215 Va. 647

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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 740410

COMMONWEALTH OF VIRGINIA,

Appellant

v.

POUNDING MILL QUARRY CORPORATION,

Appellee

A P P E N D I X

Andrew P. Miller
Attorney General of Virginia

J. Durwood Felton, III
Assistant Attorney General of Virginia
P. O. Box 6-L
Richmond, Virginia 23282
Counsel for Appellant

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Filed in the Clerk's Office the 16th day May, 1973
Teste: WALKER R. CARTER, JR. Clerk
D.C.
Appl Tax $
Deposit
Total Paid $

TO: THE HONORABLE STANFORD L. FELLERS, JUDGE OF SAID COURT

APPLICATION FOR CORRECTION OF
ERRONEOUS TAX ASSESSMENT

Applicant, Pounding Mill Quarry Corporation ("Pounding Mill"), by counsel, respectfully represents that it is aggrieved by certain erroneous and unlawful assessments of taxes and interest on such taxes under the Virginia Retail Sales and Use Tax Act for the correction and exoneration of the payment whereof, application is made pursuant to the provisions of Section 58-1130, et seq., of the Code of Virginia. In support of its application, Pounding Mill alleges and says:

1. Pounding Mill is a Virginia corporation and at all times hereto relevant maintained its registered office and principal place of business in the City of Roanoke, within the jurisdiction of this Court.

2. At all times hereto relevant, Pounding Mill owned and operated quarries in the vicinity of Bluefield and Pounding Mill, Tazewell County, Virginia, and produced and sold from these quarries, among other materials, limestone aggregates and agricultural lime.

HAZLEGROVE,
CARR, DICKINSON,
SMITH & REA
ATTORNEYS AT LAW
ROANOKE, VA.

3. At all times hereto relevant, Pounding Mill was registered as a dealer under the Virginia Retail Sales and Use Tax Act, Section 58-441.1, et seq., of the Code of Virginia ("Act"), and collected, reported and paid to the Commonwealth of Virginia the Sales and/or Use Tax on taxable transactions at the Bluefield quarry under Certificate of Registration #192-045433-8 and at the Pounding Mill quarry under Certificate of Registration #192-045443-5.

4. During the period December 1, 1967 through December 31, 1971, Pounding Mill sold from time to time to one E. H. Bowers $50,080.45 and $16,690.38 of agricultural lime from its Pounding Mill and Bluefield Quarries, respectively, as determined by field audit of the Commonwealth of Virginia, Department of Taxation, Sales and Use Tax Division, a copy whereof is hereto annexed marked Exhibit A. All such agricultural lime sold to E. H. Bowers was resold to Virginia farmers and applied as liming material upon their land to beneficiate it for agricultural production. Pounding Mill did not collect, report or pay over to the Commonwealth of Virginia the sales taxes on the foregoing sales of liming materials to E. H. Bowers because such sales were for resale and otherwise exempt under the provisions of the Act. The Commonwealth of Virginia has purported to assess a sales tax deficiency of $1,931.67, together with interest thereon of $115.90, as of March 1, 1973, in respect of the sales of liming materials as aforesaid from the Pounding Mill Quarry and a sales tax deficiency of $643.97, together with interest of $38.64, as of April 24, 1973, in respect of sales from the Bluefield Quarry. Such assessments were respectively made a part of: (a) a larger assessment in the amount of $3,451.42, together

with interest of $207.07 embracing sales or use taxes relating to other transactions, amounting to $1,519.75, together with interest of $91.05, the correctness of which has not been contested by Pounding Mill, but paid or payment tendered prior to the filing of this application; and, (b) a larger assessment of $41,769.36, together with interest of $2,506.20, a further part whereof is hereby contested and the remainder paid, as below set forth.

5. During the period December 1, 1967 through January 1, 1972, Pounding Mill sold from time to time $955,306.94, of limestone aggregates to Lilly Construction Company, Inc., Underwood Brothers Asphalt Paving Company, Inc., and W & H Contracting Company, Incorporated, as determined by the Commonwealth's field audit attached hereto as Exhibit A. Each of the purchasers was at all times hereto relevant a West Virginia corporation engaged in business in that state. Each of the purchasers was registered as a dealer under the West Virginia Sales and Consumers Service Tax Act. Lilly Construction Company, Inc. was engaged in general construction and supplying ready-mix concrete. Underwood Brothers Asphalt Paving Company, Inc. was engaged in contracting and furnishing asphalt paving for public and private construction. W & H Contracting Company was engaged in general construction. All of the purchasers were engaged in West Virginia highway construction from time to time during the period aforesaid.

6. Prior to or in connection with the commencement of sales of limestone aggregates to the foregoing purchasers, Pounding Mill received from each of them a Sales and Use Tax Certificate of Exemption, each accomplished upon a form furnished by the Commonwealth of Virginia for use by

HAZLEGROVE, CARR, DICKINSON, SMITH & REA
ATTORNEYS AT LAW
ROANOKE, VA.

out-of-state dealers purchasing tangible property in Virginia for immediate transportation out of the Commonwealth of Virginia in the purchaser's vehicle for resale outside the State of Virginia. Each such certificate was regular and complete upon its face (with the exception of a designation of limestone aggregates as the personal property purchased from Pounding Mill), and Pounding Mill accepted and continued to rely upon the certifications so made, in good faith and without knowledge of any use or intended use or disposition of the limestone aggregates so purchased by the purchasers contrary to the use or intended disposition set forth in such certificates. True copies of such certificates are attached hereto marked Exhibit B-1, B-2 and B-3.

7. Under date of January 21, 1972, following the close of the period of audit and examination giving rise to the taxes in controversy, the Virginia Department of Taxation, Sales and Use Tax Division, transmitted to Pounding Mill written notice of purported retroactive cancellation at October 18, 1966, of each of the sales and use tax certificates of exemption furnished by the purchasers identified in Paragraph 5 hereof and attached as Exhibits B-1, B-2 and B-3. True copies of such notices are hereto annexed marked Exhibit C-1, C-2, and C-3.

8. All of the limestone aggregates aforesaid were delivered by Pounding Mill to the respective purchasers at the Bluefield Quarry where such materials were placed in the purchasers' trucks, measured by weight on the quarry scales, receipted for by the purchasers' truck operators, and immediately transported across the Virginia-West Virginia line to unknown points of destination in the State of West Virginia where such materials were ultimately used or

consumed, presumably in the construction of highways and the manufacture of ready-mixed concrete or asphalt paving. No part of the limestone aggregates sold to these purchasers was used or consumed or stored for use or consumption in the State of Virginia and, following delivery to the purchasers, remained in Virginia for only the time involved in transporting the material from the quarry, several miles to the State of West Virginia. Each of the purchasers of such aggregates has confirmed that these materials were used and consumed in the State of West Virginia and also confirmed that the exemption certificate made by it was intended to apply to all sales to it of limestone aggregates by Pounding Mill.

9. Pounding Mill did not collect, report or remit or pay over to the Commonwealth of Virginia the applicable tax on the $955,306.94 of sales of limestone aggregates to the purchasers aforesaid, for the reason that such sales were made by Pounding Mill in good faith reliance upon the exemption certificates aforesaid prior to cancellation and for the further reason that the limestone aggregates were not sold at retail for use and consumption within the Commonwealth of Virginia and, therefore, did not constitute taxable transactions under the Act.

10. The Commonwealth of Virginia, Department of Taxation, Sales and Use Tax Division, determined by reason of the field audit attached hereto as Exhibit A, that Pounding Mill owed to the Commonwealth of Virginia a sales tax in the amount of $36,847.55, plus interest of $2,210.85, by reason of $955,306.94 of sales of limestone aggregates to the purchasers aforesaid and, after revising such audit to omit $960.12 of sales tax, plus interest of $57.61,

relating to $16,002.00 of sales of limestone aggregates regarded by the Commonwealth of Virginia as specifically covered by the exemption certificates aforesaid, and, therefore, not taxable, assessed Pounding Mill with a sales tax of $35,887.43, together with interest thereon in the amount of $2,153.24, which is embraced in a larger assessment bearing date of April 24, 1973, in the amount of $41,769.36, plus interest in the amount of $2,506.20. Pounding Mill does not contest the correctness of the assessment of sales or use taxes in the amount of $5,238.15, together with interest in the amount of $314.29, relating to other sales or use tax transactions covered by the foregoing assessment and has paid or tendered payment of this amount to the Commonwealth prior to the filing of this application.

11. Pounding Mill has agreed to waive or not assert any applicable provision of the Virginia Retail Sales and Use Tax Act limiting the time within which assessment of taxes may be made thereunder and the Commonwealth of Virginia, Department of Taxation, Sales and Use Tax Division, has waived or agreed not to assert against Pounding Mill a claim for penalty for nonpayment of the sales taxes in controversy.

WHEREFORE, Pounding Mill respectfully prays the Court to correct and exonerate Pounding Mill from the payment of the erroneous and unlawful assessment of sales taxes in the amount of $38,463.07, together with interest, and to certify to the Tax Commissioner of the Commonwealth of Virginia such correction and exoneration, following proceedings herein pursuant to notice to and possible answer by the Commonwealth of Virginia, as provided by

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ATTORNEYS AT LAW
ROANOKE, VA.

statute. Pounding Mill further prays the Court to correct and exonerate it from payment of such amounts of such assessments as may be found to be erroneous or unlawful and to certify or otherwise order the Treasurer of Virginia to refund to Pounding Mill such amounts of such assessments as may hereafter be collected from or paid by Pounding Mill and as may be found to be erroneous or unlawful, and to grant to it such further relief as may appear requisite.

FORM 51 46

REPORT OF FIELD AUDIT

Exhibit A

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION
SALES AND USE TAX DIVISION
P. O. BOX 6-L - RICHMOND, VIRGINIA 23215

App. 8

TAXPAYER'S COPY

NAME OF DEALER: POUNDING MILL QUARRY CORPORATION

TRADING AS: SAME

BUSINESS ADDRESS: TAZEWELL, VIRGINIA 24651

MAILING ADDRESS: P. O. BOX 2459, ROANOKE, VIRGINIA 24010

REGISTRATION NUMBER			BUSINESS CODE
192	045433	8	59

LIABILITY (OR CREDIT) PROPOSED BY AUDIT

PERIOD OF AUDIT TO	MEASURE OF TAX		TAX		PENALTY *		INTEREST TO		TOTAL	
STATE TAX 12/1/67 to 1/1/72	1,109,290	42	31,694	04	7,583	95	1,901	65	41,179	64
LOCAL TAX 12/1/67 to 1/1/72	1,103,543	00	11,035	44	2,645	67	662	16	14,343	27
TOTAL			42,729	48	10,229	62	2,563	81	55,522	91
LESS:			42,729	48			2,563	81	45,293	29
BALANCE					10,229	62			10,229	62

ANALYSIS OF MEASURE OF TAX BY CLASS OF TRANSACTION

	STATE		LOCAL	
1. Non-taxed purchases from in-State suppliers of shop supplies, tools and administrative supplies during the periods of:				
a) 12/1/67 thru 6/30/68 at 3% tax rate	12,543	37	12,543	37
b) 7/1/68 thru 12/31/71 at 4% tax rate	75,260	22	75,260	22
2. Non-taxed purchases from out-of-State suppliers of shop supplies, tools and administrative supplies during the periods of:				
a) 12/1/67 thru 6/30/68 at 2% tax rate	5,747	42	-0-	
b) 7/1/68 thru 12/31/71 at 4% tax rate	34,484	52	34,484	52

SIGNATURE OF AUDITOR	DATE	SIGNATURE OF APPROVING SUPERVISOR	DATE
Thomas H. Wright	5-31-72	Thomas H. Smith	6/5/72

NAME OF DEALER FOUNDING MILL QUARRY CORPORATION REGISTRATION NO 192 045433 8

CONTINUATION OF
ANALYSIS OF MEASURE OF TAX BY CLASS OF TRANSACTION App. 9

	STATE		LOCAL	
3. Non-taxed sales of gravel, crushed stone and lime during				
the periods of:				
a) 12/1/67 thru 6/30/68 at 3% tax rate	1,322	51	1,322	51
b) 7/1/68 thru 12/31/71 at 4% tax rate	7,935	06	7,935	06
4. Non-taxed lime sales to E. H. Bowers, a lime hauling				
contractor, during the periods of:				
a) 12/1/67 thru 6/30/68 at 3% tax rate	2,384	34	2,384	34
b) 7/1/68 thru 12/31/71 at 4% tax rate	14,306	04	14,306	04
5. Non-taxed sales of gravel and crushed stone to West				
Virginia contractors when contractor picked up stone in				
Virginia during the periods of:				
a) 12/1/67 thru 6/30/68 at 3% tax rate	136,472	42	136,472	42
b) 7/1/68 thru 12/31/71 at 4% tax rate	818,834	52	818,834	52

SIGNATURE OF AUDITOR	DATE	SIGNATURE OF APPROVING SUPERVISOR	DATE
[illegible]	5-31-72	[illegible]	5/6/72

TAXPAYER'S COPY

FORM 31-48 B (Rev. 2-1-70)

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION

Sales and Use Tax Division

TAXPAYER'S COPY

App. 10

REGISTRATION NUMBER	192	045433	8

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

SIGNATURE OF AUDITOR [illegible] DATE 5-31-72

STATE TAX [X] LOCAL TAX [ ]

SUMMARY BY PERIODS - ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD BEGINNING	PERIOD ENDING	SALES	USE	MEASURE OF TAX		ADDITIONAL TAX RATE	ADDITIONAL TAX AMOUNT		PENALTY RATE	PENALTY AMOUNT		INTEREST TO [ ] [ ] RATE	INTEREST AMOUNT		TOTAL	
12/1/67	6/30/68	X		140,179	27	2%	2,803	59	25%	700	90	6%	168	22	3,672	71
12/1/67	6/30/68		X	18,290	79	2%	365	82	25%	91	46	6%	21	95	479	23
7/1/68	8/31/71	X		760,973	18	3%	22,829	20	25%	5,707	30	6%	1,369	75	29,906	25
7/1/68	8/31/71		X	99,292	86	3%	2,978	79	25%	744	70	6%	178	73	3,902	22
9/1/71	9/30/71	X		20,025	61	3%	600	77	20%	120	15	6%	36	05	756	97
9/1/71	9/30/71		X	2,612	97	3%	78	39	20%	15	68	6%	4	70	98	77
10/1/71	10/31/71	X		20,025	61	3%	600	77	15%	90	12	6%	36	05	726	94
10/1/71	10/31/71		X	2,612	97	3%	78	39	15%	11	76	6%	4	70	94	85
11/1/71	11/30/71	X		20,025	61	3%	600	77	10%	60	08	6%	36	05	696	90
11/1/71	11/30/71		X	2,612	97	3%	78	39	10%	7	84	6%	4	70	90	93
TOTAL																

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION

Sales and Use Tax Division

TAXPAYER'S COPY

App. 11

REGISTRATION NUMBER	192	045433	8

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

SIGNATURE OF AUDITOR [illegible] DATE [illegible]

TATE TAX [X] LOCAL TAX [ ]

SUMMARY BY PERIODS-ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD BEGINNING	PERIOD ENDING	SALES	USE	MEASURE OF TAX		ADDITIONAL TAX RATE	ADDITIONAL TAX AMOUNT		PENALTY RATE	PENALTY AMOUNT		INTEREST TO [ ] NO. MONTHS	INTEREST AMOUNT		TOTAL	
12/1/71	12/31/71	X		20,025	61	3%	600	77	5%	30	04	6%	36	05	666	86
12/1/71	12/31/71		X	2,612	97	3%	78	39	5%	3	92	6%	4	70	87	01
TOTAL				1,109,290	42		31,694	04		7,583	95		1,901	65	41,179	64

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

FORM ST-40 B (Rev. 2-1-70)

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION

Sales and Use Tax Division

TAXPAYER'S COPY

App. 12

REGISTRATION NUMBER	192	045433	8

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

SIGNATURE OF AUDITOR [illegible] DATE 5-31-72

STATE TAX [ ] LOCAL TAX [X]

SUMMARY BY PERIODS-ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD BEGINNING	PERIOD ENDING	SALES	USE	MEASURE OF TAX		ADDITIONAL TAX RATE	ADDITIONAL TAX AMOUNT		PENALTY RATE	PENALTY AMOUNT		INTEREST TO [ ] NO. MONTHS	INTEREST AMOUNT		TOTAL	
12/1/67	6/30/68	X		140,179	27	1%	1,401	79	25%	350	45	6%	84	11	1,836	35
12/1/67	6/30/68		X	12,543	37	1%	125	43	25%	31	36	6%	7	53	164	32
7/1/68	8/31/71	X		760,973	18	1%	7,609	73	25%	1,902	43	6%	456	58	9,968	74
7/1/68	8/31/71		X	99,292	36	1%	992	93	25%	248	23	6%	59	58	1,300	74
9/1/71	9/30/71	X		20,025	61	1%	200	26	20%	40	05	6%	12	02	252	33
9/1/71	9/30/71		X	2,612	97	1%	26	13	20%	5	23	6%	1	57	32	93
10/1/71	10/31/71	X		20,025	61	1%	200	26	15%	30	04	6%	12	02	242	32
10/1/71	10/31/71		X	2,612	97	1%	26	13	15%	3	92	6%	1	57	31	62
11/1/71	11/30/71	X		20,025	61	1%	200	26	10%	20	03	6%	12	02	232	31
11/1/71	11/30/71		X	2,612	97	1%	26	13	10%	2	61	6%	1	57	30	31
TOTAL																

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

FORM 51-48 S (Rev. 2-1-70)

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION
Sales and Use Tax Division

TAXPAYER'S COPY

App. 13

REGISTRATION NUMBER	192	045433	S

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

SIGNATURE OF AUDITOR [illegible] DATE 4-31-72

STATE TAX [ ] LOCAL TAX [X]

SUMMARY BY PERIODS-ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD BEGINNING	PERIOD ENDING	SALES	USE	MEASURE OF TAX	ADDITIONAL TAX RATE	ADDITIONAL TAX AMOUNT	PENALTY RATE	PENALTY AMOUNT	INTEREST TO NO MONTHS	INTEREST AMOUNT	TOTAL
12/1/71	12/31/71	X		20,025 61	1%	200 26	5%	10 01	6%	12 02	222 29
12/1/71	12/31/71		X	2,612 97	1%	26 13	5%	1 31	6%	1 57	29 01
TOTAL				1,103,543 00		11,035 44		2,645 67		662 16	14,343 27

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

REPORT OF FIELD AUDIT

Exhibit A

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION
SALES AND USE TAX DIVISION
P. O. BOX 6-L - RICHMOND, VIRGINIA 23215

TAXPAYER'S COPY

App. 14

NAME OF DEALER: POUNDING MILL QUARRY CORPORATION

TRADING AS: SAME

BUSINESS ADDRESS: TAZEWELL, VIRGINIA 24651

MAILING ADDRESS: P. O. BOX 2459, ROANOKE, VIRGINIA 24010

REGISTRATION NUMBER	BUSINESS CODE
92 045443 5	59

PERIOD OF AUDIT TO	MEASURE OF TAX	TAX	PENALTY*	INTEREST TO	TOTAL
STATE TAX 12/1/67 to 1/1/72	90,084 54	2,573 86	615 88	154 43	3,344 17
LOCAL TAX 12/1/67 to 1/1/72	87,752 91	877 56	210 21	52 64	1,140 41
	TOTAL	3,451 42	826 09	207 07	4,434 58
LESS:		3,451 42		207 07	3,658 49
BALANCE			826 09		826 09

	STATE	LOCAL
1. Non-taxed purchases from in-State suppliers of shop supplies, tools and administrative supplies during the periods of:		
a) 12/1/67 thru 6/30/68 at 3% tax rate	3,134 95	3,134 95
b) 7/1/68 thru 12/31/71 at 4% tax rate	18,809 70	18,809 70
2. Non-taxed purchases from out-of-State suppliers of shop supplies, tools and administrative supplies during the periods of:		
a) 12/1/67 thru 6/30/68 at 3% tax rate	2,331 63	-0-
b) 7/1/68 thru 12/31/71 at 4% tax rate	13,989 78	13,989 78

SIGNATURE OF AUDITOR	DATE	SIGNATURE OF APPROVING SUPERVISOR	DATE
Thomas H. Waitt	5-31-72	Harry J. Smith	6/5/72

NAME OF DEALER POUNDING MILL QUARRY CORPORATION REGISTRATION NO 192 045443 5

CONTINUATION OF
ANALYSIS OF MEASURE OF TAX BY CLASS OF TRANSACTION

App. 15

	STATE		LOCAL	
3. Non-taxed sales of gravel, crushed stone and lime during				
the periods of:				
a) 12/1/67 thru 6/30/68 at 3% tax rate	248	29	248	29
b) 7/1/68 thru 12/31/71 at 4% tax rate	1,489	74	1,489	74
4. Non-taxed lime sales to E. H. Bowers, a lime hauling				
contractor, during the periods of:				
a) 12/1/67 thru 6/30/68 at 3% tax rate	7,154	35	7,154	35
b) 7/1/68 thru 12/31/71 at 4% tax rate	42,926	10	42,926	10

SIGNATURE OF AUDITOR	DATE	SIGNATURE OF APPROVING SUPERVISOR	DATE
Shirley A. Radford Thomas H. Wright	5-31-72	Harry D. Smith	

TAXPAYER'S COPY

FORM ST-48 B (Rev. 2-1-70)

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION
Sales and Use Tax Division

TAXPAYER'S COPY

App. 16

REGISTRATION NUMBER	192	045443	5

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

GNATURE OF AUDITOR [illegible] DATE 5-31-72

STATE TAX [X] LOCAL TAX [ ]

SUMMARY BY PERIODS-ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD		SALES	USE	MEASURE		ADDITIONAL TAX			PENALTY			INTEREST TO				TOTAL	
BEGINNING	ENDING			OF TAX		RATE	AMOUNT		RATE	AMOUNT		NO MONTHS	AMOUNT				
12/1/67	6/30/68	X		7,402	64	2%	148	05	25%	37	01	6%	8	88		193	94
12/1/67	6/30/68		X	5,466	53	2%	109	33	25%	27	33	6%	6	56		143	22
7/1/68	8/31/71	X		40,185	76	3%	1,205	57	25%	301	39	6%	72	33		1,579	29
7/1/68	8/31/71		X	29,675	72	3%	890	27	25%	222	57	6%	53	42		1,166	26
9/1/71	9/30/71	X		1,057	52	3%	31	73	20%	6	35	6%	1	90		39	98
9/1/71	9/30/71		X	780	94	3%	23	43	20%	4	69	6%	1	41		29	53
10/1/71	10/31/71	X		1,057	52	3%	31	73	15%	4	76	6%	1	90		38	39
10/1/71	10/31/71		X	780	94	3%	23	43	15%	3	51	6%	1	41		28	35
11/1/71	11/30/71	X		1,057	52	3%	31	73	10%	3	17	6%	1	90		36	80
11/1/71	11/30/71		X	780	94	3%	23	43	10%	2	34	6%	1	41		27	18
	TOTAL																

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

FORM ST-48 B (Rev. 2-1-70)

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION
Sales and Use Tax Division

TAXPAYER'S COPY

App. 17

REGISTRATION NUMBER	192	045443	5

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

SIGNATURE OF AUDITOR [illegible] DATE 5-31-72

STATE TAX [X] LOCAL TAX [ ]

SUMMARY BY PERIODS - ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD BEGINNING	PERIOD ENDING	SALES	USE	MEASURE OF TAX	ADDITIONAL TAX RATE	ADDITIONAL TAX AMOUNT	PENALTY RATE	PENALTY AMOUNT	INTEREST TO NO. MONTHS	INTEREST AMOUNT	TOTAL
12/1/71	12/31/71	X		1,057 52	3%	31 73	5%	1 59	6%	1 90	35 22
12/1/71	12/31/71		X	780 94	3%	23 43	5%	1 17	6%	1 41	26 01
TOTAL				90,084 54		2,573 86		615 88		154 43	3,344 17

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

FORM 51-48 B (Rev. 2-1-70)

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION

Sales and Use Tax Division

TAXPAYER'S COPY

App. 18

REGISTRATION NUMBER	192	045443	5

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

SIGNATURE OF AUDITOR [illegible] DATE 5-31-72

STATE TAX [ ] LOCAL TAX [X]

SUMMARY BY PERIODS - ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD BEGINNING	PERIOD ENDING	SALES	USE	MEASURE OF TAX	ADDITIONAL TAX RATE	ADDITIONAL TAX AMOUNT	PENALTY RATE	PENALTY AMOUNT	INTEREST TO NO. MONTHS	INTEREST TO AMOUNT	TOTAL
12/1/67	6/30/68	X		7,402 64	1%	74 03	25%	18 51	6%	4 44	96 98
12/1/67	6/30/68		X	3,134 95	1%	31 35	25%	7 84	6%	1 88	41 07
7/1/68	8/31/71	X		40,185 76	1%	401 86	25%	100 47	6%	24 11	526 44
7/1/68	8/31/71		X	29,675 72	1%	296 76	25%	74 19	6%	17 81	388 76
9/1/71	9/30/71	X		1,057 52	1%	10 58	20%	2 12	6%	63	13 33
9/1/71	9/30/71		X	780 94	1%	7 81	20%	1 56	6%	47	9 84
10/1/71	10/31/71	X		1,057 52	1%	10 58	15%	1 59	6%	63	12 80
10/1/71	10/31/71		X	780 94	1%	7 81	15%	1 17	6%	47	9 45
11/1/71	11/30/71	X		1,057 52	1%	10 58	10%	1 06	6%	63	12 27
11/1/71	11/30/71		X	780 94	1%	7 81	10%	78	6%	47	9 06
TOTAL											

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

FORM SF-43 B (Rev. 2-1-70)

REPORT OF FIELD AUDIT

VIRGINIA DEPARTMENT OF TAXATION
Sales and Use Tax Division

TAXPAYER'S COPY

App. 19

REGISTRATION NUMBER	192	045443	5

NAME OF DEALER POUNDING MILL QUARRY CORPORATION

PERIOD FROM 12/1/67 TO 1/1/72

SIGNATURE OF AUDITOR [illegible] DATE 5-31-72

STATE TAX [ ] LOCAL TAX [X]

SUMMARY BY PERIODS - ADDITIONAL LIABILITY (OR CREDIT) ESTABLISHED BY AUDIT

PERIOD BEGINNING	PERIOD ENDING	SALES	USE	MEASURE OF TAX		ADDITIONAL TAX RATE	ADDITIONAL TAX AMOUNT		PENALTY RATE	PENALTY AMOUNT		INTEREST TO [ ] NO ACCRUING	INTEREST AMOUNT		TOTAL	
12/1/71	12/31/71	X		1,057	52	1%	10	58	5%		53	6%		63	11	74
12/1/71	12/31/71		X	780	94	1%	7	81	5%		39	6%		47	8	67
TOTAL				87,752	91		877	56		210	21		52	64	1,140	41

COMPUTATION OF FACTOR:

$$\frac{\text{LOCAL LIABILITY}}{\text{STATE + LOCAL LIABILITY}} = \text{FACTOR}$$

Form ST-14

Exhibit B-1

COMMONWEALTH OF VIRGINIA

SALES AND USE TAX CERTIFICATE OF EXEMPTION

(This Certificate of Exemption is for use exclusively by an OUT-OF-STATE DEALER who purchases tangible personal property in Virginia for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside this State.)

To: POCAHONTAS FUEL COMPANY CORP.
P. O. BOX 203
BLUEFIELD, VIRGINIA
(Name of Virginia supplier)

Date October 17, 19 66

(Number and street or rural route) (City, town, or post office), Virginia (ZIP Code)

The undersigned out-of-State dealer hereby certifies that the following items of tangible personal property purchased by him from the above named supplier are purchased by him for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside Virginia:

Name of Out-of-State Dealer Lilly Construction Co., Inc.

Trading as

Address P. O. Box 6 (Number and street or rural route) Bluefield, (City, town, or post office) W. Va. 24701 (State and ZIP Code)

Name of State in which out-of-State dealer is licensed or registered W. Va.

Registration or license number 348-077128-7

Kind of business engaged in by out-of-State dealer General Construction and Ready-Mix Concrete

I certify that I am authorized to sign this Certificate of Exemption and that, to the best of my knowledge and belief, it is true and correct, made in good faith, pursuant to the Virginia Retail Sales and Use Tax Act.

(Signature) President (Title)

(If the out-of-State dealer is a corporation, an officer of the corporation or other person authorized to sign on behalf of the corporation must sign; if a partnership, one partner must sign; if an unincorporated association, a member must sign; if a sole proprietorship, the proprietor must sign.)

Information for Virginia supplier.—A separate Certificate of Exemption, properly executed by the out-of-State dealer, must be obtained from each out-of-State dealer by the Virginia supplier and attached to each invoice covering each sale of items of tangible personal property to the out-of-State dealer for immediate transportation outside this State in the dealer's vehicle for resale outside this State. This Certificate must not be accepted by the Virginia supplier unless proof of the registration or license number held by the out-of-State dealer is furnished the Virginia supplier.

Department of Taxation
Form ST-14

Exhibit B-2

COMMONWEALTH OF VIRGINIA
SALES AND USE TAX CERTIFICATE OF EXEMPTION

(This Certificate of Exemption is for use exclusively by an OUT-OF-STATE DEALER who purchases tangible personal property in Virginia for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside this State.)

PRINCE WILL COUNTY BANK
P. O. BOX 203
DUMFRIES, VIRGINIA

Sold to 8 4/15/82

To: _____ Date _____, 19____
(Name of Virginia supplier)

_____ _____, Virginia _____
(Number and street or rural route) (City, town, or post office) (ZIP Code)

The undersigned out-of-State dealer hereby certifies that the following items of tangible personal property purchased by him from the above named supplier are purchased by him for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside Virginia:

_____

_____

_____

Name of Out-of-State Dealer Underwood Bros. Asphalt Paving Co., Inc.

Trading as _____

Address P.O. Box 243 (Number and street or rural route) Princeton, W Va. (City, town, or post office) 24740 (State and ZIP Code)

Name of State in which out-of-State dealer is licensed or registered W Va.

Registration or license number Tax Exempt # 21536-098-409-27

Kind of business engaged in by out-of-State dealer Asphalt Paving

I certify that I am authorized to sign this Certificate of Exemption and that, to the best of my knowledge and belief, it is true and correct, made in good faith, pursuant to the Virginia Retail Sales and Use Tax Act.

Betty Lawrence (Signature) Secretary-Treasurer (Title)

(If the out-of-State dealer is a corporation, an officer of the corporation or other person authorized to sign on behalf of the corporation must sign; if a partnership, one partner must sign; if an unincorporated association, a member must sign; if a sole proprietorship, the proprietor must sign.)

Information for Virginia supplier.—A separate Certificate of Exemption, properly executed by the out-of-State dealer, must be obtained from each out-of-State dealer by the Virginia supplier and attached to each invoice covering each sale of items of tangible personal property to the out-of-State dealer for immediate transportation outside this State in the dealer's vehicle for resale outside this State. This Certificate must not be accepted by the Virginia supplier unless proof of the registration or license number held by the out-of-State dealer is furnished the Virginia supplier.

Department of Taxation
Form ST-11

Exhibit B-3

App. 22

COMMONWEALTH OF VIRGINIA

SALES AND USE TAX CERTIFICATE OF EXEMPTION

(This Certificate of Exemption is for use exclusively by an OUT-OF-STATE DEALER who purchases tangible personal property in Virginia for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside this State.)

To: POCAHONTAS MIX COMPANY CORP.
P. O. BOX 203
BLUEFIELD, VIRGINIA
(Name of Virginia supplier)

Date 10-18-66, 19

(Number and street or rural route) (City, town, or post office); Virginia (ZIP Code)

The undersigned out-of-State dealer hereby certifies that the following items of tangible personal property purchased by him from the above named supplier are purchased by him for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside Virginia:

Name of Out-of-State Dealer W & H Contracting Co. Inc.

Trading as W & H Contracting Co., Inc.

Address Box 1497 Bluefield, W. Va. 24701
(Number and street or rural route) (City, town, or post office) (State and ZIP Code)

Name of State in which out-of-State dealer is licensed or registered West Virginia

Registration or license number 8922

Kind of business engaged in by out-of-State dealer Heavy Highway Construction

I certify that I am authorized to sign this Certificate of Exemption and that, to the best of my knowledge and belief, it is true and correct, made in good faith, pursuant to the Virginia Retail Sales and Use Tax Act.

A. H. Hamrie (Signature) President (Title)

(If the out-of-State dealer is a corporation, an officer of the corporation or other person authorized to sign on behalf of the corporation must sign; if a partnership, one partner must sign; if an unincorporated association, a member must sign; if a sole proprietorship, the proprietor must sign.)

Information for Virginia supplier.—A separate Certificate of Exemption, properly executed by the out-of-State dealer, must be obtained from each out-of-State dealer by the Virginia supplier and attached to each invoice covering each sale of items of tangible personal property to the out-of-State dealer for immediate transportation outside this State in the dealer's vehicle for resale outside this State. This Certificate must not be accepted by the Virginia supplier unless proof of the registration or license number held by the out-of-State dealer is furnished the Virginia supplier.

Exhibit C-1

VIRGINIA DEPARTMENT OF TAXATION

Sales and Use Tax Division

ROANOKE District Office

Pounding Mill Quarry Corporation
P. O. Box 286
Bluefield, Virginia 24605

Re: Cancellation of Sales and Use Tax Certificate of Exemption

Pursuant to Section 58-441.17 of the Virginia Retail Sales and Use Tax Act, you are advised that, effective October 17, 1966, any and/or all sales and use tax Certificates of Exemption issued to you, as a dealer under the Virginia Retail Sales and Use Tax Act, by Lilly Construction Company, Inc. P. O. Box 6, Bluefield, West Virginia 24701 (name and address)

Registration Number, if any, 348-077128-7 are hereby cancelled.

All sales of tangible personal property made by you on and after this date to the above-named person, firm or corporation, are subject to the tax imposed by the Virginia Retail Sales and Use Tax Act, until such time as you may be notified to the contrary by the Virginia Department of Taxation.

ST-14 voided.

Shirley R. Radford 1-21-72
Signature of Auditor Date

Harry L. Smith 1-21-72
Signature of District Supervisor Date

DEALER

Form ST-14

Exhibit C-1

COMMONWEALTH OF VIRGINIA
SALES AND USE TAX CERTIFICATE OF EXEMPTION

App. 24

(This Certificate of Exemption is for use exclusively by an OUT-OF-STATE DEALER who purchases tangible personal property in Virginia for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside this State.)

POUNDING MILL QUARRY CORP.
P. O. BOX 206
BLUEFIELD, VIRGINIA

To: _____ Date October 17, 19 66
(Name of Virginia supplier)

_____ _____, Virginia _____
(Number and street or rural route) (City, town, or post office) (ZIP Code)

The undersigned out-of-State dealer hereby certifies that the following items of tangible personal property purchased by him from the above named supplier are purchased by him for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside Virginia:

_____

_____

_____

Name of Out-of-State Dealer Lilly Construction Co., Inc.

Trading as _____

Address P. O. Box 6 Bluefield, W. Va. 24701
(Number and street or rural route) (City, town, or post office) (State and ZIP Code)

Name of State in which out-of-State dealer is licensed or registered W. Va.

Registration or license number 348-077128-7

Kind of business engaged in by out-of-State dealer General Construction and Ready-Mix Concrete

I certify that I am authorized to sign this Certificate of Exemption and that, to the best of my knowledge and belief, it is true and correct, made in good faith, pursuant to the Virginia Retail Sales and Use Tax Act.

D. D. Lilly Jr. President
(Signature) (Title)

(If the out-of-State dealer is a corporation, an officer of the corporation or other person authorized to sign on behalf of the corporation must sign; if a partnership, one partner must sign; if an unincorporated association, a member must sign; if a sole proprietorship, the proprietor must sign.)

Information for Virginia supplier.—A separate Certificate of Exemption, properly executed by the out-of-State dealer, must be obtained from each out-of-State dealer by the Virginia supplier and attached to each invoice covering each sale of items of tangible personal property to the out-of-State dealer for immediate transportation outside this State in the dealer's vehicle for resale outside this State. This Certificate must not be accepted by the Virginia supplier unless proof of the registration or license number held by the out-of-State dealer is furnished the Virginia supplier.

FORM ST-47

App. 25

VIRGINIA DEPARTMENT OF TAXATION

Exhibit C-2

Sales and Use Tax Division

ROANOKE District Office

Pounding Mill Quarry Corporation
P. O. Box 286
Bluefield, Virginia 24605

Re: Cancellation of Sales and Use Tax Certificate of Exemption

Pursuant to Section 58-441.17 of the Virginia Retail Sales and Use Tax Act, you are advised that, effective September 1, 1966, any and/or all sales and use tax Certificates of Exemption issued to you, as a dealer under the Virginia Retail Sales and Use Tax Act, by Underwood Brothers Asphalt Paving Company, Inc., P. O. Box 243, Princeton, West Virginia 24740
(name and address)

Registration Number, if any, _____ are hereby cancelled.

All sales of tangible personal property made by you on and after this date to the above-named person, firm or corporation, are subject to the tax imposed by the Virginia Retail Sales and Use Tax Act, until such time as you may be notified to the contrary by the Virginia Department of Taxation.

ST-14 voided.

Signature of Auditor — Date 1-21-72

Signature of District Supervisor — Date 1/21/72

DEALER

Department of Taxation
Form ST-14

App. 26

Exhibit C-2

COMMONWEALTH OF VIRGINIA
SALES AND USE TAX CERTIFICATE OF EXEMPTION

(This Certificate of Exemption is for use exclusively by an OUT-OF-STATE DEALER who purchases tangible personal property in Virginia for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside this State.)

Counsel to B 9/1/66 1/14/72

To: POCAHONTAS MILL QUARRY CORP.
P. O. BOX 288
BLUEFIELD, VIRGINIA
(Name of Virginia supplier)

Date _____, 19__

_____ (Number and street or rural route) _____ (City, town, or post office), Virginia _____ (ZIP Code)

The undersigned out-of-State dealer hereby certifies that the following items of tangible personal property purchased by him from the above named supplier are purchased by him for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside Virginia:

_____

_____

_____

Name of Out-of-State Dealer Underwood Bros. Asphalt Paving Co., Inc.

Trading as _____

Address P.O. Box 243 (Number and street or rural route) Princeton, W. Va. (City, town, or post office) 24740 (State and ZIP Code)

Name of State in which out-of-State dealer is licensed or registered W. Va.

Registration or license number Tax Exempt # 21536-098-409-27

Kind of business engaged in by out-of-State dealer Asphalt Paving

I certify that I am authorized to sign this Certificate of Exemption and that, to the best of my knowledge and belief, it is true and correct, made in good faith, pursuant to the Virginia Retail Sales and Use Tax Act.

Betty Lawrence (Signature) Secretary - Treasurer (Title)

(If the out-of-State dealer is a corporation, an officer of the corporation or other person authorized to sign on behalf of the corporation must sign; if a partnership, one partner must sign; if an unincorporated association, a member must sign; if a sole proprietorship, the proprietor must sign.)

Information for Virginia supplier.—A separate Certificate of Exemption, properly executed by the out-of-State dealer, must be obtained from each out-of-State dealer by the Virginia supplier and attached to each invoice covering each sale of items of tangible personal property to the out-of-State dealer for immediate transportation outside this State in the dealer's vehicle for resale outside this State. This Certificate must not be accepted by the Virginia supplier unless proof of the registration or license number held by the out-of-State dealer is furnished the Virginia supplier.

VIRGINIA DEPARTMENT OF TAXATION

Sales and Use Tax Division

Exhibit C-3

ROANOKE District Office

Pounding Mill Quarry Corporation
P. O. Box 286
Bluefield, Virginia 24605

Re: Cancellation of Sales and Use Tax
Certificate of Exemption

Pursuant to Section 58-441.17 of the Virginia Retail Sales and Use Tax Act, you are advised that, effective October 18, 1966, any and/or all sales and use tax Certificates of Exemption issued to you, as a dealer under the Virginia Retail Sales and Use Tax Act, by W & H Contracting Company, Inc. P. O. Box 1497, Bluefield, West Virginia 24701
(name and address)

Registration Number, if any, _____ are hereby cancelled.

All sales of tangible personal property made by you on and after this date to the above-named person, firm or corporation, are subject to the tax imposed by the Virginia Retail Sales and Use Tax Act, until such time as you may be notified to the contrary by the Virginia Department of Taxation.

ST-14 voided.

Shirley T. Caldwell 1-21-72
Signature of Auditor Date

Henry L. Smith 1-21-72
Signature of District Supervisor Date

DEALER

COMMONWEALTH OF VIRGINIA

SALES AND USE TAX CERTIFICATE OF EXEMPTION

(This Certificate of Exemption is for use exclusively by an OUT-OF-STATE DEALER who purchases tangible personal property in Virginia for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside this State.)

Exhibit C-3

POUNDING MILL QUARRY CORP.
P. O. BOX 236
BLUEFIELD, VIRGINIA

(Name of Virginia supplier)

Date 10-18-66, 19

(Number and street or rural route) (City, town, or post office), Virginia (ZIP Code)

The undersigned out-of-State dealer hereby certifies that the following items of tangible personal property purchased by him from the above named supplier are purchased by him for immediate transportation out of the Commonwealth of Virginia in his own vehicle for resale outside Virginia:

Name of Out-of-State Dealer W & H Contracting Co. Inc.

Trading as W & H Contracting Co., Inc.

Address Box 1497 (Number and street or rural route) Bluefield, W. Va. (City, town, or post office) 24701 (State and ZIP Code)

Name of State in which out-of-State dealer is licensed or registered West Virginia

Registration or license number 8922

Kind of business engaged in by out-of-State dealer Heavy Highway Construction

I certify that I am authorized to sign this Certificate of Exemption and that, to the best of my knowledge and belief, it is true and correct, made in good faith, pursuant to the Virginia Retail Sales and Use Tax Act.

A C Haynie (Signature) President (Title)

(If the out-of-State dealer is a corporation, an officer of the corporation or other person authorized to sign on behalf of the corporation must sign; if a partnership, one partner must sign; if an unincorporated association, a member must sign; if a sole proprietorship, the proprietor must sign.)

Information for Virginia supplier.—A separate Certificate of Exemption, properly executed by the out-of-State dealer, must be obtained from each out-of-State dealer by the Virginia supplier and attached to each invoice covering each sale of items of tangible personal property to the out-of-State dealer for immediate transportation outside this State in the dealer's vehicle for resale outside this State. This Certificate must not be accepted by the Virginia supplier unless proof of the registration or license number held by the out-of-State dealer is furnished the Virginia supplier.

ANSWER

Now comes the Commonwealth, by the Attorney General, in answer to the application for correction of an allegedly erroneous assessment, and says:

1. The Commonwealth admits the allegations of paragraphs 1 and 2 of the application.

2. The Commonwealth admits the allegations of paragraph 3 of the application, except to the extent that it implies that the taxpayer has paid all applicable taxes.

3. The Commonwealth admits that Pounding Mill sold agricultural lime in the amounts claimed in paragraph 4 of the application to one E. H. Bowers. The Commonwealth denies that such amounts were resold by Bowers, as he was not registered as dealer because he performed a service for such farmers of which lime was a part, and therefore purchased the lime for his own use in performing such service. Moreover, as no exemption certificate was given to Pounding Mill, it is subject to the tax under § 58-441.17(a). The Commonwealth admits the assessments set forth in paragraph 4 were made.

FILED JUNE 8, 1973

4. The Commonwealth admits that the sales set forth in paragraph 5 were made, but denies that any of the purchasers except Lilly Construction Company was registered as a dealer in West Virginia. The Commonwealth asserts that all three purchasers were engaged in contracting and therefore subject to tax as consumers under § 58-441.15 of the Code of Virginia.

5. The Commonwealth admits that Pounding Mill received one exemption certificate from each of the contractors mentioned in paragraph 6 of the application. The Commonwealth asserts that such certificates were valid for one sale only.

6. The Commonwealth admits the allegations in paragraph 7 of the application, and asserts that the certificates of exemption which were cancelled were invalid, as the contractors who gave them were not purchasing for resale, and only one of the contractors was registered as a dealer in West Virginia, as required on the face of the certificate.

7. The Commonwealth admits that the purchases mentioned in paragraph 8 were transported to West Virginia, but asserts that such sales are taxable, as delivery to the customer was made in Virginia, and in addition asserts that each exemption certificate states on its face that a separate certificate must be made for each sale. Moreover, the Commonwealth asserts that the confirmations mentioned were given in February of 1972, and are therefore no evidence on which Pounding Mill can rely for sales made from 1966 forward.

8. The Commonwealth admits that the applicant did not pay the applicable tax to the Commonwealth, but denies that the applicant was entitled to rely on exemption certificates which were invalid on their face, and denies that the sales were

exempt.

9. The Commonwealth admits that the assessments set forth in paragraph 10 were made, and that it reduced its assessment to omit sales of $26,915.85 (rather than $16,002.00) which were specifically covered by the exemption certificates discussed above, which the Commonwealth determined could have been taken in good faith.

10. The Commonwealth admits the allegations of paragraph 11 of the application.

Wherefore, the Commonwealth respectfully prays the court to dismiss this application with the costs in her behalf expended.

STIPULATION OF FACTS

1. Pounding Mill neither collected nor paid to the Department sales or use taxes for sales of agricultural lime to E. H. Bowers totalling $67,770.83. Bowers is not registered as a dealer to collect sales tax, nor did he give Pounding Mill a certificate of exemption for the sale. He spreads lime for farmers and bills them in a single charge per acre covered. A percentage of this charge is paid by the U. S. Department of Agriculture. Bowers has expressed a preference to the Department to continue billing in a lump sum rather than separating sales from service, as reimbursement by the Department of Agriculture is made on a percentage lump-sum basis.

2. The applicant contests an assessment on purchases of $930,306.94 of the limestone aggregates to Lilly Construction Company, Inc., Underwood Brothers Asphalt Paving Company, Inc. and W. & H. Contracting Company, Incorporated, which would result in a State and local sales and use tax

FILED SEPTEMBER 7, 1973

liability of $34,887.47 plus interest. All three of these companies are contractors domiciled in West Virginia; during the period contested, Lilly was engaged only in contracting, principally performing highway construction contracts, and W. & H. and Underwood were engaged principally in highway contracting but made some sales of asphalt paving to individuals or other contractors. The materials in question were delivered to the purchasers' trucks in Virginia and immediately transported to West Virginia.

3. The genuineness of all documents, copies of which are attached as exhibits to the application of Pounding Mill Quarry Corporation, and all allegations of fact contained in said application admitted or not controverted by the answer of the Commonwealth of Virginia or this stipulation, are admitted and shall be accepted by the Court as proven.

This stipulation does not include an agreement as to the relevancy or materiality of the facts above stipulated, nor does it preclude either party from presenting further and additional evidence.

Dated September 7, 1973.

Mill Ck 1
Pounding Mill Q. Corp
Mellen Fuhr

LILLY CONSTRUCTION COMPANY, INC.
TELEPHONE 327-6109

GENERAL CONTRACTORS
POST OFFICE BOX NO. 6
BLUEFIELD, W. VA. 24701

February 16, 1972

Pounding Mill Quarry Corporation
P. O. Box 2459
Roanoke, Virginia 24010

Gentlemen:

This is to adviseyou that the Virginia Sales & Use Tax Exemption Certificate, Form St-14, executed and delivered by us to you in October 1966 was intended to apply and does apply to each of the separately invoiced sales of crushed stone sold to us by you from your Bluefield plant as evidenced by all your invoices to us from September 1966 through January 20, 1972.

Signed:
Martha B. Peery
(Mrs.) Martha B. Peery, Sec'y.-Treas.

W & H CONTRACTING CO., Inc.
General Construction
P. O. Box 1497
BLUEFIELD, W. VA. 24701

Telephone:
325-9191

April 7, 1972

Pounding Mill Quarry Corporation
Bluefield, Virginia 24605

Attention: Mr. Glen Mabrey

Gentlemen:

This letter is to verify that all material bought at Pounding Mill in 1970 by W & H Contracting Co., Inc. was used in West Virginia.

Very truly yours,

John F. Wilkinson

rw

Mr 3 Bramley Mill

State of West Virginia

This is to Certify that the taxpayer named below has been registered in the State Tax Department, Charleston, West Virginia, and will be required under the law to collect the Consumers' Sales and Service Tax and also to file reports as provided under the law, and to remit all taxes collected to this office.

ACCOUNT IDENTIFICATION NO.		DATE OF REGISTRATION
12400122281 27	LILLY CONSTRUCTION COMPANY INC BOX 6 BLUEFIELD W VA	80 11 1760

Consumers' Sales and Service Tax

Certificate of Registration

Donald C Cameron

STATE TAX COMMISSIONER

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION
CERTIFICATE OF REGISTRATION FOR THE
COLLECTION OF THE VIRGINIA USE TAX

REGISTRATION NUMBER	NAME AND ADDRESS	LOCATION OF DEALER
348-677137-7 REFER TO THIS NUMBER IN ALL CORRESPONDENCE	LILLY CONSTRUCTION CO INC P O BOX 6 BLUEFIELD W VA 24701 IS HEREBY AUTHORIZED AND EMPOWERED TO COLLECT THE USE TAX FOR THE COMMONWEALTH OF VIRGINIA	STATE OF WEST VIRGINIA

DATE ISSUED		
MONTH	DAY	YEAR
9	27	1966

95

STATE TAX COMMISSIONER

THIS CERTIFICATE IS NON-TRANSFERABLE

WEST VIRGINIA
CONSUMERS SALES AND USE TAX
BLANKET EXEMPTION CERTIFICATE -- NO. 2
FOR
CONTRACTORS, MANUFACTURERS, ETC.

The undersigned hereby certifies that he is engaged in this State in the business of (x) Contracting, ( ) Manufacturing, ( ) Transportation, ( ) Transmission, ( ) Communication, ( ) Production of Natural Resources (check appropriate business), and that the purchases of "raw material" as defined in the Law (which may include certain prescribed services) under this certificate are exempt from Consumers Sales and Use Taxes. The undersigned is informed that falsification or unlawful use of this certificate or use of the goods or services purchased in such a way they will be subject to tax will subject him to the tax, a fine and penalties.

Given under my hand this 27th day of March, 1972.

UNDERWOOD BROTHERS ASPHALT PAVING CO., INC.
(Name of Contractor, Manufacturer, etc.)

BY D. Lawrence

ADDRESS P. O. BOX 243, PRINCETON, W.VA.

21536-098-409-27
Acct. Identification Number

WEST VIRGINIA -- Consumers Sales and Use Tax
Blanket Certificate - Exemption for Contractors

The undersigned hereby certifies that he is engaged in this State in the business of CONTRACTING, and that the purchases made under this Exemption Certificate will be used directly in such business. The undersigned is informed that falsification or unlawful use of this certificate or use of the goods or services purchased in another manner than that indicated on the certificate will subject him to a fine and penalties.

Given under my hand this _____

day of _____, 19 _____

W&H CONTRACTING CO., INC.

Name of Contractor

By H. H. Nelkinson 3/25/72

P. O. Box 1497, Bluefield, West Virginia

22 000 297 28856
Account Identification Number

NARRATIVE TESTIMONY OF J. O. GARDNER

FILED MARCH 4, 1974

After first being duly sworn, J. O. Gardner testified substantially as follows:

I am J. O. Gardner and I live at 366 Highland Avenue, S. W., Roanoke City, Virginia. Until May 1, 1973, I was Secretary-Treasurer of Pounding Mill Quarry Corporation. I had held this position for approximately 25 years.

Pounding Mill Quarry Corporation has its principal office in the City of Roanoke, Virginia, and owns and operates stone quarries at Pounding Mill and Bluefield, Tazewell County, Virginia. Pounding Mill quarries and sells crushed stone and agricultural lime from these plants, both of which have been in operation since prior to 1965.

As Secretary-Treasurer of Pounding Mill Quarry Corporation, I was responsible for compliance with the Virginia Retail Sales and Use Tax Act, including the preparation of the monthly sales tax returns, which were sent to the Department of Taxation, and the approval and processing of certificates of exemption.

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ATTORNEYS AT LAW
ROANOKE, VA.

In October of 1966, after the Virginia Retail Sales and Use Tax Act had become effective, we advised our Virginia and West Virginia customers that we would collect the sales tax from them unless we received exemption certificates covering future sales. Following this advice, we received exemption certificates from various Virginia and West Virginia road contractors, including Lilly Construction Company, Incorporated, Underwood Brothers Asphalt Paving Company, Incorporated, and W & H Contracting Company, Incorporated, each of which was engaged in contracting in West Virginia. The exemption certificates attached to the application to correct the erroneous sales tax in question, as Exhibits B-1, B-2 and B-3, are the certificates which we received from these West Virginia contractors. We also received exemption certificates from various Virginia contractors. All certificates which were given to us were relied on in good faith.

Some time after the effective date of the Sales Tax Act, we received notice from the Department of Taxation that we were no longer to exempt Virginia contractors from payment of the sales tax, except on work under contracts predating the effective date of the Virginia Sales Tax Act. But Pounding Mill Quarry Corporation was not instructed by the Department of Taxation to void the exemption certificates of the West Virginia contractors and to begin collecting a sales tax on sales of stone aggregates to West Virginia contractors for use in that state.

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ARR, DICKINSON,
SMITH & REA
ATTORNEYS AT LAW
ROANOKE, VA.

Pounding Mill Quarry Corporation continued to rely on the exemption certificates furnished by the three West Virginia contractors from October 1966 until these certificates were cancelled in January of 1972. The notices of cancellation attached to the application to correct the erroneous sales tax assessment, as Exhibits C-1, C-2 and C-3, each dated January 21, 1972, were received by Pounding Mill Quarry Corporation and thereafter a sales tax was collected on all sales of stone aggregates to West Virginia contractors for use in that state.

During the period intervening October, 1966 and January of 1972, Pounding Mill Quarry Corporation was required to separately report, on a Virginia tax form, each month, total sales made from the Bluefield plant and the Pounding Mill plant. The monthly tax report provided for a deduction from gross sales of the amount of all nontaxable or exempt sales, and Pounding Mill Quarry Corporation, for the Bluefield plant, deducted, each month, all sales made to the three West Virginia contractors covering stone aggregates sold to them under the exemption certificates for use in West Virginia. The monthly tax reports of Pounding Mill Quarry Corporation show over $900,000.00 of sales of stone aggregates to these three West Virginia contractors during the period October, 1966 through January of 1972. These sales constituted a very significant portion of our gross sales during this period, but we did not receive any notification from the Department of Taxation to discontinue the exemption or collect a sales tax on these transactions.

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ROANOKE, VA.

Normally, we were promptly notified when the Department of Taxation disagreed with our monthly returns.

Following the audit by the Department of Taxation in the winter of 1971-72, we obtained from each of the West Virginia contractors a letter confirming that the certificates of exemption given were intended to cover all transactions in stone aggregates with these parties. These letters, collectively, were filed with the court as Exhibit 1. The letter from Lilly Construction Company is dated February 16, 1972. The letter from Underwood Brothers Asphalt Paving Company is dated February 17, 1972, and the letter from W & H Contracting Company is dated February 16, 1972.

We also received letters from each of these contractors confirming that all stone aggregates purchased from Pounding Mill Quarry Corporation were used by them in the State of West Virginia. These letters were filed collectively as Exhibit 2. The letter from Lilly Construction Company is dated April 5, 1972. The letter from Underwood Asphalt Paving Company is dated April 5, 1972, and the letter from W & H Contracting Company is dated April 7, 1972.

Pounding Mill Quarry Corporation also received certificates of registration or of blanket exemption under the West Virginia Consumers Sales Tax Act from the West Virginia contractors, filed collectively, as Exhibit 3.

Also during the period in question, Pounding Mill Quarry Corporation sold from both its Pounding Mill and its Bluefield plant, agricultural liming materials to E. H. Bowers. Pounding Mill Quarry Corporation had done business with E. H. Bowers prior to the effective date of the Virginia Retail Sales and Use Tax Act and we understood that he was spreading our agricultural lime on farmland in Virginia. We did not require an exemption certificate from Mr. Bowers because we thought that these sales were exempt under the law.

I swore to the accuracy of the factual allegations contained in the petition to correct the erroneous sales tax and, with the exception of the exact amount of tax owed, have no corrections or modifications to make concerning the statements made in the application.

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CARR, DICKINSON,
SMITH & REA
ATTORNEYS AT LAW
ROANOKE, VA.

FILED NOVEMBER 30, 1973

OPINION

This case was heard by the Court upon the pleadings and exhibits filed therewith, stipulation of certain facts, and upon oral testimony produced by the plaintiff. Briefs were filed by both the plaintiff and defendant. The facts are set forth generally in the brief of the plaintiff, there being little, if any, dispute thereto, and the Court will not attempt to outline these facts in this opinion.

The Court finds that the plaintiff is entitled to recover the amount of the taxes paid under protest for the materials furnished Underwood Brothers Asphalt Paving Company, Inc., Lilly Construction Company, Inc. and W & H Contracting Company, Incorporated, for the following reasons:

1. The language of the certificates of exemption of the out of state dealer under the clause Information for Virginia Suppliers, executed by the out of state dealer, could reasonably be construed to mean that if it had a certificate on file from said out of state dealer such certificate would be sufficient for deliveries to such dealer, and an exemption from the sales tax by the seller.

2. The part of the regulation of the Commission Section 1-20 is as follows: "The certificate of exemption taken in good faith will relieve the person who takes the exemption from

liability for payment or collection of tax except upon notice from the State Tax Commissioner that such certificate is no longer usable." The good faith of the plaintiff in this case cannot be questioned.

3. The cancellation, or attempted cancellation, by the Commissioner of the certificates of exemption by number identification and name under date of January 21, 1972, as of October 17, 1966, would indicate that not only had the plaintiff relied in good faith on the certificate but that apparently the Commissioner had also acquiesced in the use of said certificates by either misinterpretation of its agents or by inadvertence. It will be noted that the rule under Section 1-20 that a certificate of exemption taken in good faith remains valid, except "upon notice from the State Tax Commissioner that such certificate is no longer usable". "No longer usable" would certainly indicate that notice must be given to cancel the certificate on future deliveries. At any rate, if these certificates were invalid no reason can be seen for their cancellation. It is further noted that it was indicated in oral argument that these three corporations could have qualified for certificates covering the materials delivered to them.

The Court is further of the opinion that the taxes assessed against the plaintiff for deliveries made by the plaintiff to E. H. Bowers were proper and the plaintiff is not entitled to a refund thereof.

An order may be presented accordingly.

November 30, 1973

Judge

ORDER 13381

Upon the pleadings herein and the exhibits filed therewith, the stipulation of certain facts made and entered into by counsel for the parties hereto, which is accepted by the Court and made a part of the record of this proceeding, and upon the testimony ore tenus of certain witnesses produced on behalf of the applicant, and for the reasons assigned in the Court's written opinion issued under date of November 30, 1973, likewise made a part of the record of these proceedings, it is ADJUDGED, ORDERED AND DECREED that Pounding Mill Quarry Corporation shall have and recover of the Commonwealth of Virginia and that the Commonwealth of Virginia shall refund to Pounding Mill Quarry Corporation in the manner provided by law the Virginia and local sales and use tax in the amount of $35,887.48, together with interest in the amount of $2,153.25, erroneously assessed against Pounding Mill Quarry Corporation by the Commonwealth of Virginia on certain sales of stone aggregates by Pounding Mill Quarry Corporation to certain West Virginia purchasers and paid under protest by Pounding Mill Quarry Corporation under date of May 19, 1973. The Court notes the objection and exception of the Commonwealth of Virginia to the ruling and

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judgment of the Court.

It is further ADJUDGED, ORDERED AND DECREED that Pounding Mill Quarry Corporation shall recover no part of an assessment of Virginia and local sales and use taxes in the amount of $2,575.44, with interest of $154.53 on certain sales of agricultural liming materials to a Virginia purchaser. The Court notes the objection and exception of Pounding Mill Quarry Corporation to the ruling and judgment of the Court.

The Commonwealth of Virginia waives its right to a rehearing pursuant to Section 58-1137, but not its right of appeal pursuant to Section 58-1138, and consents to the entry of this final order.

The Clerk of this Court shall certify a copy of this order to the Tax Commissioner, Commonwealth of Virginia, for use in obtaining a proper warrant against the treasury of the Commonwealth of Virginia covering the amount, with interest, to be refunded hereunder.

NOTICE OF APPEAL AND
ASSIGNMENT OF ERROR

Pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, the Defendant, Commonwealth of Virginia, by the Attorney General, hereby gives notice that it will apply to the Supreme Court of Virginia for an appeal from the final order entered herein on January 17, 1974.

Counsel for Defendant gives further notice that in the application to the Supreme Court of Virginia, the Defendant assigns and will rely upon the following error:

1. The court erred in its conclusion that the Virginia retail sales and use tax assessment against Pounding Mill Quarry Corporation for tax on limestone aggregates sold to West Virginia contractors was erroneous.

Dated this 29th day of January, 1974.

COMMONWEALTH OF VIRGINIA

By Sally T. Warthen
Assistant Attorney General

Andrew P. Miller
Attorney General of Virginia

Mrs. Sally T. Warthen
Assistant Attorney General
P. O. Box 6-L
Richmond, Virginia 23282

FILED JANUARY 30, 1974

PLAINTIFF'S ASSIGNMENT
OF CROSS-ERROR

To: The Honorable Walker R. Carter, Jr.
Clerk of the Circuit Court of
the City of Roanoke

Pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, Pounding Mill Quarry Corporation assigns as cross-error the failure of the Trial Court, by its final Order, entered under date of January 17, 1974, to direct refund to Pounding Mill Quarry Corporation of the Virginia retail sales and use tax, together with interest thereon, assessed against the Plaintiff on sales of agricultural lime to E. H. Bowers.

Counsel for Pounding Mill Quarry Corporation intends to file a written statement of the testimony of J. O. Gardner for inclusion as a part of the record pursuant to, and in compliance with, the provisions of Rule 5:9 (c) of the Rules of the Supreme Court of Virginia.

Dated this 8th day of February, 1974.

POUNDING MILL QUARRY CORPORATION

By Wilbur L. Hazlegrove
Wilbur L. Hazlegrove
Of Counsel

FILED FEBRUARY 11, 1974

HAZLEGROVE,
CARR, DICKINSON,
SMITH & REA
ATTORNEYS AT LAW
ROANOKE, VA.