

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Schultz Construction, 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 3/1/75-5/31/78. :
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 July, 1984, he served the within notice of Decision by certified mail upon Schultz Construction, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Schultz Construction, Inc.
Pinecrest Eleven Industrial Park
Round Lake Rd.
Ballston Lake, NY 12019

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

James J. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Schultz Construction, Inc.	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 3/1/75-5/31/78.	:	

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 Rex Ruthman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rex Ruthman
Tate, Bishko and Ruthman
1698 Central Ave.
Albany, NY 12205

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 July, 1984.

David Parchuck

James J. Blum
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Schultz Construction, Inc.
Pinecrest Eleven Industrial Park
Round Lake Rd.
Ballston Lake, NY 12019

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
Rex Ruthman
Tate, Bishko and Ruthman
1698 Central Ave.
Albany, NY 12205
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SCHULTZ CONSTRUCTION, 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 May 31, 1978.	:	

Petitioner, Schultz Construction, Inc., Pinecrest Eleven Industrial Park, Round Lake Road, Ballston Lake, New York 12019, 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 May 31, 1978 (File No. 25745).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Bldg. #9, State Office Campus, Albany, New York, on July 26, 1983 and continued to conclusion on September 8, 1983, with all briefs to be submitted by November 10, 1983. Petitioner appeared by Tate, Tate, Bishko and Ruthman (Edward Feinberg, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether equipment and supplies purchased by petitioner for use in the performance of capital improvement contracts with exempt organizations are exempt from sales and use taxes.

II. Whether construction equipment used by petitioner in local taxing jurisdictions having rates higher than that imposed in the locality where

delivered or where petitioner maintains its headquarters is subject to additional local use tax.

III. Whether the additional local use tax assessed on the construction equipment used by petitioner in the performance of capital improvement contracts was properly based on their purchase price.

FINDINGS OF FACT

1. On December 20, 1978, as the result of an audit, the Audit Division issued to petitioner, Schultz Construction, Inc. [SCI], a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing \$26,142.85 in tax plus \$4,462.29 in interest. Said notice was for the period March 1, 1975 through May 31, 1978 and was timely issued pursuant to a signed consent that extended the period of limitation to assess sales and use taxes to June 20, 1979.

2. During the audit period from March, 1975 through May, 1978, SCI was engaged in the construction of water and waste treatment facilities. This construction took place in several taxing jurisdictions in New York State as well as at job locations outside the State and was performed for customers comprised of both governmental agencies and private companies.

3. On audit, SCI's purchases of contractor supplies (hand tools, etc.) and equipment were examined in detail by the Audit Division. Supply purchases and short term equipment rentals, which the Audit Division considered expense purchases, were traced to the original vendor invoice to determine the rate of tax charged and the taxing jurisdiction of the delivery. A similar examination was conducted on equipment purchases. Equipment purchases were identified from review of petitioner's depreciation schedules attached to its Federal income tax returns.

4. On the premise that petitioner was the retail purchaser of the equipment and liable for the State and local sales and use tax at the prevailing rate in the jurisdiction of use, the Audit Division computed an additional use tax due of \$26,142.85 on said equipment purchases. In said computation, the Audit Division considered equipment purchases for which the original invoice was missing as used at petitioner's job site having the highest State and local tax rate.

5. At the hearing, petitioner contended that equipment and expense purchases used to fulfill contracts with organizations, deemed exempt organizations, were not subject to tax. Petitioner argued that it was an agent of the exempt organization on the purchases. In the alternative, petitioner argued that section 1115(a)(15) of the Tax Law provided an exemption to equipment and expense purchases used on exempt organization projects. A listing that identified the construction contracts existing in the audit period was introduced into evidence which established the tax exempt status of petitioner's customers. No contracts were introduced to identify the type of contract signed with the exempt organizations and no testimony was offered on the terms and conditions of the contracts with said exempt organizations. None of the equipment or supply purchases subjected to use tax were incorporated into the facilities erected by petitioner for exempt organizations.

