

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Talco Contractors, 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 Ended 3/3/82. :
_____ :

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 20th day of October, 1986, he/she served the within notice of Decision by certified mail upon Talco Contractors, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Talco Contractors, Inc.
1739 Ridgeway Avenue
Rochester, NY 14615

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 October, 1986.

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

Janet M. Snay

STATE OF NEW YORK

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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 20th day of October, 1986, he served the within notice of Decision by certified mail upon Kenneth Bersani, 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 Bersani
Petralia, Webb & Bersani
811 First Federal Plaza
Rochester, NY 14614

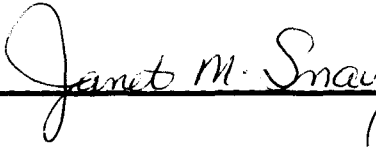
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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 October, 1986.



Authorized to administer oaths
pursuant to Tax Law section 174



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

October 20, 1986

Talco Contractors, Inc.
1739 Ridgeway Avenue
Rochester, NY 14615

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 Bersani
Petralia, Webb & Bersani
811 First Federal Plaza
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
TALCO CONTRACTORS, 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 Ended March 3,	:	
1982.	:	

Petitioner, Talco Contractors, Inc., 1739 Ridgeway Avenue, Rochester, New York 14615, 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 ended March 3, 1982 (File No. 40941).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on January 27, 1986 at 1:15 P.M., with all briefs to be submitted by May 23, 1986. Petitioner appeared by Petralia, Webb & Bersani, P.C. (Kenneth Bersani, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner's acquisition of certain construction equipment from Elmgrove Developers, Inc. constituted a "bulk sale" purchase or transfer of said equipment within the meaning of section 1141(c) of the Tax Law.

FINDINGS OF FACT

1. On October 12, 1982, the Audit Division issued to petitioner, Talco Contractors, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$47,698.75, plus interest. The notice

explained the premise upon which the Audit Division asserted tax due against petitioner as follows:

"The following taxes are determined to be due from Elmgrove Developers, Inc. and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

The notice further provided that the Audit Division's assertion of sales tax liability against petitioner was limited to \$60,500.00, the amount which it had determined to be the selling price of certain equipment acquired by petitioner from Elmgrove Developers, Inc.

2. Petitioner is and was at all times relevant herein a New York corporation engaged in a general contracting business. From time to time during the years 1979 through 1982, petitioner hired Elmgrove Developers, Inc. as a subcontractor on various jobs for which petitioner had been hired as general contractor.

3. Elmgrove Developers, Inc. ("Elmgrove") is and was at all times relevant herein a New York corporation engaged in a contracting business. Since 1982, however, Elmgrove has not been an active corporation. During the period of its operating existence, the shareholders of Elmgrove were two individuals, Nelson LeBarron and Mary Bacchetta. Nelson LeBarron also served as Elmgrove's president. Elmgrove's vice-president during the period of its operating existence was Louis Bacchetta.

4. Louis Bacchetta also served as vice-president of petitioner from 1980 through 1983, and is currently its president.

5. In connection with Elmgrove's subcontracting activities for petitioner, petitioner would, from time to time, advance funds, materials and supplies to Elmgrove in order for Elmgrove to complete its portion of the job. These advances resulted in an indebtedness between Elmgrove and petitioner.

6. Subsequent to the existence of this indebtedness, Louis Bacchetta, acting as petitioner's vice-president, initiated the filing of a financing statement (UCC-1) on or about May 27, 1980. Said financing statement was filed with the Office of the Monroe County Clerk on May 27, 1980, and was executed on behalf of both Elmgrove, listed as the debtor on the statement, and petitioner, listed as the secured party, by Louis Bacchetta, who at the time was vice-president of both corporations.

7. The May 27, 1980 financing statement described the property covered by it as follows:

"See Schedule A attached hereto and forming a part hereof.

Debtor is not authorized to sell or otherwise dispose of or encumber the collateral."

No document purporting to be the "Schedule A" referred to above was introduced at the hearing.

8. In addition, said financing statement listed "Monroe Tractor & Implement Co., Inc., 924 Lehigh Station Road, Rochester, N.Y. 14467" as assignee of the secured party. On July 7, 1980, a standard UCC-3 form was filed in the Office of the Monroe County Clerk referring to the original financing statement filed on May 27, 1980. The July 7, 1980 statement listed Monroe Tractor & Implement Co., Inc. as the secured party and was filed for the purpose of assigning said secured party's rights under the original May 27, 1980 financing statement. The assignee listed on the July 7, 1980 statement was "C.I.T. Corporation, 40 West 57th Street, New York, NY 10019."

9. On or about May 28, 1980, Louis Bacchetta met with petitioner's then attorney, John Parrinello, and Peter Ciacca, petitioner's accountant, to discuss the existing indebtedness between petitioner and Elmgrove. At hearing, both Mr. Bacchetta and Mr. Parrinello stated that it was decided at that

meeting that Elmgrove would grant a security interest to petitioner, covering Elmgrove's equipment, to secure existing and future advances and loans from petitioner to Elmgrove. Both Mr. Parrinello and Mr. Bacchetta further stated that a security agreement to that effect was prepared under Mr. Parrinello's direction, and Mr. Bacchetta stated that such security agreement was executed by Nelson LeBarron, Elmgrove's president.

10. Petitioner's representatives did not produce a copy of the security agreement at hearing nor was Mr. LeBarron present at the hearing to testify regarding the purported security agreement. Petitioner presented no evidence as to the specific terms of the agreement.

11. Subsequent to the filing of the financing statement on May 27, 1980, petitioner continued to advance to Elmgrove funds, equipment and materials in the manner described in Finding of Fact "5" herein. In addition, on September 30, 1980, petitioner loaned \$40,000.00 to Elmgrove in exchange for which Elmgrove executed a promissory note in a principal amount of \$40,000.00 in favor of petitioner. The note set forth the following terms of repayment:

"1. Interest only on the 1st day of April, 1981 and \$2,500.00 plus interest on the 1st day of December, 1981 and quarterly thereafter until the said loan is fully paid.

2. Upon default, all obligations of the undersigned shall without notice or demand, forthwith become and be immediately due and payable. I agree to pay any and all reasonable attorney's fees and costs of collection.

3. I waive presentment, protest, or notice of dishonor, and demand for payment, notice of default or non-payment."

12. On July 17, 1981, petitioner filed a financing statement (UCC-1) in the Office of the Monroe County Clerk listing itself as secured party and Elmgrove as debtor. This financing statement set forth the following as property covered by it:

"All items of personal property including trucks, heavy equipment, machinery, tools now or hereafter acquired by Elmgrove Developers, Inc."

This financing statement did not list an assignee of the secured party and was executed on behalf of petitioner by Mr. Bacchetta and on behalf of Elmgrove by Mr. LeBarron.

13. At hearing, Mr. Bacchetta stated that he caused the July 17, 1981 financing statement to be filed because of an error in filing on the part of the Monroe County Clerk's office. Mr. Bacchetta stated that he had been advised by the Clerk's office that no record existed of the May 27, 1980 filing. Mr. Bacchetta therefore directed that the July 17, 1981 statement be executed and filed.

14. Subsequent to the filing of the July 17, 1981 financing statement, petitioner continued to advance to Elmgrove funds, equipment and materials in the manner described in Finding of Fact "5" herein. In addition, by check dated September 1, 1981, petitioner loaned Elmgrove \$20,000.00.

15. On September 15, 1981, as the result of an audit of Elmgrove by the Audit Division of the Department of Taxation and Finance, Mr. Bacchetta executed on behalf of Elmgrove a Consent to Fixing of Tax Not Previously Determined and Assessed fixing Elmgrove's sales tax liability as a result of the audit at \$43,463.75.¹

16. In February 1982, Mr. Bacchetta, as vice-president of petitioner, was contacted by representatives of the Central Trust Company of Rochester, New

1 The amount asserted herein by the Audit Division against petitioner includes the amount determined due from Elmgrove together with bulk sales tax on the value of the assets transferred to petitioner in the amount of \$4,235.00 (\$60,500.00 @ 7%) for a total tax asserted due of \$47,698.75.

York ("Central Trust"). Both petitioner and Elmgrove had previously done business with Central Trust and, in February 1982, Central Trust held a \$60,500.00 demand note executed by Elmgrove in Central Trust's favor. A representative of Central Trust met with Mr. Bacchetta on February 19, 1982 and advised Mr. Bacchetta at that time that it planned to call in all of Elmgrove's indebtedness. Central Trust proposed a resolution to the situation whereby it would agree not to call in Elmgrove's indebtedness if petitioner would assume such indebtedness. By letter agreement dated February 22, 1982, Central Trust proposed to petitioner that the bank consolidate Elmgrove's \$60,500.00 demand note and a \$12,857.00 note from a separate corporation into a five year term loan in the amount \$73,357.00 in the name of petitioner. Mr. Bacchetta accepted this letter agreement on behalf of petitioner on March 3, 1982.

17. Based upon Central Trust's representation that it would call in all of Elmgrove's indebtedness and its proposal to resolve the situation (to which petitioner agreed), petitioner took possession of Elmgrove's equipment subsequent to its February 19, 1982 meeting with Central Trust. Pursuant to this transfer, a document encaptioned "Bill of Sale" dated February 19, 1982 was executed on behalf of Elmgrove by Mr. LeBarron. Said Bill of Sale stated the following:

"For the value recieved (sic) of \$75,955.68 on this date of February 19, 1982 we will sell to Talco Contractors, Inc. any and all equipment that Elmgrove Developers, Inc. owns as per Talco Contractors, Inc. chattel agreement. The following is to be included, but not limited to:

1972 TD8 Dozer	S/N 1066
1970 TD8 Dozer	S/N V000591
1974 Case 580B Backhoe	S/N 8748820
955 Cat Loader	S/N 71J820
BW210 Bomag Roller	S/N 73657
619 Cat Pan	S/N 61F1490"

18. At hearing, Mr. Bacchetta stated that it was his understanding that, in exchange for petitioner's assumption of Elmgrove's indebtedness, petitioner

would be assigned all of Central Trust's security interests in Elmgrove's property.

19. Central Trust was listed as secured party and Elmgrove was listed as debtor on a financing statement filed in the Monroe County Clerk's office on May 2, 1978. Said financing statement set forth the following as property covered by it:

"Equipment Security Agreement dated April 27, 1978
1974 #580 B 8748820 - Monroe Tractor"

A continuation of said financing statement listing the same parties as secured party and debtor, respectively, was filed in the Clerk's Office on April 22, 1983.

20. Petitioner introduced no evidence of the existence of an assignment to petitioner by Central Trust of Central Trust's security interest in Elmgrove's equipment.

21. Elmgrove ceased operations as a contracting firm upon petitioner's acquisition of its equipment in February 1982.

22. At the time of petitioner's acquisition of Elmgrove's equipment, Elmgrove was indebted to petitioner in the amount of \$66,937.85.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

* * *

For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee... shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferrer or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher..."

B. That 20 NYCRR 537.1(a)(4)(i) excludes from the definition of sales, transfers or assignments in bulk all "sales, transfers or assignments of business assets in settlement or realization of a valid lien, mortgage or other security interest" (emphasis supplied). Accordingly, the issue to be determined herein is whether petitioner's acquisition of Elmgrove's equipment was in settlement or realization of a valid security interest held by petitioner. If so, then such transfer was not a bulk sale within the meaning of section 1141(c) of the Tax Law.

C. That, for purposes of the above-cited regulation, the term "valid security interest" refers to security interests enforceable under the Uniform Commercial Code. Accordingly, a security interest which, in the opinion of the Commission, is not enforceable under the Uniform Commercial Code is not a valid security interest within the meaning of 20 NYCRR 537.1(a)(4)(i).

D. That Uniform Commercial Code § 9-203(1) provides, in pertinent part, that:

"a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral" (emphasis supplied).

E. That Uniform Commercial Code § 9-105 defines "security agreement" as "an agreement which creates or provides for a security interest."

F. That Official Comment 1 to Uniform Commercial Code § 9-203 sets forth, in pertinent part, the following with respect to non-possessory security interests:

"The only requirements for the enforceability of non-possessory security interests in cases not involving land are (a) a writing; (b) the debtor's signature; and (c) a description of the collateral or kinds of collateral."

G. That Official Comment 5 to Uniform Commercial Code § 9-203 provides the following:

"The formal requisites stated in this section are not only conditions to the enforceability of a security interest against third parties. They are in the nature of a Statute of Frauds. Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies subsection (1)(b) is not enforceable even against the debtor, ... More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing."

H. That in view of the aforecited statutes, Official Comments and regulations, our initial inquiry as to the existence of a valid security agreement between petitioner and Elmgrove must center upon an analysis of the documents submitted at hearing on petitioner's behalf in order to determine whether such documents satisfy the requirements for a valid security agreement. For purposes of this threshold inquiry, we do not consider the testimonial evidence introduced at hearing to establish the existence of a security agreement. Such evidence may properly be considered only if petitioner meets the initial Statute of

Frauds burden imposed by the statutes in question (see White & Summers, Uniform Commercial Code 905 [2nd Ed., 1980]).²

I. That, with respect to the documents submitted by petitioner at hearing, it is not necessary that a separate document formally designated "security agreement" be introduced in order to establish the existence of the security agreement, nor is it necessary that the security agreement be embodied in a single document, for the courts have established that "a security agreement may be found through a collective examination of various documents none of which could, standing alone, satisfy the requirements for a security agreement found in UCC section 9-203" (In re Coffee Cupboard, Inc., 33 Bankr. Rep. 668, 671 [Bkrtcy. 1983]). See also Matter of Numeric Corp., 485 F.2d 1328 [1st Cir. 1973]).

J. That notwithstanding the rule of law set forth in Conclusion of Law "I", the courts have further established that "some [written] language reflecting a desire to grant a security interest must be contained within the documents offered to establish a security agreement under U.C.C. § 9-203." (In Re Modafferi, 45 Bankr. Rep. 370, 372 [S.D.N.Y. 1985]; emphasis in original.)

K. That petitioner has failed to introduce into evidence any documents containing any language reflecting a desire on the part of Elmgrove to grant a

2 In reaching this conclusion we are mindful of the provisions of section 306(1) of the State Administrative Procedure Act which makes provision only for the exclusion of "irrelevant or unduly repetitious evidence" and requires that all administrative decisions be made "upon consideration of the record as a whole". In view of Conclusions of Law "C" through "G", however, it is clear that as a matter of substantive law such testimonial evidence may not be considered in determining the existence of a security interest absent petitioner's satisfaction of the above-cited UCC requirements. We therefore do not consider petitioner's testimonial evidence absent such a showing (cf. Catholic Medical Center of Brooklyn and Queens v. N.L.R.B. 589 F2d 1166, 1170 [2d Cir 1978]).

security interest to petitioner. Specifically, the two financing statements, filed on May 27, 1980 and July 17, 1981, respectively, do not reflect any desire on Elmgrove's part to grant a security interest to petitioner. Rather, these documents merely serve to put third parties on notice that a security interest may exist (see Matter of Marta Corp., 74 Misc.2d 612, 615. See also Uniform Commercial Code §9-402, Official Comment 2). Moreover, the courts in New York which have reviewed documents in combination to create a security interest, have consistently required that, in addition to the standard financing statement, "there must be some further documentation corroborative of the debtor's intent to pledge collateral" (In Re Modafferi, 45 Bankr. Rep. 370, 372, supra).

L. That the documentation submitted by petitioner, in addition to the financing statements, contains no language reflecting a desire on the part of Elmgrove to grant a security interest to petitioner and thus fails to establish the existence of a valid security interest under Uniform Commercial Code §9-203 and 20 NYCRR 537.1(a)(4)(i). Specifically, the promissory note dated September 30, 1980, and executed on Elmgrove's behalf by its president, makes no reference whatever to any security agreement. While the "Bill of Sale" dated February 19, 1982 makes reference to a "chattel agreement", such reference is vague and cannot be said to evince a written expression of a "present intent to create a security interest" (In re Coffee Cupboard, Inc., 33 Bankr. Rep. 668, 672, supra). Accordingly, petitioner has failed to establish that the transfer of property at issue herein was pursuant to a valid security interest.

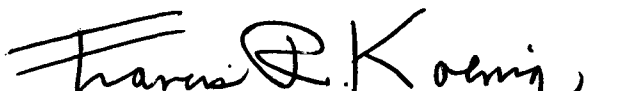
M. That the petition of Talco Contractors, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated October 12, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER