

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Wheatfield Properties :

AFFIDAVIT OF MAILING

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 March 1, 1979 :
through May 31, 1982.

State of New York :

ss.:

County of Albany :

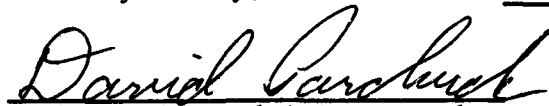
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 29th day of May, 1987, he/she served the within notice of decision by certified mail upon Wheatfield Properties the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

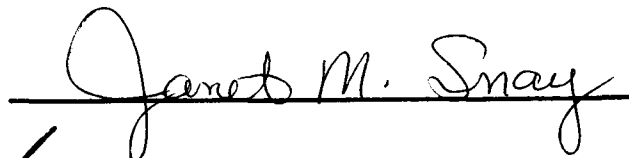
Wheatfield Properties
6929 Williams Road
Niagara Falls, NY 14304

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
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Boulevard Mall Co. : AFFIDAVIT OF MAILING

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 March 1, 1979 :
through May 31, 1982.

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 29th day of May, 1987, he/she served the within notice of decision by certified mail upon Boulevard Mall Co. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

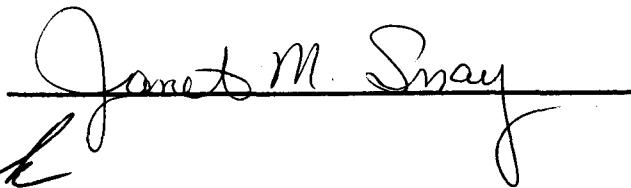
Boulevard Mall Co.
730 Alberta Drive
Amherst, NY 14226

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
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Wheatfield Properties :

AFFIDAVIT OF MAILING

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 March 1, 1979 :
through May 31, 1982.

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 29th day of May, 1987, he served the within notice of decision by certified mail upon Thomas Michaels, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas Michaels
Forest City Enterprises, Inc.
10800 Brookpark Rd.
Cleveland, OH 44130

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
29th day of May, 1987.

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

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Boulevard Mall Co. :

AFFIDAVIT OF MAILING

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 March 1, 1979 :
through May 31, 1982.

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 29th day of May, 1987, he served the within notice of decision by certified mail upon Thomas Michaels, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

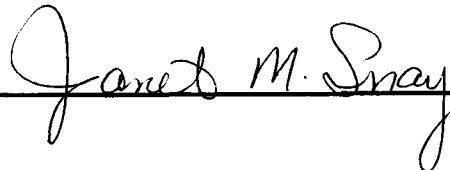
Thomas Michaels
Forest City Enterprises, Inc.
10800 Brookpark Rd.
Cleveland, OH 44130

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
29th day of May, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

May 29, 1987

Wheatfield Properties
6929 Williams Road
Niagara Falls, NY 14304

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:
Thomas Michaels
Forest City Enterprises, Inc.
10800 Brookpark Rd.
Cleveland, OH 44130

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

May 29, 1987

Boulevard Mall Co.
730 Alberta Drive
Amherst, NY 14226

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.

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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:
Thomas Michaels
Forest City Enterprises, Inc.
10800 Brookpark Rd.
Cleveland, OH 44130

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

WHEATFIELD PROPERTIES :

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 March 1, 1979 :
through May 31, 1982.

DECISION

In the Matter of the Petition :

of :

BOULEVARD MALL CO. :

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 March 1, 1979 :
through May 31, 1982.

Petitioner, Wheatfield Properties, 6929 Williams Road, Niagara Falls, New York 14304, 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 March 1, 1979 through May 31, 1982 (File No. 50456).

Petitioner, Boulevard Mall Co., 730 Alberta Drive, Amherst, New York 14226, 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 March 1, 1979 through May 31, 1982 (File No. 50455).

A consolidated hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 5, 1987 at 1:15 P.M. Petitioners appeared by Thomas Michaels, Esq.

The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that certain purchases made by petitioners were subject to sales and use tax.

FINDINGS OF FACT

1. On December 12, 1983, following an audit, the Audit Division issued to petitioner Wheatfield Properties ("Wheatfield") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, asserting additional tax due of \$18,558.95 plus \$6,137.64 in interest for a total amount due of \$24,696.59 for the period March 1, 1979 through May 31, 1982.

2. Also on December 12, 1983, following an audit, the Audit Division issued to petitioner Boulevard Mall, Co. ("Boulevard"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, asserting additional tax due of \$17,782.03 plus \$6,104.99 in interest for a total amount due of \$23,887.02 for the period March 1, 1979 through May 31, 1982.

3. At all times relevant herein, Wheatfield was a partner in a partnership which owned and operated the Summit Park Mall located at 6929 Williams Road, Niagara Falls, New York 14304. Wheatfield's partner was Forest City Enterprises, Inc. of Cleveland, Ohio.

4. Also at all times relevant herein Boulevard was a partner in a partnership which owned and operated the Boulevard Mall located at 730 Alberta Drive, Amherst, New York 14226. Boulevard's partner was also Forest City Enterprises, Inc.

5. Subsequent to the period at issue Forest City Enterprises, Inc. became the sole owner of both malls.

6. The tax asserted due herein arose out of each petitioner's ownership and operation of its respective mall. On audit, the Audit Division examined each petitioner's purchases in detail. Neither petitioner disputed that the purchases had been made, but rather took issue with the taxability of such purchases.

7. The additional tax found due from Wheatfield involved purchases made in three areas: the mall parking lot, the mall roof, and snowplowing services.

8. Specifically, Wheatfield's purchases at issue herein were as follows:

Parking Lot

(a) \$60,548.35 on a job performed during 1979, consisting of the following:

(1) \$50,311.20 for work on 30,757 square feet of the lot, consisting of the excavation of the existing surface and the replacement thereof with a 12 to 16 inch layer of crushed stone, topped with 3 inches of a binder coating and 1 inch of asphalt topping;

(2) \$573.75 for work on 1,275 square feet of the lot, consisting of a 1½ inch overlay of asphalt topping;

(3) \$8,870.00 to undercut an entrance roadway to the parking lot, remove unsuitable material and replace it with totally compacted and graded bank run slag - a more suitable support for an entrance roadway;

(4) \$793.40 in sales tax on materials.

(b) \$54,046.36 on a job performed on its lot during 1980, consisting of the following:

(1) \$47,461.92 for replacement of 35,956 square feet of the lot in a manner substantially similar to the replacement described above in Finding of Fact "8(a)(1)";

(2) \$6,584.44 for the resurfacing of 28,628 square feet of the lot with a 1 inch overlay of asphalt;

(c) \$28,375.65 on a job performed on the lot during 1981, consisting of the following:

(1) \$10,184.24 for excavation and replacement of 12 separate areas of the lot totalling 7,172 square feet. The work

performed was similar to the work described in Finding of Fact "8(a)(1)";

(2) \$17,491.41 for work, consisting of either one inch of binder and one inch of asphalt or one inch of asphalt alone, on 57,354 square feet of the lot;

(3) \$700.00 for trench excavation and filling.

(d) \$1,655.00 to stripe the parking lot.

(e) \$947.69 for unidentified services.

Mall Roof

(f) \$80,546.32 for work performed on 33,792 square feet of the mall roof. The work was performed on 16 separate areas of the roof which ranged in size from 21 square feet to 11,860 square feet. The work itself consisted of the installation of a new roof system onto the existing system.

Snowplowing Services

(g) \$39,273.44 for "labor" charges in connection with snowplowing services performed on the mall property.

9. With respect to its parking lot, Wheatfield contended that financial considerations precluded the replacement of the entire lot at one time. No evidence of a plan to replace the entire parking lot over a certain period was presented. No evidence was presented to show whether the entire lot had been replaced or resurfaced over the period at issue. Also, no evidence as to the total area of the parking lot was introduced.

10. With respect to the mall roof, the entire area of the roof was not replaced. A map of the mall roof attached to the service contract indicated that the proposed re-roofing areas comprised less than one-third of the total roof. No evidence of a plan to completely re-roof the mall was introduced, nor was the amount of the total area encompassed by the roof introduced into evidence.

11. With respect to the snowplowing services, Wheatfield contended that it rented the trucks for plowing and that the drivers of the trucks were its employees while they were engaged in snowplowing. Wheatfield directed the drivers where to plow while they were at the mall. The drivers were not paid by Wheatfield through its payroll accounts, nor did Wheatfield have the right to select which driver would be sent to perform the services on each occasion. Wheatfield had no right to hire or fire the drivers.

12. The additional taxes found due from Boulevard involved purchases made by Boulevard in several areas: the mall parking lot, snowplowing services, temporary or substitute personnel, the installation of certain additions or alterations in and around the mall, and excavation work around the mall.

13. Specifically, Boulevard's purchases at issue herein were as follows:

Parking Lot

(a) \$60,830.98 for work performed during of 1979, consisting of the following:

(1) \$37,267.20 to excavate and replace 41,408 square feet of the lot with 8 inches of crushed stone, topped by 1½ inches of binder coating and 1 inch of asphalt;

(2) \$19,963.78 to resurface 58,717 square feet of the lot with 2 inches of binder and asphalt;

(3) \$3,600.00 to resurface 18,000 square feet with one inch of asphalt.

(b) \$2,300.00 for additional work in 1979, consisting of the resurfacing of an area of the lot with 1 inch of asphalt.

(c) \$55,269.00 for a job performed in 1980, consisting of the following:

(1) \$10,230.00 to excavate and replace 9,300 square feet of the parking lot in a manner similar to that described in Finding of Fact "13(a)(1)";

(2) \$35,948.00 to resurface 81,700 square feet of the lot with approximately 2 inches of binder and asphalt;

(3) \$7,711.00 to resurface 35,050 square feet with one inch of asphalt topping;

(4) \$1,320.00 to patch small holes in the lot;

(5) \$60.00 to repair and replace water boxes.

(d) \$1,652.40 to excavate and replace 1,836 square feet of the lot in the manner described in Finding of Fact "13(a)(1)".

(e) \$37,092.71 for a job performed on the parking lot in 1981 consisting of the following:

(1) \$11,488.00 to excavate and replace in the manner described in Finding of Fact "13(a)(1)" 4 areas of the lot totalling 11,488 square feet. The replaced areas ranged in size from 176 square feet to 4,536 square feet;

(2) \$11,277.12 to resurface 23,494 square feet with one inch of binder and one inch of asphalt topping;

(3) \$14,327.59 to resurface 57,941 square feet with one inch of asphalt.

(f) \$16,200.00 to replace 1,339 feet of concrete curbing and 4,000 square feet of concrete sidewalk throughout the mall property.

(g) \$252.00 to install "No Standing" signs throughout the mall property.

(h) \$2,094.60 to bulldoze a corner of the lot to prepare it for landscaping. Of this amount, \$1,280.00 was for topsoil and \$89.60 was for sales tax thereon. The remaining \$725.00 represented the cost of bulldozer operation.

(i) \$680.90 to stripe an area of the lot in 1979.

(j) \$7,270.75 to completely restripe the lot in 1981.

Snowplowing Services

(k) \$53,538.50 for "labor" charges in connection with snowplowing services performed on the mall property.

Substitute Personnel

(l) \$4,774.47 in charges for temporary maintenance services.

Installation of Additions or Alterations

(m) \$5,267.00 to install an information booth on the mall floor. Also, \$1,300.00 to install a formica countertop in the booth and \$331.00 to install a computer terminal in the booth.

(n) \$3,246.00 to install a "stroller corral" in the mall floor.

(o) \$422.00 to install a board fence enclosing a trash bin on mall property.

Excavation Work

(p) \$1,100.00 to excavate, haul away excavation and to backfill trenches with crushed stone.

14. With respect to the parking lot, Boulevard, like Wheatfield, contended that financial considerations precluded it from replacing the entire lot at one time. Boulevard presented no evidence of a plan to replace or resurface over the audit period. Additionally, no evidence was presented as to the total area of the lot.

15. With respect to the snowplowing services, Boulevard made the same contentions as made by Wheatfield herein at Finding of Fact "11". Boulevard's rights with respect to the drivers of the snowplowing equipment were identical to the rights of Wheatfield as set forth in Finding of Fact "11".

16. With respect to the substitute or temporary personnel services, the persons sent by the service were under the direction of the mall manager while at the mall and performed certain maintenance services, such as mopping, cleaning or painting. The temporary personnel worked both inside and outside the mall. Boulevard did not have a contract with the entity which provided the personnel, but arranged for such temporary services as they were needed. Boulevard could not fire the temporary individuals, although it could force them to leave the mall premises. The temporary individuals were not on Boulevard's payroll and Boulevard did not pay any FICA taxes with respect to these individuals.

