

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Tenalp Construction Corp. and :
Alvin Levine & Stephen Levine, :
Individually & as Officers : 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 12/1/71-2/28/80. :
:

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 29th day of February, 1984, he served the within notice of Decision by certified mail upon Tenalp Construction Corp. and Alvin Levine & Stephen Levine, Individually & as Officers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Tenalp Construction Corp. and
Alvin Levine & Stephen Levine,
Individually & as Officers
11 Grace Ave.
Great Neck, NY 11021

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
29th day of February, 1984.

David Parchuck

Bernie A. Huppert
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Tenalp Construction Corp. and :
Alvin Levine & Stephen Levine, :
Individually & as Officers : 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 12/1/71-2/28/80. :
:

State of New York }
County of Albany } ss.:

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 29th day of February, 1984, he served the within notice of Decision by certified mail upon Stanley H. Meyer, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley H. Meyer
1401 Hemlock Ave.
East Meadow, NY 11554

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
29th day of February, 1984.

David Archuck

Commie A. Hayden
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 29, 1984

Tenalp Construction Corp. and
Alvin Levine & Stephen Levine,
Individually & as Officers
11 Grace Ave.
Great Neck, NY 11021

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
Stanley H. Meyer
1401 Hemlock Ave.
East Meadow, NY 11554
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
TENALP CONSTRUCTION CORP. and	:	DECISION
ALVIN LEVINE AND STEPHEN LEVINE,	:	
Individually and as Officers	:	
	:	
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 December 1,	:	
1971 through February 28, 1980.	:	

Petitioners, Tenalp Construction Corp, 11 Grace Avenue, Great Neck, New York 11021, Stephen Levine, 11 Grace Avenue, Great Neck, New York 11021, and Alvin Levine, 1785 215th Street, Bayside, New York 11360, 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 December 1, 1971 through February 28, 1980 (File Nos. 33715, 34451, and 34452).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1983 at 1:15 P.M. with additional evidence to be submitted by June 15, 1983. Petitioners appeared by Stanley Meyer, CPA. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether certain work performed by petitioner constituted a capital improvement to real property or whether such work was in the nature of repairs or installation of tangible personal property.

II. Whether petitioner is liable for tax on certain purchases of fixed assets and expense items.

III. Whether the Audit Division properly used a "test period" as a basis for determining petitioner's tax liability.

IV. Whether petitioners Alvin Levine and Stephen Levine are personally liable for the taxes determined due from Tenalp Construction Corp.

FINDINGS OF FACT

1. Petitioner Tenalp Construction Corp. (Tenalp) was a contractor that performed various types of construction work during the period at issue. Tenalp did not register with the Department of Taxation and Finance as a vendor for sales tax purposes until December, 1975. Tenalp began business operations on February 18, 1972.

2. On March 20, 1981, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes due against Tenalp covering the period December 1, 1971 through February 28, 1980. Said notices assessed additional sales and use taxes amounting to \$19,175.86. Penalty and maximum interest were imposed for periods that returns were not filed and those periods where returns were not timely filed.

On the same date, notices were issued to petitioners, Alvin Levine and Stephen Levine, individually as officers of Tenalp, for taxes due of \$9,703.00. The officers were not held personally liable for use taxes.

3. Tenalp executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1975 through February 28, 1979 to March 20, 1981.

4. The Audit Division reviewed Tenalp's contracts in detail for the fiscal years February 1, 1973 through January 31, 1977. Tenalp considered all of its sales as nontaxable capital improvement work. The Audit Division determined that sales of \$93,646.68 for this period were taxable repairs and

installation of tangible personal property. The disallowed nontaxable sales represented .0113452 percent of gross sales. Tenalp did not have contracts available for the fiscal years ended January 31, 1973, January 31, 1980 and the month of February, 1980. As a result, the percentage of disallowance was applied to gross sales of \$1,654,254.56 to arrive at taxable sales of \$18,767.85 for said years. (The gross sales for fiscal year ended January 31, 1973 were obtained from the federal income tax return. The fiscal year ended January 31, 1980 and the month of February 1980 were estimated based on the average gross sales reported for the years examined). In addition, the contracts actually examined totaled \$8,254,277.11 compared to gross sales reported on income tax returns of \$8,815,000.00. The Audit Division concluded from this comparison that contracts totaling \$561,000 were missing. The percentage of disallowance computed above was applied to this amount to estimate taxable sales of \$6,367.22 for the missing contracts. The total taxable sales for the audit period were \$118,781.75. Said amount was adjusted to \$108,580.77 to reflect tax paid on material purchases of \$10,200.98. The tax due computed thereon was \$7,662.07.

The Audit Division analyzed expense purchases¹ for February, 1974 and found that sales tax was not paid on purchases totaling \$1,300.55 (initially two months were requested but after a delay of three years, Tenalp was only able to produce one complete month). The test month was used to estimate use taxes due of \$8,913.97 for the entire audit period.

A review of fixed assets acquired during the audit period revealed use taxes due of \$476.72.

¹ Expense purchases were contract related items consumed by Tenalp rather than materials incorporated into capital improvement work or transferred to the customer in the performance of repairs.

The foregoing audit procedures show a deficiency of \$17,052.76. The original assessment of \$19,175.86 was revised to this amount following a pre-hearing conference. Tenalp executed a Withdrawal of Petition and Discontinuance of Case on which it agreed to \$820.93 of the revised amount, leaving \$16,231.83 at issue herein.

The notices issued against Alvin Levine and Stephen Levine were adjusted to \$7,662.07.

5. The disallowed nontaxable sales of \$93,646.68 referred to in Finding of Fact "4" consisted of the following contracts:

(a) Union Dime Savings Bank	\$84,392.69
(b) Alsco Aluminum	1,520.79
(c) Donald E. Axinn Co.	<u>7,733.20</u>
	\$93,646.68

The tax liability of \$820.93 agreed to by Tenalp on the withdrawal of petition was based on the taxability of contracts (b) and (c), \$9,253.99 extrapolated to \$11,737.76 for the audit period less material purchases of \$1,008.04, for a net taxable amount of \$10,729.72.

At the hearing, Tenalp claimed that it erred in conceding to contract (c) because it subsequently found a capital improvement certificate issued by Donald E. Axinn Co. Tenalp was given the opportunity to submit such certificate after the hearing; however it did not. Consequently, contracts (b) and (c) are not addressed herein.

6. The contract between Tenalp and Union Dime Savings Bank provided that Tenalp perform all the work required for the site preparation, foundation, building, drive up canopy, vestibules and aluminum siding for the temporary branch of the Union Dime Savings Bank. The work also included electrical, telephone and sewer connections.

Union Dime Savings Bank issued a Certificate of Capital Improvement to Tenalp.

7. The expense purchases found taxable for February, 1974 were the following:

(a) South Side Carting	\$ 675.00
(b) Worth Supply Co., Inc.	35.00
(c) Expert Concrete Breakers, Inc.	390.55
(d) Industrial Waste Removal Co.	200.00
	<u>\$1,300.55</u>

At the hearing, Tenalp substantiated that sales tax was paid on (a). The purchase from Expert Concrete was held taxable because Tenalp was not able to furnish an invoice showing that sales tax was paid. The Audit Division however, found that sales tax was paid to Expert Concrete on an invoice dated May, 1974 and therefore the purchase made in the test month was not included in the estimate of additional use taxes due for periods after March, 1974.

Tenalp established that sales tax was paid to Industrial Waste on purchases made prior to February, 1974.

No evidence was produced regarding (b).

8. The fixed assets in dispute involved two automobiles and a level. A 1968 Ford and the level were purchased from Plant Construction Corp. for \$1,331.07 without payment of sales tax. At the hearing, Tenalp agreed to the liability on this transaction.

Another Ford (year unknown) was purchased from a New Jersey dealer for \$3,187.00. The automobile was used by Richard Levine, a resident of New Jersey. Tenalp could not show payment of either New Jersey or New York sales tax.

Tenalp transferred the same vehicle to Richard Levine personally. Richard Levine assumed the balance of the notes payable on the automobile of \$2,292.24. The Audit Division held Tenalp liable for tax on that amount.

Tenalp argued that the automobile could not be registered without paying the sales tax. Tenalp further argued that the automobile transferred to Richard Levine was for treasury stock he surrendered and therefore not a taxable transaction.

9. Petitioner Alvin Levine was the president of Tenalp, a stockholder and director. He was actively involved in the day-to-day management and financial affairs of Tenalp.

Petitioner Stephen Levine was secretary-treasurer, a stockholder and director. He was also active in the daily business operations until he severed his relationship with Tenalp sometime during 1979.

At the hearing neither Alvine Levine or Stephen Levine contested their personal liability for taxes determined due from Tenalp.

10. Tenalp's books and records were inadequate for the Audit Division to determine its sales and use tax liability with any exactness.

CONCLUSIONS OF LAW

A. That Tenalp was furnished with and accepted in good faith a Certificate of Capital Improvement from Union Dime Savings Bank for the construction of the temporary branch of the bank. Accordingly, Tenalp was not required to collect sales tax on the contract price of \$84,392.69 (Saf - Tee Plumbing Corp. v. Tully, 77 A.D.2d 1). Therefore, it is unnecessary to determine whether the contract actually resulted in a capital improvement.

Since the disallowed nontaxable sales remaining at issue, \$107,043.99, (\$11,737.76 were agreed on withdrawal) were estimated for the entire audit

period based solely on the foregoing contract, the additional taxes of \$6,841.14 are cancelled.

B. That because of Tenalp's insufficient recordkeeping, the Audit Division's use of a "test period" to determine the tax liability on expense purchases was proper in accordance with section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

However, in accordance with Finding of Fact "7", the test shall be revised by deleting the purchase from South Side Carting entirely and the purchase from Industrial Waste Removal shall be projected only for periods after February, 1974.

C. That Tenalp is liable for tax on the assets it acquired set forth in Finding of Fact "8" pursuant to section 1132(c) of the Tax Law. That the subsequent transfer of the automobile to Richard Levine constituted a retail sale within the meaning and intent of section 1101(b)(4) and therefore is subject to the tax imposed by section 1105(a) of the Tax Law.

D. Petitioners Alvin Levine and Stephen Levine were persons required to collect tax on behalf of Tenalp Construction within the meaning and intent of section 1131(1) of the Tax Law and thus have personal liability for the sales taxes due from said corporation.

E. That the petitions of Tenalp Construction Corp., Alvin Levine and Stephen Levine are granted to the extent indicated in Conclusions of Law "A", "B" and "C"; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued

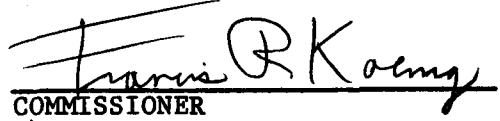
March 20, 1981; and that, except as so granted, the petitions are in all other respects denied.

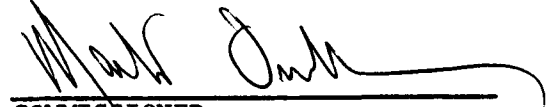
DATED: Albany, New York

FEB 29 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 258

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Stanley H. Meyer	
Street and No.	
1461 Denlock Ave.	
P.O., State and ZIP Code	
East Meadow, NY 11554	
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 470 315 257

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Lynal Construction Corp.	
Street and No.	
11 Grace Ave.	
P.O., State and ZIP Code	
Great Neck, NY 11021	
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