

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Daniel Leach & Craig Foster  
d/b/a Adirondack Builders, Inc.

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales and Use Tax  
under Article(s) 28 & 29 of the Tax Law :  
for the Period 6/1/80 - 5/31/84.

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 23rd day of December, 1986, he/she served the within notice of Decision by certified mail upon Daniel Leach & Craig Foster, d/b/a Adirondack Builders, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel Leach & Craig Foster  
d/b/a Adirondack Builders, Inc.  
4 West State Street  
Gloversville, NY 12078

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  
23rd day of December, 1986.

Janet M. Snay

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of

Daniel Leach & Craig Foster : AFFIDAVIT OF MAILING  
d/b/a Adirondack Builders, Inc.

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales and Use Tax  
under Article(s) 28 & 29 of the Tax Law :  
for the Period 6/1/80 - 5/31/84.

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 23rd day of December, 1986, he served the within notice of Decision by certified mail upon Edward F. Skoda, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward F. Skoda  
Caputo, Aulisi & Skoda  
15 W. Fulton Street  
Gloversville, NY 12078

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  
23rd day of December, 1986.

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

Janet M. Snay

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

December 23, 1986

Daniel Leach & Craig Foster  
d/b/a Adirondack Blds., Inc.  
4 W. State Street  
Gloversville, NY 12078

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:  
Edward F. Skoda  
Caputo, Aulisi & Skoda  
15 W. Fulton Street  
Gloversville, NY 12078

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition

of

DANIEL LEACH AND CRAIG FOSTER  
D/B/A ADIRONDACK BUILDERS, 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, 1980  
through May 31, 1984.

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Petitioners, Daniel Leach and Craig Foster d/b/a Adirondack Builders, Inc., 4 West State Street, Gloversville, New York, 12078, 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 May 31, 1984 (File No. 63847).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman State Office Building Campus, Albany, New York on May 23, 1986 at 9:00 A.M., with all briefs to be submitted by June 12, 1986. Petitioners appeared by Caputo, Aulisi & Skoda, Esqs. (Edward F. Skoda, Esq., of counsel). The Audit Division appeared by John D. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioners filed a petition for a hearing with the State Tax Commission within 90 days of the issuance of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

FINDINGS OF FACT

1. On March 20, 1985 the Audit Division issued, by certified mail, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioners, Daniel Leach and Craig Foster doing business as Adirondack Builders.

The notice assessed sales and use taxes for the period June 1, 1980 through May 31, 1984 in the amount of \$17,616.53 plus penalty of \$4,404.10 and interest of \$8,807.48 for a total amount due of \$30,828.11.

2. In a petition dated June 19, 1985, the foregoing assessment was challenged. The petition was mailed in an envelope which was postmarked by the United States Postal Service on June 28, 1985. On July 2, 1985, the petition was received by the Tax Appeals Bureau of the New York State Tax Commission.

3. In a letter dated July 23, 1985, the Tax Appeals Bureau notified petitioners' law firm that the petition was late, having been filed beyond 90 days from the date of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

4. During the periods in issue, Daniel Leach and Craig Foster were partners doing business as Adirondack Builders, Inc. The partnership engaged in construction activities.

5. At the hearing, Mr. Leach testified that on April 15, 1985 he prepared a letter of protest and that on April 16, 1985 the letter was mailed from a post office in Gloversville, New York. The purported letter was addressed to the New York State Department of Taxation and Finance.

6. Mr. Leach, within 90 days of the issuance of the notice, orally notified an employee of the Department of Taxation and Finance that petitioners wished to have a hearing on the assessment of sales and use taxes due.

7. Neither the Audit Division nor the Tax Appeals Bureau has a record of receipt of the letter purportedly prepared April 15, 1985.

#### CONCLUSIONS OF LAW

A. That pursuant to section 1138(a)(1) of the Tax Law, a notice of determination of tax due "[s]hall be given to the person liable for the collec-

tion or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing".

B. That proceedings before the Commission must be commenced by the filing of a petition (20 NYCRR 601.3[a]). Moreover, a petition "... must be filed within the time limitations prescribed by the applicable statutory sections". (20 NYCRR 603.1[c]).

C. That the burden of proving that a timely application for a hearing was made is upon petitioners (Matter of Tea Auto Clinic, Inc. and Eunice M. Accardi, as Officer, State Tax Commission, January 3, 1986). This Commission has no record of receipt of a petition allegedly mailed in April 1985 and petitioners have failed to prove that such a petition was in fact mailed. The petition received on July 2, 1985 was filed outside the 90 day time limit prescribed by Tax Law §1138(a)(1) and was therefore untimely. Furthermore, oral notification of the desire to have a hearing does not constitute the filing of a petition within the meaning of 20 NYCRR 601.3(a). Accordingly, the petition must be dismissed as untimely.

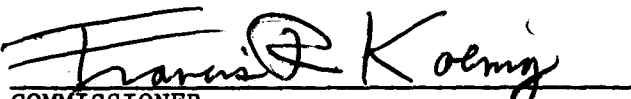
D. That the petition of Daniel Leach and Craig Foster d/b/a Adirondack Builders, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued March 20, 1985, is sustained.

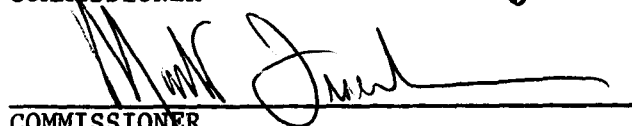
DATED: Albany New York

STATE TAX COMMISSION

DEC 23 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 319 117 224

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 <b>Edward F. Skoda</b>	
Street and No. <b>Caputo, Aulisi + Skoda</b>	
P.O. State and ZIP Code <b>15 W. Fulton Street</b>	
<b>Gloversville, N.Y. 12078</b>	
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 319 117 223

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 <b>Daniel Leach + Craig Foster</b>	
Street and No. <b>216/1 Adirondack Bldg, Inc.</b>	
P.O. State and ZIP Code <b>4 West Street</b>	
<b>Gloversville, N.Y. 12078</b>	
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	