

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Madison Concrete Products Corp. :
d/b/a Diehl Syracuse :

and :

KJDE Corp. :
d/b/a Diehl Syracuse :

AFFIDAVIT OF MAILING

for Revision of a Determination of for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the Tax :
Law for the Period June 1, 1978 through :
February 28, 1981. :

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 July, 1984, he served the within notice of Decision by certified mail upon Madison Concrete Products Corp. d/b/a Diehl Syracuse, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Madison Concrete Products Corp.
d/b/a Diehl Syracuse
ATTN: Robert Hall
551 E. Genesee St.
Fayetteville, NY 13066

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 July, 1984.

David Parchuck

William G. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
Madison Concrete Products Corp. :
d/b/a Diehl Syracuse :

and :

KJDE Corp. :
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Sales & Use Taxes under Articles 28 & 29 of the Tax :
Law for the Period June 1, 1978 through :
February 28, 1981. :

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 July, 1984, he served the within notice of Decision by certified mail upon K.J.D.E. Corp. d/b/a Diehl Syracuse, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

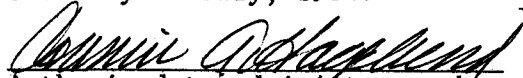
K.J.D.E. Corp.
d/b/a Diehl Syracuse
Attn: Kenneth Jacobs
4413 James St.
E. Syracuse, NY 13057

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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 July, 1984.





Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Madison Concrete Products Corp.
d/b/a Diehl Syracuse
ATTN: Robert Hall
551 E. Genesee St.
Fayetteville, NY 13066

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, 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: Taxing Bureau's Representative

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

July 31, 1984

K.J.D.E. Corp.
d/b/a Diehl Syracuse
Attn: Kenneth Jacobs
4413 James St.
E. Syracuse, NY 13057

Gentlemen:

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Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
MADISON CONCRETE PRODUCTS CORP.	:	
d/b/a DIEHL SYRACUSE	:	
AND	:	DECISION
KJDE CORP.	:	
d/b/a DIEHL SYRACUSE	:	
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, 1978	:	
through February 28, 1981.	:	

Petitioners, Madison Concrete Products Corp., d/b/a Diehl Syracuse, c/o Robert Hall, 551 East Genesee Street, Fayetteville, New York 13066 and KJDE Corp., d/b/a Diehl Syracuse, 4413 James Street, East Syracuse, New York 13057 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 June 1, 1978 through February 28, 1981 (File Nos. 35129 and 37350).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 17, 1983 at 1:15 P.M. Petitioners appeared by Robert Hall, President of Madison Concrete Products Corp., and Kenneth Jacobs, President of KJDE Corp. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether certain equipment was exempt from sales and use taxes under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. On February 16, 1981, petitioner Madison Concrete Products Corp. d/b/a Diehl Syracuse ("Madison") sold its business assets to Kenneth Jacobs, Michael Brown and Tony Bragaglia. Messrs. Jacobs, Brown and Bragaglia subsequently formed the KJDE Corp. T/A Diehl Syracuse ("KJDE") and transferred the assets to said corporation. The sales agreement between Madison and Messrs. Jacobs, Brown and Bragaglia identified the assets sold as follows:

a) Old Equipment	\$14,000.00
b) New Equipment	18,237.84
c) 1977 Ford	500.00
1978 Ford Truck	500.00
1974 Dodge Pick-Up	1.00

2. On March 27, 1981, Madison submitted an Affidavit - Sale of Equipment on which it stated that equipment was sold to Messrs. Jacobs, Brown and Bragaglia for \$5,200.00. A check in the sum of \$364.00 accompanied the affidavit in payment of the sales tax due thereon.

The Audit Division considered the affidavit as notification of a bulk sale and contacted Madison for an examination of its books and records.

The only discrepancy found on audit was with regard to the tax paid on the sale of the equipment. Madison paid the sales tax on the book value of office equipment which was part of the equipment identified as "old equipment" in the contract. It excluded the remaining equipment transferred on the basis that it was exempt from tax as manufacturing equipment. The Audit Division took the position that Madison failed to establish that the equipment was used directly and predominantly in a manufacturing process.

3. On June 24, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Madison assessing a

tax due of \$1,892.65 plus interest of \$41.98 on the sale of the equipment to Messrs. Jacobs, Brown and Bragaglia.

4. On October 9, 1981, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was also issued to petitioner KJDE for \$1,892.65 plus interest. This notice represented the liability of KJDE, as a purchaser, in accordance with section 1141(c) of the Tax Law. KJDE inherited the liability from Messrs. Jacobs, Brown and Bragaglia who operated the business acquired from Madison in February, 1981, until the incorporation of KJDE on March 16, 1981. No sales tax was assessed on the sale of assets by Messrs. Jacobs, Brown and Bragaglia to petitioner KJDE since said sale was regarded as not being a retail sale pursuant to section 1101(b)(4)(iii) of the Tax Law.

5. Madison and KJDE had the same business operations which activities were threefold: (1) wholesaler of electric motors (2) repair of electric motors and (3) manufacturer of specialized motors.

The equipment in dispute consisted of the following: burn-out ovens, winding equipment, surge tester, phase head and monorail system.

6. Petitioners' primary business activity was the manufacture of specialized motors. The motors manufactured by petitioners have a special function that serve the particular needs of the customer (i.e. a motor which operates on different frequency, voltage and cycles than the standard motor usually for use overseas). The specifications were furnished by the customer. The specifications were put into a computer to determine such data as the type, quantity and pounds of copper required. Standard electric motors were purchased from manufacturers such as General Electric. The motor was placed in a burn-out oven to remove previous manufactured windings. Coils were produced on a winding machine using the data obtained from the computer and then laid in the

casing along with any other necessary parts. The motor was then surge tested for continuity. Finally, it was dipped and cured in an oven.

Twenty-five percent of petitioners customers furnish the motor to be burned out and remanufactured.

The equipment listed above in Finding of Fact "5", except for, the monorail system, was used solely in the foregoing process. Petitioners failed to establish the manner in which the monorail system was used in their operations. The monorail system was sold for \$1,500.00.

7. Madison did not include a vacuum cleaner, desk and chair listed under "new equipment" in its payment of tax on office equipment. This equipment was sold for \$652.45.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides an exemption from sales and use taxes for "[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property... for sale, by manufacturing, processing...".

Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process [20 NYCRR 528.13(c)(4)].

B. That the burn-out ovens, winding equipment, surge tester and phase head constitute machinery or equipment used directly and predominantly in production in accordance with the meaning and intent of section 1115(a)(12) of the Tax Law and therefore are exempt from the imposition of sales and use taxes.

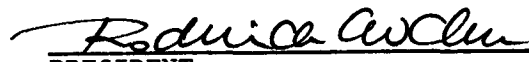
C. That petitioners are liable for tax on the monorail system and the office equipment referred to in Findings of Fact "6" and "7".

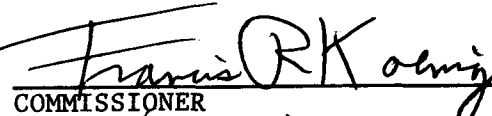
D. That the petitions of Madison Concrete Products Corp. d/b/a Diehl Syracuse and KJDE Corp. d/b/a Diehl Syracuse are granted to the extent that the additional tax due is reduced to \$150.67; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued June 24, 1981 and October 9, 1981; and that, except as so granted, the petitions are in all other respects denied.

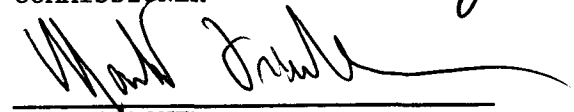
DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 977 349

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to <i>H. J. D.E. Corp.</i>	
Street and No. <i>4413 James St.</i>	
P.O., State and ZIP Code <i>Syracuse, NY 13207</i>	
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	

P 440 977 354

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

Providence Corp.

PS Form 3800, Feb. 1982

Sent to <i>Madison Concrete</i>	
Street and No. <i>551 E. Genesee St.</i>	
P.O., State and ZIP Code <i>Syracuse, NY 13066</i>	
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	