

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GREAT LAKES DREDGE & DOCK CO.

For a Redetermination of a Deficiency or
a Refund of Sales & Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the ~~Year(s)~~ Period
1965 thru 1968.

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 7th day of March, 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon Great Lakes
Dredge & Dock Co. (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows:

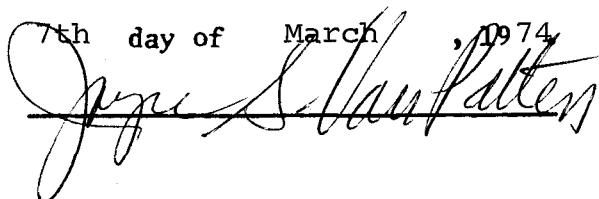
Great Lakes Dredge & Dock Co.
228 North LaSalle Street
Chicago, Illinois

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

7th day of March, 1974





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GREAT LAKES DREDGE & DOCK CO.

For a Redetermination of a Deficiency or
a Refund of Sales & Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the ~~Year(s)~~ Period
1965 thru 1968.

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 7th day of March, 1974, she served the within
Notice of Decision (or Determination) by (certified) mail upon Christopher
Heckman, Esq. (representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows:

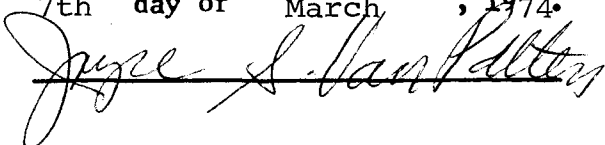
Christopher Heckman, Esq.
McHugh, Heckman, Smith & Leonard
Eighty Pine Street
New York, New York 10005


and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) 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

7th day of March, 1974.







STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A

STATE CAMPUS

ALBANY, N. Y. 12226

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION
HEARING UNIT

EDWARD ROOK
SECRETARY TO
COMMISSION

STATE TAX COMMISSION

Mario A. Procaccino
~~XXXXXXXXXXXXXXXXXXXX~~ PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

ADDRESS YOUR REPLY TO

DATED: Albany, New York
March 7, 1974

Great Lakes Dredge & Dock Co.
228 North LaSalle Street
Chicago, Illinois

Gentlemen:

Please take notice of the **DETERMINATION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(s) **1138 & 1250** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Any inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned.
These will be referred to the proper party for
reply.

Very truly yours,

Nigel G. Wright

HEARING OFFICER

Enc.

cc: Petitioner's Representative
Law Bureau

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
GREAT LAKES DREDGE & DOCK COMPANY	:	DETERMINATION
for a Hearing to Review a Determination	:	
of Sales and Use Taxes under Articles 28	:	
and 29 of the Tax Law for the Period	:	
August 1, 1965 through May 31, 1968.	:	

Great Lakes Dredge and Dock Company applied pursuant to Tax Law section 1138 for a hearing to review a determination issued under date of November 8, 1968, for sales and use taxes due under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through May 31, 1968. A hearing was duly held on March 4, 1970, November 3, 1971, and May 9, 1972, before Nigel G. Wright, Hearing Officer. Christopher E. Heckman, Esq., of McHugh, Heckman, Smith & Leonard, represented the applicant. Saul Heckelman, Esq., appearing by Alexander Weiss, Esq., represented the Sales Tax Bureau. The record of said hearing has been duly examined and considered.

ISSUES

The issues in this case are whether certain vessels and certain supplies purchased for those and similar vessels, are exempt from use tax when the vessels are used for dredging operations. The exemptions are claimed by reason of (1) the interstate commerce clause of the United States Constitution and, (2) Tax Law section 1115(a)(8) providing for the exemption of "commercial vessels primarily engaged in interstate or foreign commerce...". The exemption is claimed with respect to three types of vessels, and the supplies purchased for them, which are (a) dredges, drillboats and cranes; (b) tugboats; (c) scows towed by the tugs, and; (d) launches and oil barges used in conjunction with the other vessels.

