

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
J & J Sheet Metal Work, 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 6/1/80-2/28/83. :  
:

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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 16th day of July, 1985, he served the within notice of Decision by certified mail upon J & J Sheet Metal Work, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J & J Sheet Metal Work, Inc.  
P.O. Box 888  
Johnson City, NY 13790

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  
16th day of July, 1985.

David Parchuck

Annunzio A. Magagnoli  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :  
J & J Sheet Metal Work, Inc. :  
for Redetermination of a Deficiency or Revision :  
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Period 6/1/80-2/28/83. :  
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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 16th day of July, 1985, he served the within notice of Decision by certified mail upon Murray Rappaport, 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 Rappaport  
16 Chadwick Rd.  
Binghamton, NY 13903

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  
16th day of July, 1985.

David Parchuck

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

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

July 16, 1985

J & J Sheet Metal Work, Inc.  
P.O. Box 888  
Johnson City, NY 13790

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 Rappaport  
16 Chadwick Rd.  
Binghamton, NY 13903  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	DECISION
J & J SHEET METAL WORKS, INC.	:	
	:	
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 June 1, 1980	:	
through February 28, 1983	:	

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Petitioner, J & J Sheet Metal Works, Inc., P.O. Box 888, Johnson City, New York 13790, 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 June 1, 1980 through February 28, 1983 (File No. 47246).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York on December 18, 1984 at 9:15 A.M., with all briefs to be submitted by January 15, 1985. Petitioner appeared by Murray Rappaport, CPA. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner is liable for tax on materials used in the performance of capital improvements where the customers issued direct payment permits.

FINDINGS OF FACT

1. Petitioner, J & J Sheet Metal Works, Inc., was engaged in the fabrication and installation of sheet metal. Petitioner also performed repair and maintenance work.

2. On September 20, 1983, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1980 through February 28, 1983 for taxes due of \$1,950.80, plus interest of \$550.77, for a total of \$2,501.57.

3. On audit, the Audit Division examined sales invoices for the entire period under audit. This examination revealed that petitioner collected sales tax on all taxable transactions except where an exemption certificate was issued by the purchaser. The examination of sales invoices also showed that petitioner performed certain installation work which the Audit Division considered to be capital improvements to real property. The Audit Division reviewed the contract folders and contracts that were available (some contracts were oral) and a list was prepared of the capital improvement jobs for which no sales or use tax was paid on the material purchases. The use tax assessed on these purchases amounted to \$9,272.23. Petitioner has agreed to and paid \$7,321.43. The unresolved portion, \$1,950.80, represented use tax assessed on materials used in work performed for other contractors who issued direct payment permits.

4. Petitioner argued that it accepted direct payment permits for the jobs in dispute in good faith and had not been apprised by the customers either by the issuance of a capital improvement certificate or orally that the work to be performed was in the nature of capital improvements. Petitioner, therefore concluded that it was not liable for tax on the materials used in contracts which the Audit Division determined were capital improvements and the customer erroneously issued a direct payment permit. Petitioner argued further that it was not its obligation to determine the nature of the work.

The Audit Division took the position that since the work performed constituted capital improvements, petitioner was the ultimate consumer of the materials and that the purchases thereof constituted retail sales under section 1101(b)(4) of the Tax Law. Furthermore, it was the Audit Division's position that the tax was not imposed on the transaction between petitioner and its customer, so consequently the issuance of a direct payment permit by petitioner's customer is irrelevant to the taxes assessed.

5. Petitioner accepted the direct payment permits from its customers in good faith.

#### CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part,

"...it shall be presumed 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. Unless (1) 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 section eleven hundred fifteen,...the sale shall be deemed a taxable sale at retail. Where such certificate or statement has been furnished to the vendor, the burden of proving that the receipt...is not taxable hereunder shall be solely upon the customer...The tax commission may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquisition to determine the manner in which the tangible personal property or services will be used, to pay the tax directly to the tax commission and waive collection of the tax by the vendor."

B. That section 1101(b)(4) of the Tax Law defines the term "retail sale", in relevant part, as "a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on or otherwise adding to, altering, improving, maintaining, servicing or repairing real property or land...".

Any contractor who makes a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property [20 NYCRR 527.7(b(5))].

C. That the material purchases at issue were used or consumed by petitioner in performing capital improvements to real property and, therefore, petitioner was liable for tax on such purchases in accordance with section 1101(b)(4) of the Tax Law.


Petitioner, in good faith, accepted direct payment permits from certain customers for which it was performing capital improvement work. These permits relieved petitioner of any obligation to collect sales tax from the customer (Saf-Tee Plumbing Corp. v. Tully, 77 A.D. 2d 1). However, the acceptance of the direct payment permits did not relieve petitioner of its own liability under section 1101(b)(4) of the Tax Law for the tax due as the consumer of materials purchased.

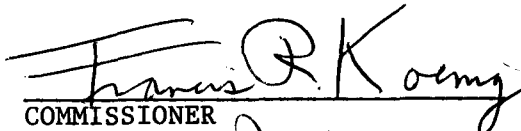
D. That the petition of J & J Sheet Metal Works, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 2, 1983 is sustained.

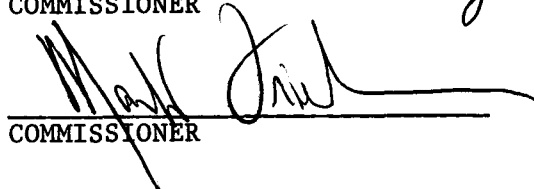
DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 095 690 922

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Send to <i>Sheet Metal Work Inc.</i>	
Street and No. <i>P.O. Box 888</i>	
P.O., State and ZIP Code <i>Johnson City NY 13790</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	

P 095 690 923

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Send to <i>Murray Lappapant</i>	
Street and No. <i>16 Chardwick Rd.</i>	
P.O., State and ZIP Code <i>Binghamton NY</i>	
Postage	\$ <i>3.93</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	