

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Koren DiResta Construction Co., 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 12/1/72-8/31/78. :
:

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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Koren DiResta Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Koren DiResta Construction Co., Inc.
475 Fifth Ave.
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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
15th day of April, 1985.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Koren DiResta Construction Co., Inc. :
for Redetermination of a Deficiency or Revision :
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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 15th day of April, 1985, he served the within notice of Decision by certified mail upon Herman J. Soloway, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herman J. Soloway
Arthur, Blau, Soloway & Co., P.C.
515 Madison Ave.
New York, NY 10022

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
15th day of April, 1985.

David Parchuck

James A. Hight
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 15, 1985

Koren DiResta Construction Co., Inc.
475 Fifth Ave.
New York, NY 10017

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
Herman J. Soloway
Arthur, Blau, Soloway & Co., P.C.
515 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
KOREN DIRESTA CONSTRUCTION CO., 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 December 1, 1972	:	
through August 31, 1978.	:	

Petitioner, Koren DiResta Construction Co., Inc., 475 Fifth Avenue, New York, New York 10017, 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 December 1, 1972 through August 31, 1978 (File No. 27883).

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 July 24, 1984 at 1:15 P.M. and continued to conclusion on October 19, 1984 at 9:00 A.M. Petitioner appeared by Elliot Rosenthal, C.P.A. on July 24, 1984 and by Herman J. Soloway, C.P.A. on October 19, 1984. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's purchases subject to use tax.

FINDINGS OF FACT

1. On August 27, 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, Koren DiResta Construction Co., Inc., in the amount of \$192,912.51, plus penalty of \$42,427.51 and interest of \$105,552.76, for a

total due of \$340,892.78 for the period December 1, 1972 through May 31, 1976. On the same date, the Audit Division also issued a notice against petitioner in the amount of \$235,651.57, plus penalty of \$55,022.71 and interest of \$54,696.11, for a total due of \$345,370.39 for the period June 1, 1976 through August 31, 1978.

2. Petitioner is a general contractor involved in the construction of new buildings and the renovation of existing buildings. During the period in issue, petitioner properly reported and paid tax on all its taxable sales. However, petitioner did not report or pay use tax on any of its purchases. Most of the purchases made by petitioner were items purchased for installation into capital improvement projects.

3. On audit, the auditor checked petitioner's purchase records and found numerous purchase invoices and exempt organization certificates to be missing. Repeated attempts by the auditor to obtain these documents from petitioner's bookkeeper were unsuccessful. As a result, the auditor decided to do a test using three typical capital improvement projects as a sample. The auditor analyzed the purchases made for each project and determined a percentage of purchases subject to tax for which no tax had been paid. For the period December 1, 1972 through August 31, 1976, the percentage was computed to be 13.1 percent. For the period September 1, 1976 through August 31, 1978, the percentage was computed to be 15.7 percent. The reason for the different percentages was that for the period after September 1, 1976, the auditor included tax on purchases of debris removal service. Petitioner maintains that purchases of debris removal are not subject to tax and that such purchases should not have been included in computing the percentage of purchases subject

to tax. The total cost of debris removal for the three sample projects was \$15,216.00.

4. The taxable percentages were applied to petitioner's total purchases for each month of the audit period to arrive at taxable purchases for the period March 1, 1975 through August 31, 1978. For the period December 1, 1972 through February 28, 1975, when insufficient purchase records were available, the taxable purchases were derived by obtaining a ratio of taxable purchases to total sales per sales tax returns for the period March 1, 1975 through August 31, 1976. The 12 percent ratio thus determined was applied to sales per sales tax returns for the period December 1, 1972 through February 28, 1975 to arrive at taxable purchases for that period. The auditor then applied appropriate sales tax rates to the audited purchases subject to tax to arrive at total use tax due of \$428,564.03 as per the computations set forth at Appendix A.

5. Petitioner had three major objections to the audit. First, it claimed that the Audit Division's determination that certain electrical subcontracts were taxable in their entirety because taxable temporary lighting services were included in the total cost of such contracts was in error. Petitioner maintained that such "temporary lighting" actually consisted of charges due to a union requirement that a union electrician must be on the construction site to turn the existing lights on and off. Second, petitioner argued that credit should have been given for additional exempt organization certificates which were available. Third, petitioner argued that steel purchases on two of the three sample projects analyzed had sales tax included in the total contract price and such purchases should have been deleted from the purchases for which tax had not been paid.

6. The auditor pointed out that, with respect to the electrical subcontracts, all such subcontracts had a single contract price. The costs were not broken down as to time and individual materials and, as a result, such contracts must be deemed taxable in their entirety since the taxable and nontaxable item costs were mixed in the single contract price. With respect to the contracts with exempt organizations, the auditor gave petitioner credit for every exemption certificate which petitioner submitted and additionally gave credit where the contract was with a readily ascertainable exempt organization such as a government agency even in the absence of an exemption certificate. All other claimed exempt organization contracts were disallowed.

7. Petitioner produced contracts indicating that the steel purchased for two of the three sample projects had sales tax included in the contract price. The individual invoices which the auditor examined represented partial payments of the total contract price and thus did not have sales tax stated on each invoice. The total amount of the steel purchases for which tax was included in the contract price was \$4,920.00.

CONCLUSIONS OF LAW

A. That the removal of construction and demolition debris from a construction site is not a service subject to sales and use tax under section 1105(c)(5) of the Tax Law (Building Contractors Association, Inc. v. Tully, 87 A.D.2d 909). The debris removal costs of \$15,216.00 should, therefore, have been eliminated in computing the percentage of purchases subject to tax for the entire audit period.

B. That petitioner has demonstrated that sales tax was included in the contract price for the purchase of steel for two of the three projects tested

and, as a result, the total taxable purchases computed for the three projects should be reduced by the \$4,920.00 cost of the steel for those two projects.

C. That section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28 of the Tax Law. When tangible personal property, composed of taxable and exempt items, is sold as a single unit, the tax is collected on the total price (20 NYCRR 527.1[b]). Section 1105(c)(5) of the Tax Law imposes a tax on the receipt from every sale, except for resale, of the services of maintaining, servicing or repairing real property, property or land, whether the services are performed inside or outside of a building as distinguished from adding to or improving real property by a capital improvement.

D. That, regardless of whether the temporary lighting services provided for in the subcontracts, as discussed in Finding of Fact "5", involved setting up a temporary lighting system or having a union electrician at the site to turn existing lights on and off, both cases involve the providing of the service of maintaining or servicing of real property as distinguished from a capital improvement within the meaning and intent of section 1105(c)(5) of the Tax Law. Inasmuch as the taxable and exempt items covered by the subcontract were included in a single contract price, the tax is collected on the total price and the auditor properly included the entire contract price in the determination of taxable purchases.

E. That section 1132(c) of the Tax Law provides, in part, that all sales of property or services subject to the sales tax shall be deemed taxable sales at retail unless:

"a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by

reason of which the sale is exempt from tax under the provisions of eleven hundred fifteen."

The auditor in this case gave petitioner credit for every exemption certificate which was available and also gave credit for certain purchases for use in projects involving readily ascertainable exempt organizations. Taking into consideration petitioner's lack of cooperation in providing records for review, the audit procedures used resulted in a fair and reasonable determination of exempt purchases.

F. That, in light of the adjustments noted supra, the amount of tax due is to be reduced to \$370,925.95 computed as set forth in Appendix B.

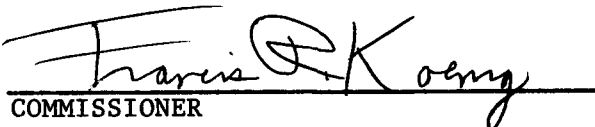
G. That the petition of Koren DiResta Construction Co., Inc. is granted to the extent indicated in Conclusions of Law "A", "B" and "F"; that the Audit Division is directed to modify the notices of determination and demand for payment of sales and use taxes due issued August 27, 1979 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

APPENDIX A

Taxable purchase per test	\$92,437.35
Less debris removal costs	<u>15,216.00</u>
	\$77,221.35
Taxable purchases without debris removal	<u>77,221.35</u>
Total purchases per test	588,120.56 = .131
(Taxable percentage for 12/1/72-8/31/76 debris removal not taxable)	
Taxable purchases with debris removal	<u>92,437.35</u>
Total purchases per test	588,120.56 = .157
(Taxable percentage for 9/1/76-8/31/78 debris removal taxable)	
Total purchases 3/1/75-8/31/76	\$11,544,278.00
Taxable percentage	x .131
Taxable purchases 3/1/75-8/31/76	<u>\$ 1,512,300.42</u>
Total purchases 9/1/76-8/31/78	\$16,256,746.00
Taxable percentage	x .157
Taxable purchases 9/1/76-8/31/78	<u>\$ 2,552,309.10</u>
Taxable purchases 3/1/75-8/31/76	<u>1,512,300.42</u>
Total sales per returns 3/1/75-8/31/76	12,573,621.00 = .120
Sales per returns 12/1/72-2/28/75	\$11,891,474.00
Purchase to sale ratio	x .120
Taxable purchases 12/1/72-2/28/75	<u>\$ 1,426,976.88</u>
Taxable purchases 12/1/72-2/28/75	\$1,426,976.88
Taxable purchases 3/1/75-8/31/76	1,512,300.42
Taxable purchases 9/1/76-8/31/78	<u>2,552,309.10</u>
Total taxable purchases	\$5,491,586.40
Purchases subject to tax at 7%	\$1,076,288.12
Tax rate	x .07
Tax due at 7%	<u>\$ 75,340.17</u>
Purchases subject to tax at 8%	\$4,415,298.30
Tax rate	x .08
Tax due at 8%	<u>\$ 353,223.86</u>
Tax due at 8%	\$ 353,223.86
Tax due at 7%	<u>75,340.17</u>
Total tax due	\$ 428,564.03

APPENDIX B

Taxable purchases from test	\$92,437.35
Less steel purchases	<u>4,920.00</u>
	87,517.35
Less debris removal costs	<u>15,216.00</u>
Revised taxable purchases	\$72,301.35
Taxable purchases per test	<u>72,301.35</u>
Total purchases per test	588,120.56 = .123
Total purchases 3/1/75-8/31/78	\$27,801,024.00
Taxable purchase percentage	<u>x .123</u>
Taxable purchases 3/1/75-8/31/78	\$ 3,419,525.90
Taxable purchases 3/1/75-8/31/76	<u>1,419,946.20</u>
Total sales per returns 3/1/75-8/31/76	12,573,621.00 = .113
Sales per returns 12/1/72-2/28/75	\$11,891,474.00
Purchase to sale ratio	<u>x .113</u>
Taxable purchases 12/1/72-2/28/75	\$ 1,343,736.60
Purchases subject to tax at 8%	\$3,749,757.78
Tax rate	<u>x .08</u>
Tax due at 8%	\$ 299,980.62
Purchases subject to tax at 7%	\$1,013,504.72
Tax rate	<u>x .07</u>
Tax due at 7%	\$ 70,945.33
Tax due at 8%	\$ 299,980.62
Tax due at 7%	<u>70,945.33</u>
Total tax due	\$ 370,925.95

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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 <i>John Deere Const Co</i>	
Street and No. <i>475 5th Ave</i>	
P.O., State and ZIP Code <i>New York NY 10017</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	

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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 <i>Shirley J. Salway</i>	
Street and No. <i>1000 Blue Salway</i>	
P.O., State and ZIP Code <i>515 Madison Ave</i>	
Postage	\$ <i>10.22</i>
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	