6. Petitioner further contended that any liability for equipment purchased is limited to the tax imposed in Ballston Lake, Saratoga County, pursuant to the holding in Xerox Corporation v. State Tax Commission, 71 A.D.2d 177. The equipment purchases scheduled in the Audit Division's worksheets as subject to additional use tax consisted of construction equipment such as bulldozers, backhoes, front end loaders and two motor vehicles. The motor vehicles (pickup

trucks) were registered with the Department of Motor Vehicles while the construction equipment was not since it was not suitable for use on the highways. Petitioner has its headquarters in Ballston Lake and facilities are located there for the maintenance and repair of equipment, plus the storage and garaging of equipment. Petitioner has not shown the period of time that the equipment was at the headquarters in Ballston Lake for maintenance, repair, storage or garaging.

7. Petitioner contended that the Audit Division erred in the computation of additional use tax on the purchase price of the equipment. Said purchase prices were extracted from the suppliers original invoice and, when such was not available, from the depreciation schedules attached to petitioner's federal tax returns. The division used the purchase price because petitioner could not establish that a piece of equipment was used at any job site for any particular time. Petitioner has not produced records to identify the location of the equipment that it purchased in the audit period or the period of time that said equipment was used at that particular location.

8. Petitioner, as the result of the hearing held July 26, 1983, prepared and introduced schedules of equipment used at three out-of-state job locations. The source documents used in the preparation of said schedules were not introduced. Petitioner was unable to show that any of the equipment it scheduled had been purchased in the audit period or included by the Audit Division in its schedule of equipment subject to use tax.

9. The Audit Division admitted to the duplication of items on the schedule it prepared of equipment subject to use tax and conceded to a reduction of \$544.14 in the use tax assessed.

10. The equipment purchases which the Audit Division subjected to an additional local taxing jurisdiction's tax involved only acquisitions made subsequent to petitioner's presence in that local taxing jurisdiction.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides that "...all receipts for property or services...are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax or the customer."

B. That petitioner has failed to meet its burden of proof in establishing that it was an agent of a tax exempt organization in the purchase of equipment of supplies.

C. That section 1115(a)(15) of the Tax Law provides an exemption from the sales and use tax for the following:

"Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision(a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization..., provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property."

D. That the equipment and supplies purchased by petitioner were used by it in the performance of construction contracts rather than incorporated in the property of an exempt organization.

E. That unless a vehicle is garaged in a local taxing jurisdiction or principally used in a taxing jurisdiction, it is not subject to that jurisdiction's sales or use tax. Where the taxpayer affirmatively shows that a vehicle is used only briefly or occassionally in a local taxing jurisdiction, the vehicle is not subject to the use tax of that locality [Xerox Corporation v. State Tax Commission, 71 A.D.2d 177].

F. That the term vehicle means any kind of vehicle commonly used to transport people or things from one place to another, especially along the ground, but also through the air. This includes passenger automobiles, trucks, tractor-trailers, airplanes and jetplanes, but does not include construction machinery or other vehicles not narrowly designed for the purpose of transportation, as such. Accordingly, except for the two registered pickup trucks, the construction equipment owned or leased by petitioner is not considered a vehicle. Further, even if the construction equipment was a vehicle, petitioner has not produced sufficient evidence to prove its contention that said equipment was garaged in Ballston Lake and only briefly, or occasionally used in other taxing jurisdiction or the contention that the equipment was principally used outside the State.

G. That sections 1210(a)(1) and 1111(b)(2) of the Tax Law provide that the compensating use tax on tangible personal property brought into a local taxing jurisdiction and used in the performance of a contract for a period of less than six months may be based, at the option of the taxpayer, on the fair rental value.

H. That inasmuch as petitioner failed to maintain adequate records as to the location and length of time that a particular piece of equipment was used in a taxing jurisdiction; the Audit Division correctly determined the local use tax on the purchase price of the equipment.

I. That the audit procedures adopted by the Audit Division to determine additional use taxes due were proper pursuant to section 1138(a) of the Tax Law. Except for the error of duplication conceded by the Audit Division, petitioner has failed to meet its burden of showing error [Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929].

J. That the petition of Schultz Construction, Inc. is granted to the extent indicated in Conclusion of Law "I" and Finding of Fact "9"; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Dev Ruthman</i>	
Street and No.	
P.O., State and ZIP Code	
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 440 977 363

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Schultz Construction</i>	
Street and No. <i>Round Lake Rd.</i>	
P.O., State and ZIP Code <i>Ballston Lake, NY 12019</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	

PS Form 3800, Feb. 1982