STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of ROSS STEEL ERECTION CORPORATION 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.	DECISION

Petitioner, Ross Steel Erection Corporation, 8555 Packard 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 November 30, 1981 (File No. 38559).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York on June 25, 1984 at 2:45 P.M. with all briefs to be submitted on or before September 10, 1984. Petitioner appeared by Albrecht, Maguire, Heffern & Gregg, P.C. (Ralph J. Gregg, Esq., of counsel) and by George R. Armitage, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that a crane purchased by petitioner was not purchased for resale and was therefore subject to sales or use tax.

FINDINGS OF FACT

1. On April 27, 1982 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Ross Steel

Erection Corporation, for the period ended November 30, 1982. The Notice assessed tax due of $10,875.20 plus interest of $525.27 for a total amount due of $11,400.47. The Notice was premised upon the Audit Division's determination that tax was due upon petitioner's purchase of a crane because it was purchased for performing contract work and not for resale.

2. The president of petitioner is Martin VeRost.

3. It was Mr. VeRost's practice to purchase machinery and equipment such as welding machines, cranes, automobiles and trucks and lease the equipment to petitioner. Petitioner, in turn, paid the sales tax on the rentals. No issue has been raised with respect to these rentals.

4. In September 1981, William Mackenberg, a salesman for Dow and Company, Inc., convinced Mr. VeRost that he should purchase a large crane and rent it to one of the approximately fourteen or fifteen general contractors who were working on a major construction project in Somerset, New York. Mr. VeRost anticipated being able to rent the crane to contractors at the construction site at Somerset because approximately one hundred cranes would be required there. Because of the cost of the crane, Mr. VeRost did not purchase it himself, but rather had petitioner purchase it.

5. The crane was subsequently delivered to petitioner in or about late November, 1981.

6. Petitioner initially had difficulty in finding parties interested in renting the crane. However, in late 1981, the crane was rented to Quackenbush Company, Inc. ("Quackenbush").

7. During the period in issue, Quackenbush was under contract to provide heating, ventilating and air conditioning work at the Olin Chemical Plant

("Olin") in Niagara Falls, New York. Petitioner, in turn, entered into a subcontract with Quackenbush to provide labor, equipment, small tools and supplies. The subcontract incorporated a sales tax direct payment permit as a part of the purchase order.

8. Petitioner subsequently supplied Quakenbush with iron workers, truckdrivers, millwrights, equipment operators and crane operators. Petitioner also supplied and billed Quackenbush for welding equipment, magnetic drills, dump trucks, cranes and other heavy equipment at hourly and weekly rates.

9. Petitioner also supplied Hooker Chemical Corp.[1] ("Hooker") with iron workers, millwrights, drivers and other laborers at regular and overtime rates. In addition, petitioner supplied Hooker with, among other things, grinders, torches, welders, trucks and cranes.

10. The rental rates charged to Quackenbush during 1982 for cranes (with or without a crew), trucks and trailers were based upon hourly, daily, weekly or monthly rates. The same rental rates were charged to Hooker.

11. A typical transaction with petitioner would commence with a "Day Order" to provide certain equipment and operators to perform a particular job. At the conclusion of the day, one of petitioner's employees would prepare a time sheet which disclosed the equipment and individuals employed on each particular job and the amount of time utilized. A sheet summarizing the charges was then prepared and presented to the lessor for approval. The summary sheet was then used to prepare the invoice which separately stated

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1 The name of this firm was subsequently changed to Occidental Chemical Corporation.

charges for labor and equipment. Both the daily time record and the summary sheet contain the inscription:

> "The Lessee agrees with the owner that the equipment rented is in sound condition, that it will be returned in like condition. NOTE: It is understood and agreed that while above equipment is on the customer's job, it is under the supervision, direction, control, and responsibility of the Lessee at all times and the Lessee agrees to hold Lessor harmless from any and all claims arising from the rental of the above equipment and operation of the above equipment. The Lessee further agrees that any applicable sales taxes are to be charged as an extra." (Emphasis added)

12. A portion of the labor charges which petitioner billed its customers arose from services of individuals who had the title of foreman. This was in accordance with union requirements that if a certain number of individuals were working a particular project, one individual would be considered a foreman. Actual supervision, however, was provided by the party to whom the crane was rented.

13. The Audit Division concluded that the crane was not purchased for rental purposes because petitioner was in the business of performing various contracting services such as installation, maintenance and repair. This conclusion was based on the fact that this particular piece of equipment stood out from the rest because no tax was being paid on its rental and the fact that Olin placed the cost of petitioner's charges into a single cost center.

14. In accordance with section 307(1) of the Administrative Procedure Act, petitioner's proposed findings of fact have been generally accepted with the following exceptions: proposed findings of fact "2", "10", "19", "20", "22" and "23" have been rejected as unnecessary to the decision; proposed finding of fact "9" has been rejected as not fully supported by the evidence.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law §1105(a), sales tax is imposed on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article".

B. That Tax Law §1101(b)(4)(i)(A) excludes sales for resale from the definition of "retail sale".

C. That Tax Law §1101(b)(5) defines "sale, selling or purchase" as follows:

> "Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefore...".

D. That the Sales and Use Tax Regulations at 20 NYCRR 526.7(c)(1) provide that:

> "The terms 'rental, lease, license to use' refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property."

E. The Regulations further provide that:

> "Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:
>
> (i) custody or possession of the tangible personal property, actual or constructive;
> (ii) the right to custody or possession of the tangible personal property;
> (iii) the right to use, or control or direct the use of, tangible personal property" [20 NYCRR 526.7(e)(3); renumbered 20 NYCRR 526.7(e)(4)].

F. Lastly, former 20 NYCRR 526.7(e)(5) [renumbered 20 NYCRR 526.7(e)(6)] provided as follows:

> "(6) When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease provided they reflect prevailing wage rates."

G. That the meaning and intent of former 20 NYCRR 526.7(e)(5) [renumbered 20 NYCRR 526.7(e)(6)] is set forth by example 15. This example states:

> "A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions from the company's foreman, and the company determines the working hours and locations. The operator's wages are separately stated. This transaction is within the definition of sale, and the transfer of possession has occurred by reason of the company's right to direct and control the use of the equipment by the operator. The taxable receipt excludes the operator's wages."

H. That the uncontradicted facts presented herein establish that the crane leased by petitioner together with the services of one or more operators were subject to the direction and control of the lessees of the crane and further that the wages of the crane operators were separately stated. Accordingly, the crane was purchased for resale within the meaning of 20 NYCRR 1101(b)(4)(i)(A) and former 20 NYCRR 526.7(e)(5) and therefore petitioner was not required to pay sales and use tax upon the purchase of the crane in issue (see e.g. Matter of Brookhaven Bus Lines Corp., State Tax Commission, November 9, 1984).

I. That the petition of Ross Steel Erection Corporation is granted and the Notice of Deficiency issued April 27, 1982 is cancelled.

DATED: Albany, New York
APR 15 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER