

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Susquehanna Sheet Metal Erection Service, 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 3/1/80-11/30/82.

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 5th day of December, 1986, he/she served the within notice of Decision by certified mail upon Susquehanna Sheet Metal Erection Service, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

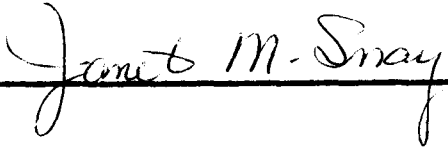
Susquehanna Sheet Metal Erection Service, Inc.
7077 E. Eden Rd.
Hamburg, NY 14075

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
5th day of December, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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of :
Susquehanna Sheet Metal Erection Service, Inc. : AFFIDAVIT OF MAILING
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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 5th day of December, 1986, he served the within notice of Decision by certified mail upon Corey J. Hogan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

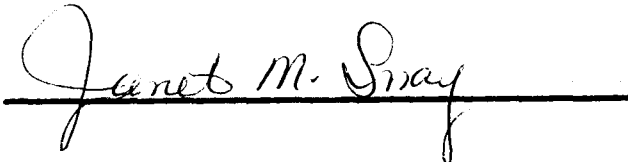
Corey J. Hogan
Grove, Hogan, Hogan & Douglas
102 East Ave., P.O. Box 456
Lockport, NY 14094

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
5th day of December, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

December 5, 1986

Susquehanna Sheet Metal Erection Service, Inc.
7077 E. Eden Rd.
Hamburg, NY 14075

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:
Corey J. Hogan
Grove, Hogan, Hogan & Douglas
102 East Ave., P.O. Box 456
Lockport, NY 14094

STATE TAX COMMISSION

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York on April 29, 1986 at 10:45 A.M. with all briefs to be submitted by July 21, 1986. Petitioner appeared by Grove, Hogan, Hogan & Douglas (Corey J. Hogan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the installation of either metal restroom partitions or metal lockers results in a capital improvement to real property or is merely the installation of tangible personal property.

II. Whether petitioner substantiated certain claimed exempt sales.

FINDINGS OF FACT

1. Petitioner, Susquehanna Sheet Metal Erection Service, Inc., was a contractor specializing in the sale and installation of lockers, shelving and restroom partitions.

2. On December 20, 1983, as the result of a field audit, the Audit Division issued against petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1980 through November 30, 1982, asserting a tax due of \$17,758.96 plus minimum statutory interest.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through August 31, 1980 to December 20, 1983.

4. The Audit Division conducted a detailed examination of petitioner's contracts, contractor worksheets, cash receipts journal and exemption certificates for the audit period. This analysis revealed that petitioner had treated the installation of metal partitions and footlockers as capital improvements. Petitioner reported the cost of materials used in this manner as taxable sales and paid tax on the materials of \$3,057.69. The auditor considered the installation of both the partitions and the lockers to be the installation of tangible personal property. Accordingly, he computed sales tax on the entire amount of all contracts affected, gave petitioner credit for tax already paid on the materials portion of the contracts and determined additional tax due on the service of installing personal property of \$12,984.66.

5. Included in all contracts reviewed by the auditor were a certain number of sales upon which petitioner paid no tax on the basis that the sales were made to exempt organizations. Because no exemption certificates were made available to the auditor, these claimed exempt sales were disallowed in their entirety. Sales tax of \$4,774.30 was assessed on the entire amount of these contracts.

6. Approximately 95 percent of petitioner's jobs were obtained through competitive bidding. This process included the review of architectural drawings

and specifications and the submission by petitioner of detailed blueprints and shop drawings. The restroom partitions were ordered from a manufacturer which cut the partitions to meet the size specifications required by each job.

7. The restroom partitions consisted of metal walls and doorways that surround toilets in public and semi-public restrooms. The walls of the partitions were roughly one and one-half to two inches thick with a height of between seventy and ninety inches. Petitioner installed partitions of three different designs: floor mounted, floor mounted head vail and ceiling mount. In all cases, the partitions were anchored to floors or ceilings and walls using steel threaded rods and bolts. In some instances, a reinforcement or bracket was attached behind the wall or ceiling before the partition was anchored into place.

8. Petitioner installed lockers using three methods. The recessed locker style involved fitting lockers into prepared alcoves in a wall. The lockers were attached to floor and ceiling, using anchor bolts. The second type of installation involved a double row of lockers, standing back to back in the middle of a room. The lockers were anchored into a concrete base prepared by the builder. The third type of installation involved affixing a single row of lockers to a concrete base and a wall.

9. The removal of partitions and lockers was not a common occurrence; however, it was done on occasion, especially as part of a general renovation or rehabilitation of restrooms or locker rooms. Removal caused damage to the extent that holes were left where steel rods and bolts anchored the partitions and lockers to floors, walls and ceilings.

10. Three certificates of capital improvement were provided to petitioner. The tax assessed on the installation and materials from these jobs totalled \$740.46.

11. Four exempt use certificates were provided to petitioner in connection with contracts to directly provide goods and services to tax exempt organizations. The total tax assessed on these contracts was \$345.69.

12. Three invoices identified in connection with the certificates submitted could not be located.

CONCLUSIONS OF LAW

A. That receipts from the sale of services performed in making capital improvements are excluded from the imposition of sales tax under section 1105(c)(3) of the Tax Law; receipts from the sale of tangible personal property used in making capital improvements are exempt from tax under section 1115(a)(17) of the Tax Law (Saf-Tee Plumbing Corp. v. Tully, 77 AD2d 1).

B. That section 1101(b)(9) of the Tax Law and 20 NYCRR 527.7(a)(3) define capital improvements as:

"An addition or alteration to real property which:

(i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(ii) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(iii) Is intended to become a permanent installation."

C. That prior to their enactment into law, the courts applied the criteria set forth in Tax Law §1101(b)(9) in determining the taxability of installations similar to those at issue here (See, Matter of Consolidated Edison Co. of N.Y., Inc., v. City of New York 44 NY2d 536; Matter of Wood Enterprises v. State Tax Commission, 67 AD2d 1042; Matter of Flah's of Syracuse v. Tully, 89 AD2d 729).

D. That neither the metal restroom partitions nor the lockers lost their identity as tangible personal property after being installed by petitioner. Neither is designed to be a permanent installation as evidenced by the methods

of affixation and the fact that they can be easily removed without causing material damage to the property on which they were installed or the articles themselves. (See, Matter of Raised Computer Floors, Inc. v. Chu, 116 AD2d 958, lv denied ___ NY2d ___ [September 4, 1986].)

E. That petitioner was furnished with and accepted in good faith certificates of capital improvement and exempt use certificates; therefore, its tax liability is reduced in the amount of \$1,086.15 as set forth in Findings of Fact "10" and "11" (Saf-Tee Plumbing Corp. v. Tully, 77 AD2d 1 supra).

F. That the petition of Susquehanna Sheet Metal Erection Service, Inc. is granted to the extent indicated in Conclusion of Law "E"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1983 shall be modified accordingly; and that in all other respects, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986

Richard W. Allen
PRESIDENT

Francis R. Kolm
COMMISSIONER

Mark J. Judd
COMMISSIONER