

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

March 14, 1984

Paniflex Corp. - Rudnick Division
431 East 165th St.
Bronx, NY 10456

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: Petitioner's Representative
Murray M. Knight
60 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

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

March 14, 1984

Philip Sciubba, Vice-President
Paniflex Corp. - Rudnick Division
431 East 165th St.
Bronx, NY 10456

Dear Mr. Sciubba:

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.

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Murray M. Knight
60 E. 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paniflex Corp. - Rudnick Division : AFFIDAVIT OF MAILING
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 3/1/75-5/31/77. :

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 14th day of March, 1984, he served the within notice of Decision by certified mail upon Paniflex Corp. - Rudnick Division, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paniflex Corp. - Rudnick Division
431 East 165th St.
Bronx, NY 10456

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
14th day of March, 1984.





Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paniflex Corp. - Rudnick Division : AFFIDAVIT OF MAILING
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 3/1/75-5/31/77. :

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 19th day of March, 1984, he served the within notice of Decision by certified mail upon Edward H. Honig, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward H. Honig, Atty.
150 Broadway
New York, NY 10038

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
19th day of March, 1984.

David Parchuck

Connie A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Ernesto A. Sampedro
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Philip Sciubba, Vice-President :
Paniflex Corp. - Rudnick Division : AFFIDAVIT OF MAILING
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 3/1/75-5/31/77. :

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 14th day of March, 1984, he served the within notice of Decision by certified mail upon Philip Sciubba, Vice-President, Paniflex Corp. - Rudnick Division the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Sciubba, Vice-President
Paniflex Corp. - Rudnick Division
431 East 165th St.
Bronx, NY 10456

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
14th day of March, 1984.

David Parchuck

James R. Hughes

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip Sciubba, Vice-President :
Paniflex Corp. - Rudnick Division :

AFFIDAVIT OF MAILING

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 3/1/75-5/31/77.

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 14th day of March, 1984, he served the within notice of Decision by certified mail upon Murray M. Knight, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

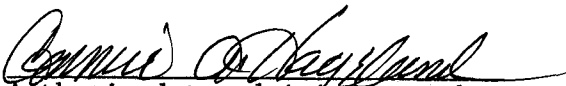
Murray M. Knight
60 E. 42nd St.
New York, NY 10017

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
14th day of March, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 :
 of :
 :
 PANIFLEX CORP. - RUDNICK DIVISION :
 :
 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 May 31, 1977. :

DECISION

In the Matter of the Petition :
 :
 of :
 :
 PHILIP SCIUBBA :
 :
 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 May 31, 1977. :

Petitioners, Paniflex Corp. - Rudnick Division and Philip Sciubba, 431 East 165th Street, Bronx, New York 10456, 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 March 1, 1975 through May 31, 1977 (File Nos. 28437 and 28478).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 20, 1983 at 11:15 A.M. Petitioners appeared by Edward H. Honig, Esq. and Murray M. Knight, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether penalties and interest in excess of the statutory minimum imposed pursuant to section 1145(a) of the Tax Law should be waived.

FINDINGS OF FACT

1. On December 20, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Paniflex Corp. - Rudnick Division ("Paniflex"), in the amount of \$586,892.89, plus penalty of \$146,723.23 and interest of \$259,164.00, for a total due of \$992,780.12 for the period March 1, 1975 through May 31, 1977.¹

2. Petitioner by its president or vice president, had executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1975 through August 31, 1978 to December 20, 1979.

3. At a pre-hearing conference held on March 25, 1981, petitioner and the Audit Division agreed to a reduction of the assessment to \$48,645.70. Petitioner by its president, executed a Withdrawal of Petition and Discontinuance of Case with respect to the aforesaid amount plus minimum statutory interest. However, the Audit Division would not agree to waiver of penalties or interest in excess of the statutory minimum. The only issue remaining at the hearing was the waiver of said penalties and interest.

¹ On April 2, 1983, petitioner Philip Sciubba died. At the hearing, petitioner Paniflex, by its representative, offered to withdraw the petition of Mr. Sciubba if the Audit Division would hold Paniflex solely responsible for the taxes in issue. The Audit Division agreed to discontinue its claim against Mr. Sciubba with the stipulation that, should Paniflex be found liable, it would pay the tax found to be due and the assessment against Mr. Sciubba would be cancelled. The hearing then proceeded with the petition of Paniflex only. Accordingly, the term "petitioner" as used herein, refers to Paniflex.

4. Petitioner had been operating as a mill work firm providing trim, windows and doors for builders. At some point, the exact date of which is unclear, petitioner changed its operation to manufacturing and wholesale sales of rough lumber to contractors. Rough lumber is used for such applications as support beams for pouring concrete. Once the concrete has set, the lumber is removed and does not become part of the finished structure. Petitioner maintained that there was some confusion in the construction industry as to whether sales of lumber for such purposes were subject to sales tax.

5. Petitioner's accounting system, with respect to sales tax collections, involved establishing a "sales tax accrual account". When a taxable sale was billed, the amount of tax due was entered in the accrual account. When the sales tax was received by petitioner, it would debit the cash account and reverse the accrual account. In effect, petitioner waited until it actually received the sales tax payments from its customers before remitting the tax to the Department of Taxation and Finance. Occasionally, petitioner's customers would pay their bill but request that petitioner defer collection of the sales tax due until the next job. When this occurred, petitioner would enter the tax due in its sales tax accrual account and would not remit the tax until the customer later paid petitioner. Petitioner conceded prior to the hearing that its accrual method of collecting and remitting sales tax was an improper procedure. Petitioner, however, wanted to point out that it should not be assessed a penalty for its mistaken interpretation of the law.

6. On audit, the Special Investigations Bureau instructed the auditor to disallow all nontaxable sales for the period in issue. The auditor did so but noted that he had tested nontaxable sales for the month of September, 1977 and found many such sales to have been correctly claimed by petitioner. The

auditor included in the assessment the outstanding balances due in petitioner's sales tax accrual account. Based on the fact that petitioner had had two prior audits with "substantial assessments" (\$190,356.00 for March 1, 1967 through November 30, 1971 and \$138,554.00 for March 1, 1972 through February 28, 1975), the auditor recommended that penalty and maximum interest be imposed. In the second of petitioner's two prior audits, the assessment was arrived at by assessing the sales tax accrual account indicating that petitioner was aware that its sales tax collection procedure was improper.

7. Petitioner argued that it always paid over sales tax when received and never collected such tax and used it for other expenses of the business. Moreover, petitioner maintains that because of the confusion in the construction business over which sales were taxable, combined with the changes in the type of sales made by petitioner, it acted in good faith and made a reasonable mistake in failing to pay over the tax due and, therefore, penalty and interest should be waived. Additionally, petitioner argued that in a criminal prosecution against it for grand larceny involving sales tax payments, it had plea bargained for waiver of penalties in exchange for its cooperation and prompt payment. It appears, however, that such plea bargain involved a prior audit.

CONCLUSIONS OF LAW

A. That section 1145(a)(1) of the Tax Law in effect during the period in issue imposes a penalty on any person who fails to timely file a return or to pay over sales or use tax, provided, however, that if "the tax commission is satisfied that the delay was excusable, it may remit all or any part of such penalty and it may remit that portion of such interest" in excess of the rate set by the Commission.


B. That inasmuch as petitioner was made aware during a prior audit that the delay in remitting sales taxes billed but not collected was an improper procedure, there was no excuse for petitioner to continue to use such an accounting procedure as its "sales tax accrual account" to delay remittance of sales taxes due during a later audit period. Moreover, it is not at all clear from the record just when petitioner changed the nature of its sales from finished lumber to rough lumber. Thus, it is impossible to determine whether such change had a significant effect on petitioner's ability to determine which sales were taxable. At any rate, it would seem that after two sizeable audits and an ongoing investigation by the Special Investigations Bureau, that petitioner would be able to determine which of its sales were taxable. There was, therefore, no excuse for petitioner's delay in paying over the proper amount of sales tax when due.

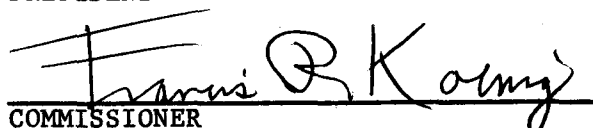
C. That the petition of Paniflex Corp. - Rudnick Division is granted to the extent indicated in Finding of Fact "3"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1979 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 309

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Murray M. Knight	
Street and No.	
60 E. 42nd St.	
P.O., State and ZIP Code	
NY, NY 10017	
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 470 315 310

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Philip Scimboa	
Street and No.	
431 East 165th St.	
P.O., State and ZIP Code	
Bronx, NY 10456	
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 470 315 311

RECEIPT FOR CERTIFIED MAIL

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Sent to	
Murray M. Knight	
Street and No.	
60 E. 42nd St.	
P.O., State and ZIP Code	
NY, NY 10017	
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 470 315 308

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Parille Corp.	
Street and No.	
431 East 165th St.	
P.O., State and ZIP Code	
Bronx, NY 10456	
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 470 315 518

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Edward H. Hany	
Street and No.	
150 Broadway	
P.O., State and ZIP Code	
New York, NY 10038	
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	