the charge for gravel, not on the charge for loading. Petitioner's president explained that he had been collecting sales tax in this manner since 1965 based on advice he received in telephone conversations with Department of Taxation and Finance employees. During the current audit, the auditor determined that tax should have been collected on the total selling price and he computed additional sales tax due based on such determination.

6. An examination of capital acquisitions revealed that petitioner had made several purchases on which no sales or use tax was paid. Petitioner agreed that the majority of the purchases were subject to tax; however, it claimed that four items, including a wire rope drag line, two used shovel buckets and a 1973 Ford van, were used in production and not subject to tax. The wire rope drag line was purchased for \$800.00 and was used to dredge gravel out of water which would accumulate in the pit. Under normal usage, a drag

line has a useful life of two years; however, accidents sometimes occur and a line could snap in less than two years. For this reason, apparently, the auditor decided that the line was not exempt from sales tax. The two used shovel buckets, purchased at a cost of \$140.00 and \$800.00, respectively, were used on the front end loader to load the gravel. The van was purchased for \$950.00 and was used to store production equipment and machinery.

CONCLUSIONS OF LAW

A. That section 1115(a)(6) of the Tax Law provides for an exemption from sales and use tax on the receipts from sales of tangible personal property, except property incorporated in a building or structure, for use or consumption directly and predominantly in the production for sale of tangible personal property by farming. The term "directly" is further defined in 20 NYCRR 528.7(d)(1) to mean that the tangible personal property must, during the production phase of farming:

- "(i) act upon or effect a change in material to form the product to be sold; or
- (ii) have an active causal relationship in the production of the product to be sold; or
- (iii) be used in the handling, storage or conveyance of materials used in the production of the product to be sold; or
- (iv) be used to place the product to be sold in the package in which it will enter the stream of commerce."

B. That the bank run gravel sold by petitioner to farmers does not meet any of the requirements of section 1115(a)(6) of the Tax Law or 20 NYCRR 528.7(d)(1), in that it has no effect on the product sold and is not used for handling, storing or conveying the product. It is merely used for creating pathways and yard bases for the farm. Therefore, sale of the bank run gravel is subject to sales tax; however, in the instant case the farmers submitted farmer's exemption certificates which petitioner accepted in good faith. Section 1132(c) of the Tax Law provides, in part, that all sales of property or

services subject to the sales tax shall be deemed taxable sales at retail unless: "a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of eleven hundred fifteen." Section 1132(c) further provides that where such a certificate has been furnished to the vendor, the burden of proving that the receipt is not taxable shall be solely upon the customer. Section 1115(a)(6) of the Tax Law, "when read in conjunction with subdivision (c) of section 1132 of the Tax Law, evidence[s] the Legislature's intention to insulate from sales tax liability vendors who obtain [exemption] certificates...from their customers in good faith" (Saf-Tee Plumbing Corp. v. Tully, 77 A.D.2d 1, 3). "A vendor should not be required to police or investigate his customers..." (id at 4). Having taken the exemption certificates in good faith, it was no longer petitioner's burden to prove that the receipt was nontaxable and the sales to farmers with exemption certificates which totalled \$1,703.68 were not properly taxable to petitioner.

C. That section 1105(a) imposes a tax on the receipts from every retail sale of tangible personal property except as otherwise provided in Article 28. Section 1101(b)(3) of the Tax Law defines the term "receipt", in part, as "The amount of sale price of any property and the charge for any service taxable under this article, ...without any deduction for expenses...". The deduction of expenses is further explained in 20 NYCRR 526.5(e) which states:

"All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts."

D. That the loading of gravel into customers' trucks was an expense of petitioner which was passed along to the customers as part of the sales price

and was not a separate service offered to the customers as an option. Therefore, petitioner should have collected sales tax on the total selling price of the gravel regardless of whether it separately stated the charges. It is unfortunate that petitioner received any misinformation concerning this issue, however, this Commission is not bound by misinterpretations of the law by Department of Taxation and Finance employees.

E. That section 1115(a)(12) of the Tax Law provides, in part, for an exemption from sales and use tax on the receipts from sales of "[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property...by...mining or extracting..., but not including parts with a useful life of one year or less...". Production activities are further classified by 20 NYCRR 528.13(b)(1) as follows:

"(i) 'Administration' includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) 'Production' includes 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.

(iii) 'Distribution' includes all operations subsequent to production such as storing, displaying, selling, loading and shipping finished products."

Additionally, 20 NYCRR 528.13(b)(2) states:

"The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase."

F. That the wire rope drag line was used in the production phase and had a useful life of more than one year and its purchase was not subject to sales or use tax. The shovel buckets were used exclusively for loading gravel into customers' trucks. They were not used for conveying the gravel during the

production phase; they were used for loading following production during the distribution phase and, therefore, the exemption provided for in section 1115(a)(12) does not apply. Similarly, the Ford van was not used during the production phase, but was only used to store machinery and equipment when not being used; thus, the 1115(a)(12) exemption does not apply.

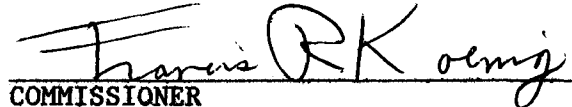
G. That the petition of Jack W. Miller, Excavating Contractor, Inc., is granted to the extent indicated in Finding of Fact "2" and Conclusions of Law "B" and "F"; that the Audit Division is directed to modify the Notice and Demand for Payment of Sales and Use Taxes Due issued July 10, 1978 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 379
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Jack W. Miller	
Street and No. 500 Farrell Rd. Ext.	
P.O., State and ZIP Code W. Henrietta NY 14586	
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 470 315 380
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Donald A. Kohler	
Street and No. Merkel, Pissero, Byrnes & Kohler	
P.O., State and ZIP Code 524 Mount Hope Ave.	
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