17. The information booth was installed by sinking bolts into the mall floor and fastening the four walls to the bolts. It could be unbolted and the wiring disconnected in order to be moved without serious damage to either the booth or the mall floor.

18. The "stroller corral" was a fenced area in which baby strollers were kept for use by shoppers. The corral was bolted to the mall floor and could be moved without damage to either the corral or the mall floor.

19. Regarding the board fence, posts were sunk in the ground for this fence, but were not cemented.

20. The excavation work was necessitated by damage caused by a wind storm.

21. The Audit Division conceded that the amount assessed against petitioner Wheatfield Properties should be adjusted by \$793.40 to reflect sales tax paid and included as part of this petitioner's taxable purchases (see Finding of Fact "8[a][4]").

22. The Audit Division also conceded that the amount of tax assessed against petitioner Boulevard Mall Co., Inc. should be adjusted by \$89.60 to reflect sales tax paid and included as part of this petitioner's taxable purchases (see Finding of Fact "13[h]").

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law imposes a tax upon the receipts from sales, except for resale, of the services of maintaining, servicing or repairing real property, property or land, as distinguished from capital improvements to such property or land.

B. That 20 NYCRR 527.7(a)(1) sets forth the following with respect to the terms "maintaining", "servicing" and "repairing" as used in Tax Law § 1105(c)(5):

"Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a

condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal."

C. That 20 NYCRR 527.7(a)(3) defines "capital improvement" for purposes of section 1105(c)(5) as follows:

"A capital improvement is an addition or alteration to real property:

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

(ii) which 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."

D. That the Audit Division properly asserted tax due on petitioners' parking lot expenditures as discussed herein. Both petitioners' replacement of certain sections of their respective lots and resurfacing of other sections, albeit extensive, nonetheless constituted activities related to keeping the property in a "condition of fitness, efficiency readiness or safety or restoring it to such condition" (20 NYCRR 527.7[a][1]). Accordingly, the services performed in connection with the parking lots were taxable pursuant to section 1105(c)(5) of the Tax Law.

E. That the roofing services performed in connection with petitioner Wheatfield Properties, Inc.'s mall roof likewise constituted maintaining, servicing or repairing real property within the meaning and intent of 20 NYCRR 527.7(a)(1). Such services were therefore properly subject to tax pursuant to Tax Law § 1105(a)(5).

F. That the Audit Division's assertion of tax on the snowplowing services and temporary personnel services as described herein was in all respects

proper. The assertion made by each petitioner that it was involved in an employee-employer relationship with the individuals who performed the services is simply unsupported by the record. In each instance petitioners engaged the services of an entity or individuals who offered such services to the public as part of a regular course of business. Accordingly, such services were properly taxable pursuant to section 1105(c)(5) of the Tax Law.

G. That the Audit Division's assertion of tax due with respect to the installation of petitioner Boulevard Mall's information booth, stroller corral and board fence was in all respects proper. The record clearly indicates that each of the aforementioned items did not become permanently affixed to the real property; each item could therefore be moved without material damage either to it or to the mall property (see 20 NYCRR 527.7[a][3]). Consequently, none of these items were capital improvements within the meaning of 20 NYCRR 527.7(a)(3).

H. That with respect to the excavation services performed for petitioner Boulevard (Finding of Fact "13(a)(1)"), petitioner has failed to show that such work met the criteria to be considered a capital improvement as set forth in 20 NYCRR 527.7(a)(3).

I. That the petition of Wheatfield Properties is in all respects denied and the notice of determination, dated December 12, 1983, as adjusted (Finding of Fact "21"), is sustained.

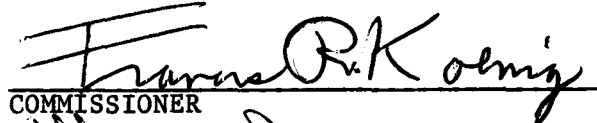
J. That the petition of Boulevard Mall Co., is in all respects denied and the notice of determination, dated December 12, 1983, as adjusted (Finding of Fact "22"), is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER