

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
FOURTH COAST POLLUTION CONTROL : 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 March 1, 1979 :  
through November 30, 1981.

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Petitioner, Fourth Coast Pollution Control, P.O. Box 278, Waddington, New York 13694, 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 November 30, 1981 (File No. 37504).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 207 Genesee Street, Utica, New York, on March 31, 1986 at 2:45 P.M. Petitioner appeared by Richard Mayette, President. The Audit Division appeared by John P. Dugan Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner is liable for sales tax on the purchase of equipment, materials and supplies used in fulfillment of pollution control agreements with the United States Coast Guard and the New York State Department of Transportation.

FINIDINGS OF FACT

1. Petitioner, Fourth Coast Pollution Control, is engaged in two businesses:  
a) oil spill pollution control, which constitutes about 90 percent of petitioner's business; and b) rental of equipment not used in pollution control, apparently constituting the remainder of its business.

2. A sales tax field audit of petitioner's books and records was conducted by the Watertown Branch of the Utica District Office. The auditor determined that, with the exception of one mathematical error, all sales tax had been properly collected and remitted. The additional tax due as a result of the mathematical error was \$147.42.

3. The auditor analyzed purchase invoices for the audit period and found that petitioner failed to pay tax to its suppliers on, or to report on its sales and use tax returns, a substantial portion of purchases subject to sales or use tax. The purchases were grouped into three categories: a) assets per depreciation schedules; b) equipment rentals; and c) materials and supplies. The auditor gave petitioner credit for all items purchased where petitioner could demonstrate to the auditor that the item purchased was exclusively for rental and not used in the pollution control business, or was used in Canada. The auditor also gave petitioner credit for \$10,296.00 in absorbent material (a supplies item) resold to exempt organizations or to firms with a direct payment permit. The total tax due on purchases was broken down by category and added with the mathematical error, as follows:

(a) Depreciation Schedules Assets	\$ 5,868.52
(b) Equipment Rental	1,956.01
(c) Materials and Supplies	2,255.47
(d) Mathematical Error	<u>147.42</u>
Total Additional Tax Due	\$10,227.42

Petitioner agreed with \$3,858.26 in tax and disagreed with the remaining \$6,369.16.

4. On March 26, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner (named therein as "Fourth Coast Pollution") in the amount of \$6,369.16 for the period March 1, 1979 to November 30, 1981, plus simple interest.

5. The items at issue consist of: a) assets such as boats and motors, loaders, vacuum systems, tractors, a bulldozer and skimmer heads, all of which were used in cleaning up oil spills; and b) materials and supplies, such as absorbent, used to absorb petroleum products.

6. Most, if not all, of petitioner's pollution control work was performed for the United States Coast Guard and the New York State Department of Transportation under "immediate response" type contracts, which are entered into on an annual basis. When oil spills occur, petitioner and other similar contractors are called in by the United States Coast Guard or the Department of Transportation, on a rotating basis, and must respond immediately.

7. A typical clean-up operation would be exemplified by the following: After an oil spill, the agency's on-site coordinator will call petitioner and specify what the coordinator thinks is needed to clean up the spill, e.g. "I want five bales of absorbent material, one vac truck, one operator for the vac truck, two laborers, one supervisor". Petitioner then sends personnel, equipment and supplies and cleans up the spill. The coordinator may ask the petitioner to go back and get more absorbent. At the end of the day, the coordinator completes the "Contractor's Daily Work Report" sheets confirming the personnel, equipment and supplies that were utilized.

8. Absorbent material is placed on an oil spill not only by petitioner's personnel, but by the district engineer, a conservation officer or a fire department. In fact, some absorbent material is kept by the district engineer, who will keep a certain amount on hand since he is usually the first to arrive at a spill.

9. Despite the fact that some of the absorbent may have been retained by the agency personnel and that the on-site coordinator specified what personnel,

equipment and materials were needed, it is clear that petitioner did use the equipment and absorbent in cleaning up spills.

10. Petitioner argues that by virtue of the contracts required by the United States Coast Guard and the New York State Department of Transportation, those agencies actually purchased labor, rented equipment and purchased materials and supplies. The contracts with each agency are similar in many respects. Some of the more relevant provisions of each are as follows:

A. New York State Department of Transportation Contract

1. The "Request for Proposal" requires that cost proposals be stated in terms of labor, equipment and materials cost. [B. Cost Proposal]
2. Petitioner agreed to provide the following service: "Contain and remove petroleum products from any waters or lands of New York State (surface spills)". Petitioner did not choose to bid for other services. [E. Scope of Work 1.1]
3. Petitioner agreed to "provide all the resources required to contain, remove, transport, store, and dispose of petroleum products and debris as described under Scope of Work." [F. Resources To Be Furnished]
4. Petitioner specified the types of labor, the numbers of personnel it could provide and rates for each type, e.g. 18 equipment operators at \$16.00 per hour. [F. Resources To Be Furnished 1]
5. The agreement required petitioner to complete a schedule indicating equipment which petitioner agreed to provide, "together with the fixed rental price for each item offered. Hourly rates shall commence upon departure to the location of the spill." [F. Resources To Be Furnished 2(a)] Petitioner listed its available equipment and rental rates, e.g., it indicated it would provide one thirty foot steel work boat with inboard winch for \$40.00 per hour. [Equipment Schedule (2)]
6. The agreement also contained a "Materials and Disposal Schedule" on which petitioner listed the absorbents and other supplies it would provide and the cost for each and petitioner's charges for

disposing of pollutants. [Materials and Disposal Schedule (1)(2)(3)]

B. United States Coast Guard Contract

1. The contract described the services to be performed in pertinent part, as follows:

"Pursuant to orders placed and accepted in accordance with paragraph 5, below, the contractor shall furnish the ordered labor, material and equipment and shall provide adequate supervision for same. Consistent with directions received from the OSC, the contractor shall expend his best efforts to contain, remove and/or mitigate the harmful effects of, oil and/or hazardous substances on or in the designated waters, their bottoms and their adjoining shorelines. Subsequent to the first day at the job site the contractor shall provide the same personnel, materials and equipment at the job site as authorized the previous day, except as otherwise directed by the OSC." [Item No. 4 Services a]

"The contractor is encouraged to draw upon his experience to suggest to the OSC use of personnel, material, equipment and procedures that he believes may improve the containment, cleanup and mitigation operations. However, the decision to use such suggestions shall rest solely with the OSC. No services shall be rendered without a specific order of either the OSC or Contracting Officer in the manner provided in paragraph 5, below." [Item No. 4 Services b]

2. The contract also provided:

"Since this Basic Ordering Agreement is in the nature of a time and materials contract, material pricing hereunder is governed by Title 41, Code of Federal Regulations, 1-3.406-1. ...." [Item No. 4 Services 1]

3. Schedules listing available labor, equipment and materials with rates and charges, similar to the Department of Transportation Contract were made part of the contract with the United States Coast Guard.

CONCLUSIONS OF LAW

- A. That the equipment and the materials and supplies purchased by petitioner were not purchased for resale, but were used by petitioner in its

services of controlling and removing oil spills. While the contracts with the New York State Department of Transportation and the United States Coast Guard are in the form of time and materials contracts, in substance, petitioner contracted to contain and remove oil and other pollutants and the equipment, materials and supplies at issue were used by its personnel in accomplishing such services. The form of the contract merely provides a means by which the governmental agency could monitor and control cost. (See: In re Sherwood Diversified Services, Inc., 382 F. Supp. 1359 (S.D. N.Y. 1974)).

B. That the purchases of equipment, materials and supplies made by petitioner constituted retail sales within the meaning of section 1101(b)(4) of the Tax Law and are subject to tax.

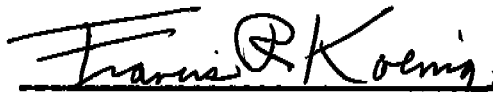
C. That the petition of Fourth Coast Pollution Control is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER