

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
D.J.H. 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 June 1, 1976 :  
through May 31, 1980.

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Petitioner, D.J.H. Construction, Inc., c/o Henry F. Secord, President, 1750 Union Road, West Seneca, New York 14224, 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, 1976 through May 31, 1980 (File Nos. 35702 and 45849).

A hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman State Office Building Campus, Albany, New York on December 6, 1983 at 2:00 P.M. and concluded on October 17, 1985 with all briefs to be submitted by December 30, 1985. Petitioner appeared by Ian R. Arcus, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the notices of determination and demands for payment of sales and use taxes due were barred by the statute of limitations.

II. Whether petitioner's purchase of machinery and equipment for use in manufacturing concrete pipe was exempt from sales and use taxes by section 1115(a)(12) of the Tax Law.

III. 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.

IV. Whether sales tax was paid on the purchase of a vehicle.

FINDINGS OF FACT

1. The Audit Division, on the basis of a field audit, issued notices of determination and demands for payment of sales and use taxes due to petitioner, D.J.H. Construction, Inc., as follows:

<u>Date of Notice</u>	<u>Periods Ending</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
9/15/80	8/31/76-8/31/77	\$57,698.36	\$17,165.26	\$ 74,863.62
6/18/81	11/30/77-2/28/80	29,708.09	5,997.33	35,705.42
11/3/82	11/30/78-2/28/80	2,439.61	939.85	3,379.46
6/14/83	5/31/80	91,678.68	30,756.36	122,435.04

After the Notice dated June 14, 1983 was issued, the Audit Division reduced the amount of tax assessed to \$89,769.59.

2. Each of the foregoing notices were premised upon the Audit Division's position that sales and use taxes were due upon certain recurring expense purchases and certain asset acquisitions since petitioner was unable to document to the Audit Division's satisfaction that sales tax was paid on said purchases. The recurring purchases included such items as tools, lubricant and other items that wouldn't have been large enough to capitalize. The particular assets which were included in the portion of the assessment pertaining to capital assets were disclosed by an examination of petitioner's depreciation schedules and purchase invoices.

3. On June 11, 1980, petitioner executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1976 through February 28, 1980 to any time

on or before September 20, 1980. On November 24, 1980, petitioner executed a second Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through February 28, 1980 until any time on or before June 20, 1981.

4. Petitioner filed, on an annual basis, New York State and local sales and use tax returns. Its returns for the years ending May 31, 1976, May 31, 1977 and May 31, 1978 were timely filed. Petitioner's return for the year ending May 31, 1979 was filed on November 7, 1979 and the return for the year ending May 31, 1980 was filed on September 26, 1980.

5. Because the time limit for issuing the notices dated September 15, 1980 and June 18, 1981 was about to expire, the Audit Division did not have sufficient time to attribute the correct amount of tax to each quarterly period. Accordingly, the amount of tax due for each quarterly period on said notices was determined by dividing the total amount of tax found due into equal amounts per quarterly period. After the notices were issued, the Audit Division recomputed the amount of tax due per quarterly period. However, the total amount of tax asserted to be due remained unchanged.

6. Prior to 1976, petitioner's business activity consisted of installing large diameter concrete pipe for use in water and sewer lines for local governmental entities. In or about 1976, petitioner decided to build its own concrete pipe manufacturing plant. Petitioner's officers planned that, upon the completion of the pipe manufacturing plant, the plant would be transferred to a corporation known as Concord Pipe. It was anticipated that petitioner would continue with its pipeline installation activities under new management.

7. When the decision to build the pipe manufacturing plant was made, the outlook for selling concrete pipe was good. Further, petitioner's principals

felt that the manufacture and sale of concrete pipe would be profitable.

Accordingly, petitioner built the plant with the intention of becoming the main supplier of concrete pipe in the Northeastern region of the country.

8. In or about 1978, the pipe manufacturing plant was capable of limited production and in 1979 the plant became fully operational. As constructed, the plant was able to operate twenty-four hours a day, seven days a week and could produce approximately 770,000 tons of concrete pipe a year. In contrast, prior to the construction of the pipe manufacturing plant, petitioner utilized between 400 and 500 tons of concrete pipe per year for its own needs.

9. During the period of time between petitioner's decision to build the concrete manufacturing plant and the time when the plant became operational, the demand for concrete pipe diminished considerably. The decline in demand for the concrete pipe was precipitated by a decline in federal funding for projects wherein concrete pipe was used.

10. After the concrete plant became operational, petitioner made a practice of bidding to supply concrete pipe on all projects which it was aware of. Nevertheless, petitioner never sold any concrete pipe to others. One reason for this lack of sales may have arisen from a contractor's possible reluctance to purchase concrete pipe from a manufacturer who also installs pipe.

11. In order to install pipe, petitioner built tunnel shields. A tunnel shield was used for holding back banks of earth so men could work underground. It was petitioner's practice to build the tunnel shields, as needed, out of materials that had been available in petitioner's yard. When petitioner finished using the tunnel shield it would be put back in the yard to be used again as needed. If a different size tunnel shield was needed for a new project, the old one would be cut apart and reconstructed.

12. In the course of its construction activities, petitioner utilized hay which was topsoil-seeded. The hay, which was blown on to the ground with a mulcher, eventually disintegrated into the grass. Petitioner performed this activity because petitioner's contracts required it to restore construction sites to their previous condition upon completion of excavation work.

13. Prior to any construction, petitioner's contracts with the governmental entities required it to have color photographs taken of the existing terrain by a qualified photographer. The photographs were sent by the photographer directly to the governmental entity which had title to the photographs. However, petitioner was able to obtain copies of the photographs at its own expense. The photographs were used to ensure proper restoration of the land. They might also be used by the governmental entity in the event of a claim for damages.

14. The contracts entered into by petitioner required that an informational sign be erected and maintained throughout the duration of the construction project. The sign contained the project number, the amount of funding, the name of the project and the name of the governor. Petitioner did not receive title to the sign. When the construction project was completed, the signs were left at the construction site.

15. No evidence was offered to establish that petitioner's contracts provided that petitioner purchase either the photographs or signs as an agent for a governmental entity or that the purchase invoices indicated that petitioner was purchasing the signs or photographs as an agent.

16. On August 27, 1977 petitioner purchased a vehicle from Barney's GMC, Inc. Sales tax was paid on this vehicle.

17. At the hearing the parties stipulated to the following items:

- (1) that sales tax had been paid at the time of purchase on certain transportation equipment;
- (2) that certain items designated as capital expenditures were related to the operation of the pipe manufacturing plant;
- (3) that, with respect to certain items designated as expense purchases, either sales tax was paid or sales tax was not due;
- (4) that certain items were utilized and or consumed in the pipe manufacturing process; and
- (5) that petitioner has conceded that sales and use tax is due with respect to certain items designated as expense purchases.

#### CONCLUSIONS OF LAW

A. That section 1147(b) of the Tax Law provides, in part, that "...no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return...". Since petitioner annually files sales and use tax returns, those returns which were timely filed were deemed filed on June 20 (Tax Law §§1136[b]; 1147[b]).

B. That section 1147(c) of the Tax Law further provides, in part:

"Where, before the expiration of the period prescribed herein for the assessment of additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period..."

C. That the Notice dated September 15, 1980 was timely as it was issued prior to September 20, 1980, which was the date agreed to in the first consent to extend the statute of limitations (Tax Law §1147[c]). Similarly, the Notice dated June 18, 1981 was timely as it was issued prior to June 20, 1981, which was the date agreed to in the second consent to extend the statute of limitations (Tax Law §1147[c]). It is recognized that the Audit Division attributed

certain transactions to the wrong quarterly periods resulting in the amount of tax assessed being too great in some periods and the amount of tax being understated for other periods. However, petitioner was aware of the transactions in issue and has not demonstrated any prejudice caused by the attributing of transactions which arose during the audit period to the wrong quarterly period. Accordingly, it is concluded that the foregoing notices were not flawed in a manner which would render them void (see Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 1001). The notices dated November 3, 1982 and June 14, 1983 were timely as they were issued within the prescribed three year period (Tax Law §1147[b]).

D. That section 1115(a)(12) of the Tax Law exempts from sales and use taxes:

"Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property...for sale, by manufacturing..."

E. That in order for machinery or equipment to be exempt under section 1115(a)(12) of the Tax Law, it must be used directly and predominantly in the production of tangible personal property for sale (Matter of Lawrence Hunter [Purchaser], State Tax Commission, May 27, 1983). In view of the fact that petitioner has never sold pipe to a customer, petitioner is not entitled to the exemption since the pipe manufacturing equipment was not used at least fifty percent of the time in producing tangible personal property for sale on an uninstalled basis (Matter of Lawrence Hunter [Purchaser], *supra*).

F. That since petitioner did not make any purchases of tunnel shields during the periods in issue, no sales or use tax is due thereon.

G. That Tax Law §1115(a)(15) provides that receipts from the following shall be exempt from sales and use taxes:

"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, as the terms real property, property or land are defined in the real property tax law; 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."

H. That although the hay disintegrated into the ground, the hay, as such, did not become an integral component of the real property. Accordingly, petitioner's purchases of hay are not exempt from sales and use taxes by virtue of section 1115(a)(15) of the Tax Law.

I. That petitioner has failed to sustain its burden of proof in establishing that it was an agent of a tax exempt organization in its purchase of photographs or signs (see Matter of Schultz Construction, Inc., State Tax Commission, July 31, 1984). Accordingly, said purchases were not exempt from sales and use taxes.

J. That since sales tax was paid on the vehicle described in Finding of Fact "16", the portion of the assessment which pertains to this vehicle is cancelled.

K. That the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due in accordance with Findings of Fact "1" and "17".

L. That the petitions of D.J.H. Construction, Inc. are granted to the extent of Conclusions of Law "F", "J" and "K" and the Audit Division is directed to modify the notices of determination and demands for payment of sales and use




taxes due accordingly; and except as so granted the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of

D.J.H. Construction, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 6/1/76-5/31/80.  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of November, 1986, he/she served the within notice of Decision by certified mail upon D.J.H. Construction, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

D.J.H. Construction, Inc.  
c/o Henry F. Secord, President  
1750 Union Road  
West Seneca, NY 14224

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  
20th day of November, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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D.J.H. Construction, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
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under Article(s) 28 & 29 of the Tax Law for the :  
Period 6/1/76-5/31/80.  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of November, 1986, he served the within notice of Decision by certified mail upon Ian R. Arcus, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ian R. Arcus  
90 State Street, Suite 1031  
Albany, NY 12207

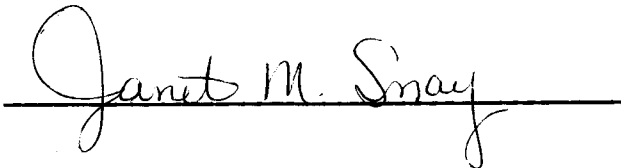
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
20th day of November, 1986.



Authorized to administer oaths  
pursuant to Tax Law section 174



P 319 376 815

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
D. J. H. Construction Inc.	
City and State	
1756 Union Road	
P.O. State and ZIP Code	
West Seneca, N.Y. 14224	
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 319 376 816

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
Ian R. Arcus	
Street and No.	
90 State Street, Suite 103	
P.O. State and ZIP Code	
Albany, N.Y. 12207	
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	

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

November 20, 1986

D.J.H. Construction, Inc.  
c/o Henry F. Secord, President  
1750 Union Road  
West Seneca, NY 14224

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Ian R. Arcus  
90 State Street, Suite 1031  
Albany, NY 12207