

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Ruston Paving Co., 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 9/1/80-5/31/83.  
\_\_\_\_\_ :

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 15th day of September, 1986, he/she served the within notice of Decision by certified mail upon Ruston Paving Co., Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ruston Paving Co., Inc.  
Jamesville Rd.  
Jamesville, NY 13078

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 September, 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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State of New York :

ss.:

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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 15th day of September, 1986, he served the within notice of Decision by certified mail upon Kenneth Makowski, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth Makowski  
Shiroki Associates  
499 S. Warren Street  
Syracuse, NY 13202

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 September, 1986.

David 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

September 15, 1986

Ruston Paving Co., Inc.  
Jamesville Rd.  
Jamesville, NY 13078

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:  
Kenneth Makowski  
Shiroki Associates  
499 S. Warren Street  
Syracuse, NY 13202

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RUSTON PAVING 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 September 1, 1980	:	
through May 31, 1983.	:	

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Petitioner, Ruston Paving Co., Inc., Jamesville Road, Jamesville, New York 13078, 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 September 1, 1980 through May 31, 1983 (File No. 50065).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on April 1, 1986 at 9:15 A.M. Petitioner appeared by Kenneth Makowski, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly asserted additional sales tax due from petitioner on certain cleaning services purchased by petitioner during the audit period.

II. Whether the Audit Division properly asserted additional sales tax due from petitioner on certain purchases of rock salt used in connection with snow removal services provided by petitioner during the audit period.

III. Whether the Audit Division properly asserted additional sales tax due from petitioner in connection with certain recurring purchases of construction

materials used by petitioner in road construction jobs in which governmental entities were involved.

IV. Whether the Audit Division properly asserted additional sales tax due from petitioner in connection with recurring purchases of materials used in road construction jobs from a supplier who did not charge petitioner sales tax.

FINDINGS OF FACT

1. Petitioner, Ruston Paving Co., Inc., is and was at all times relevant herein a contractor involved primarily in road construction. During the winter months, petitioner provided snow removal services.

2. On November 23, 1983, as the result of an audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1980 through May 31, 1983 asserting additional tax due in the amount of \$17,593.07, together with minimum interest. Subsequent to the issuance of the notice, the Audit Division adjusted the additional tax asserted due to \$14,728.49.

3. With respect to the additional tax asserted due, petitioner did not take issue with the Audit Division's assertion of \$1,213.04 in additional tax due which was premised upon petitioner's purchase of certain assets during the audit period. Petitioner likewise did not take issue with the Audit Division's assertion of \$1,240.53 in additional tax due based upon additional taxable sales found on audit. Petitioner did, however, dispute the Audit Division's assertion of \$12,274.92 in additional tax due which was premised upon recurring purchases by petitioner of materials used in its construction and snow removal activities and upon purchases by petitioner of certain cleaning services on which no sales tax had been paid.

4. On audit, the Audit Division analyzed petitioner's purchases during the audit period in detail with respect to tax charged and the jobs on which purchased materials were used. The Audit Division found that tax had not been paid on purchases of cleaning services or on purchases of rock salt used in connection with petitioner's snow removal services. Tax had also not been paid on purchases of materials used in certain of petitioner's road construction jobs and also on purchases made by petitioner from Allied Chemical Corporation. Petitioner did not deny that any of the aforementioned purchases had been made; rather, it contended, for various reasons to be discussed hereinafter, that the transactions at issue were exempt from taxation.

5. Regarding petitioner's purchases of cleaning services, petitioner, on two occasions during the audit period, purchased such services, which consisted of cleaning petitioner's office. Petitioner purchased such services from two different providers: C & M Cleaning Co. and Economy Diversified Industries. Petitioner did not pay sales tax on its purchase of cleaning services from either of the aforementioned providers.

6. Petitioner contended that C & M Cleaning Co. had provided monthly cleaning services during the audit period and that petitioner had had a verbal contract with C & M Cleaning Co. to provide such services. Petitioner did not, however, introduce any evidence to substantiate its claim.

7. Regarding petitioner's purchases of rock salt during the audit period, petitioner used the purchased rock salt in connection with its snow removal service. Petitioner collected sales tax from its customers on the sale of its snow removal services, but did not pay sales tax on its purchases of rock salt used in providing such services. Petitioner contended that, inasmuch as sales

tax had been collected on its snow removal services, which included the use of the rock salt, tax should not be imposed upon its purchases of rock salt.

8. With respect to petitioner's purchases of materials used in certain of its road construction jobs on which purchases petitioner paid no sales tax, petitioner took the position that the existence of government involvement, together with government's benefiting from petitioner's work, resulted in petitioner's work being, in effect, performed for a governmental entity.

9. Specifically, petitioner performed road construction work in connection with the modification of an existing public road in Onondaga County, New York. Petitioner contracted for this job with a private contractor and was paid for its work by said private contractor. The private contractor for this job was, in turn, hired by the owner of a supermarket located in a shopping plaza along the road in question. Local governmental authorities had required the owners of the shopping plaza to widen the road in question as a condition of continuing to operate the shopping plaza. The source of funds used to pay petitioner for its work on this job was the owner of the supermarket and not any governmental entity.

10. Petitioner was also involved in the construction of new roads in connection with the building of private housing developments at various times during the audit period. Such roads were required of the developer by local governmental authorities. The source of the funds used to pay petitioner for all of these jobs was private and not governmental.

11. In addition, petitioner contended that it had performed work on Federally-funded road construction projects and had paid no sales tax on the purchase of materials in connection therewith. Petitioner was not paid for its services in connection with these jobs by any governmental entity, but was at

all times paid by private contracting firms. Petitioner failed to establish the nature and extent of Federal government involvement in the funding of these projects.

12. During the audit period, petitioner made recurring purchases of materials used in its various road construction activities from Allied Chemical Corporation. Petitioner did not pay sales tax on the purchase of these materials. Petitioner contended that because Allied had not charged sales tax upon purchase of the materials, and because it believed that Allied was being audited by the Department of Taxation and Finance with respect to these sales, that petitioner should not be held liable for the sales tax due on such sales.

#### CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law provides for the imposition of sales tax upon every sale, except for resale, of the following services:

"Maintaining, servicing or repairing real property, property or land...whether the services are performed in or outside of a building ...but...excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days..." (emphasis supplied).

B. That the cleaning services provided to petitioner during the audit period and described in Findings of Fact "5" and "6" were not "performed on a regular contractual basis for a term of not less than thirty days." Petitioner has failed to establish that the cleaning services in question were performed on a regular basis. Accordingly, the cleaning services in question were subject to sales tax pursuant to section 1105(c)(5) of the Tax Law.

C. That with respect to petitioner's purchases of rock salt as described in Finding of Fact "7", section 1105(a) of the Tax Law imposes sales tax upon the receipts from every retail sale of tangible personal property, with exceptions not relevant with respect to such purchases of rock salt.



D. That 20 NYCRR 526.6(c)(6) excludes from the definition of "retail sale" for purposes of Article 28 of the Tax Law, and thus excludes from the imposition of sales tax:

"Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law...where the property so sold becomes (i) a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

E. That the rock salt purchased by petitioner was purchased for use in performing the taxable service of snow removal. Such purchases were therefore clearly not for resale. It is likewise clear that the rock salt did not become a physical component part of petitioner's customer's property, nor was the rock salt actually transferred to petitioner's customers in conjunction with the performance of petitioner's snow removal activities. Any rock salt which remained on a customer's property was merely incidental to petitioner's snow removal activities and was of no use to the customer. Accordingly, petitioner's purchases of rock salt during the audit period were properly subject to tax under Article 28 of the Tax Law.

F. That section 1115(a)(15) of the Tax Law exempts from the sales and use tax imposed under sections 1105(a) and 1110 of the Tax Law receipts from sales of the following:

"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..."

Section 1116(a) sets forth as an exempt organization for purposes of section 1115(a)(15) the Federal government, its agencies and instrumentalities where it is the purchaser, user or consumer of property or services. Section 1116(a) also lists as an exempt organization for purposes of section 1115(a)(15) the

State of New York, its agencies, instrumentalities, public corporations and political subdivisions where it is the purchaser, user or consumer of property or services.

G. That with respect to the work performed by petitioner as described in Findings of Fact "9", "10" and "11", it is undisputed that petitioner was paid for its services on each such job by private entities, and petitioner has failed to establish that any governmental entity paid for petitioner's services with respect to any of the jobs it performed during the audit period. Accordingly, neither the Federal government nor the state government, nor any of their respective agencies or political subdivisions, purchased, used or consumed petitioner's services within the meaning of the aforecited statutes. Petitioner's purchases of materials used on the jobs in question were therefore not exempt from sales tax under section 1115(a)(15) of the Tax Law and the Audit Division properly asserted sales tax due from petitioner with respect to such purchases.

H. That petitioner's purchases of materials from Allied Chemical Corporation, as described in Finding of Fact "12", were retail sales pursuant to section 1101(b)(4)(i) of the Tax Law. Accordingly, such purchases were subject to the sales tax imposed by section 1105(a) of the Tax Law. Petitioner, as purchaser, was liable for the sales tax imposed pursuant to section 1133(b) of the Tax Law which provides, in pertinent part:

"Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission..."

Petitioner's liability for sales tax on the purchases in question is unaffected by any failure by the seller to charge and collect sales tax or by any audit by the Department of Taxation and Finance of the seller.


I. That the petition of Ruston Paving Co., Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 23, 1983 and subsequently adjusted to the amount of \$14,728.49, plus interest, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER