

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Wayne Floral Co. Inc.
and Newark Florists, Inc.

AFFIDAVIT OF MAILING

for Revision of Determinations or for Refunds of
Sales & Use Taxes under Articles 28 & 29 of the
Tax Law for the Periods December 1, 1976 through
November 30, 1979 and June 1, 1978 through
November 30, 1981, respectively.

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Michael R. McEvoy, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael R. McEvoy
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604

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
9th day of November, 1984.

David Parchuck

William A. Hagelmueller
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Wayne Floral Co. Inc. and Newark Florists, Inc.	: : : : : : :	: : : : : : :	: : : : : : :
AFFIDAVIT OF MAILING			
for Revision of Determinations or for Refunds of Sales & Use Taxes under Articles 28 & 29 of the Tax Law for the Periods December 1, 1976 through November 30, 1979 and June 1, 1978 through November 30, 1981, respectively.			

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Wayne Floral Co. Inc. and Newark Florists, Inc., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wayne Floral Co. Inc.
and Newark Florists, Inc.
P.O. Box 6
Newark, NY 14513

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
9th day of November, 1984.

David Parchuck

William A. Hayes
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

Wayne Floral Co. Inc.
and Newark Florists, Inc.
P.O. Box 6
Newark, NY 14513

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
Michael R. McEvoy
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
WAYNE FLORAL CO., INC.	:	DECISION
and NEWARK FLORISTS, INC.	:	
	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods December 1, 1976	:	
through November 30, 1979 and June 1, 1978	:	
through November 30, 1981, respectively.	:	

Petitioners, Wayne Floral Co., Inc., P.O. Box 6, Newark, New York 14513 and Newark Florists, Inc., P.O. Box 68, Newark, New York 14513, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1976 through November 30, 1979 and June 1, 1978 through November 30, 1981, respectively (File Nos. 31010 and 38920).

A combined small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on December 5, 1983 at 1:15 P.M., with all briefs to be submitted by March 4, 1984. Petitioners appeared by Michael R. McEvoy, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether metal framing used in the construction of "Canadian Greenhouses" is property incorporated in a building or structure used in the production for sale of tangible personal property by farming.

FINDINGS OF FACT

1. On May 20, 1980, 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 Wayne Floral Co., Inc. in the amount of \$1,021.31, plus interest of \$189.85, for a total due of \$1,211.16 for the period December 1, 1976 through November 30, 1979. On May 27, 1982, 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 Newark Florists, Inc. in the amount of \$10,071.56, plus interest of \$1,578.48, for a total due of \$11,650.04 for the period June 1, 1978 through November 30, 1981.

2. Petitioners are engaged in the business of producing floricultural and horticultural products for sale. In connection with their operations, both petitioners purchased materials used to construct growing chambers known as "Canadian Greenhouses" which consist of metal frames covered by polyvinyl sheets. The greenhouses are of various sizes with 96 feet by 60 feet being an average size. The chambers can be attached to each other in order to create a larger growing area.

3. In constructing the greenhouses, 2½ foot stakes are driven into the ground 12 to 18 feet apart. The uppermost one foot of each stake is left above the ground. The metal frame is bolted to the stakes. No concrete or other foundation is used. The metal frame is assembled using bolts; no permanent welds are used. Once the frame is in place, polyethylene sheets are attached to the frame. The sheets are double-layered so that air can be forced between them for an insulation effect. Heated air is circulated within the chamber by large fans to maintain the proper climate for the raising of petitioners' products. All electrical and water lines to the greenhouses are located above

ground, either on the surface or suspended from the metal frame. The useful life of the greenhouses is two to five years. The greenhouses can be left up and operated year-round and are able to withstand harsh winter weather.

4. The growing chambers can be dismantled, moved and reassembled without damage to any of the parts used in assembling the chambers or to any real property to which the chambers might be attached. The president of petitioner Newark Florists, Inc. testified that he has moved one of the greenhouses once. The process took two days using four employees. Petitioner Wayne Floral Co., Inc. has never moved its greenhouses. Both petitioners' presidents testified that they knew of firms which dismantle their greenhouses each year in order to prolong their useful life. There is an active market in used Canadian Greenhouses and petitioner Newark Florists, Inc. has sold used units to other companies which reinstall them for use as growing chambers.

5. On audit, the Audit Division determined that the Canadian Greenhouse was a structure within the meaning and intent of section 1115(a)(6) of the Tax Law and was not eligible for the exemption provided for in that section; and that, therefore, purchase of the metal framing used in the greenhouses was subject to tax while the polyethylene sheets were not considered taxable. The Audit Division also pointed out that an Opinion of Counsel of the State Board of Equalization and Assessment held that the greenhouses were real property subject to the real property tax but eligible for an exemption from tax for buildings and structures used in agriculture and horticulture.

6. Petitioners argue that the term "building or structure" in the statute must be interpreted to refer only to buildings or structures which are real property subject to real property tax. Although the State Board of Equalization and Assessment has found the greenhouses to be subject to real property tax,

petitioners maintain that no one contested this determination because the greenhouses were also held to be qualified for an agricultural exemption and there was, therefore, no incentive to protest the Board's findings.

7. Petitioners also argue that the term "building or structure" must be interpreted to refer only to such buildings or structures as constitute capital improvements to real property and that the greenhouses are not capital improvements under the definition provided in section 1101(b)(9) of the Tax Law. Moreover, petitioners argue that the Federal courts have found Canadian Greenhouses to be qualified for the investment tax credit under a statute that provides that such credit is available only for "other tangible property (not including a building and its structural components)...".

8. Petitioners submitted proposed findings of fact for the Commission's consideration, all of which have been adopted herein by the Commission.

CONCLUSIONS OF LAW

A. That section 1115(a)(6) of the Tax Law provides, in pertinent part, that receipts from the sale of "[t]angible 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..." are exempt from sales and use tax. The term "farming" under said section includes operating greenhouses or other similar structures used primarily for the raising of horticultural or floricultural commodities.

B. That the wording of section 1115(a)(6) makes it clear that the legislature intended the term "structure" to have a meaning different from the term "building". As commonly understood, the term "structure" means "a thing built, erected, or fabricated;... The word 'structure' usually refers to a permanent

stationary erection, and ordinarily carries with it the idea of size, weight, and strength..." (83 C.J.S. Structure).

C. That the Canadian Greenhouses are of considerable size and weight and are strong enough to withstand the elements including the cold and snow of winter. The greenhouses are designed to be erected and used in one location and, despite their removability, it is apparent from the record that their most effective utilization does not include taking them down and re-erecting them on a daily, weekly or monthly basis. The Canadian Greenhouses are, therefore, structures and the metal framing incorporated in said structures is not exempt from sales and use tax under section 1115(a)(6) of the Tax Law.

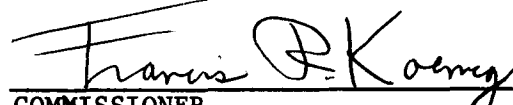
D. That the petitions of Wayne Floral Co., Inc. and Newark Florists, Inc. are denied and the notices of determination and demand for payment of sales and use taxes due issued May 20, 1980 and May 27, 1982 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 895

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517
PS Form 3800, Feb. 1982

Sent to	Wayne Floral Co. Inc.
Street and No.	2 Newark Florists, Inc.
P.O., State and ZIP Code	P.O. Box 6
Postage	Newark, NY 14513
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 693 168 896

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517
PS Form 3800, Feb. 1982

Sent to	Michael R. McEvoy
Street and No.	Harter, Secret & Emery
P.O., State and ZIP Code	700 Midtown Tower
Postage	Rochester, NY 14604
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	