FINDINGS OF FACT

1. Taxpayer is a corporation organized under the laws of New Jersey, with its executive office in Chicago, Illinois, and with other offices in various cities in the United States including New York City and Buffalo, New York. The corporation is authorized to do business in many states and in foreign countries. It carries on its dredging, marine and other construction operations in various parts of the United States, including New York State and also Canada, the Caribbeans and Latin America. In New York State, the taxpayer maintains repair and storage yards on the north shore of Staten Island, a dock at Tottenville on the southend of Staten Island and offices in Manhattan and in Buffalo.

2. The taxes as determined on November 8, 1968, amount to \$325,610.07, plus penalty and interest of \$75,511.22 for a total of \$401,121.29. At the hearing, the taxes due were redetermined to amount to \$288,134.28, plus penalty and interest. The taxes due are attributable as follows:

	<u>Tax on Value of Vessels</u>	<u>Tax on Purchases of Supplies for Vessels</u>	<u>Tax on "Prior Contracts"</u>	<u>TOTAL</u>
Dredges	\$ 58,487.88	\$ 90,016.90	\$ 411.16	\$148,915.94
Cranes	407.42	886.63	43.98	1,338.03
Drillboats	224.92	1,762.99	3.36	1,991.27
Tugs	27,973.08	19,768.56	227.86	47,969.50
Scows	66,749.36	16,164.80	274.51	83,188.67
Barges	- 0 -	1,515.60	3.03	1,518.63
Launches	- 0 -	3,587.82	203.97	3,791.79
	<u>\$153,842.66</u>	<u>\$113,703.30</u>	<u>\$1,167.87</u>	<u>\$288,713.83</u>
			<u>- 579.54</u>	<u>- 579.54</u>
			<u>\$ 588.33</u>	<u>\$288,134.29</u>

3(a) The vessels in issue here are the following, together with the jurisdictions in which they were found to be taxable and the tax found to be due on each:

	<u>Albany Co.</u>	<u>Erie Co.</u>	<u>N.Y.C.</u>	<u>TOTAL</u>
Dredge Cleveland			\$ 32,069.31	
Dredge #50			26,418.57	
Crane #9	\$283.45			
Crane #11	123.97			
Drillboat #3	224.92			
Tug Lynn			27,973.08	
Scow #13			8,531.25	
" #14			8,531.25	
" #15			590.00	
" #16			510.00	
" #17			500.00	
" #70		\$ 456.00		
" #71		440.00		
" #72		408.00	450.00	
" #73		424.00	450.00	
" #94			22,729.43	
" #95			22,729.43	
	<u>\$632.34</u>	<u>\$1,728.00</u>	<u>\$151,482.32</u>	<u>\$153,842.66</u>

3(b) The tax due on the vessels was computed on the basis of purchase price or on the basis of market value, if appropriate, under section 1111(b)(1) of the Tax Law, or on the basis of rental value, if appropriate, under section 1111(b)(2) of the Tax Law.

4(a) The purchase of supplies here in issue were used on the many vessels of applicant which were in New York waters. These included approximately 15 dredges, 6 cranes, 3 drillboats, 10 tugs, 39 scows, 10 barges, and 11 launches. (Many of these vessels were not deemed to be themselves subject to use tax because of their use in New York prior to the imposition of the New York State sales tax.)

The amount of tax found to be due on purchases of supplies according to type of vessel and jurisdiction in which the vessel was working is as follows:

	<u>Albany Co.</u>	<u>Erie Co.</u>	<u>N.Y.C.</u>	<u>TOTAL</u>
Dredges	\$37,939.21	\$2,129.43	\$49,948.26	\$ 90,016.90
Cranes	273.49	309.51	303.63	886.63
Drillboats	62.64	.13	1,700.22	1,762.99
Tugs	1,911.09	1,346.76	16,510.71	19,768.56
Scows	112.33	1,678.93	14,373.54	16,164.80
Barges	- 0 -	- 0 -	1,515.60	1,515.60
Launches	<u>206.14</u>	<u>1,361.74</u>	<u>2,019.94</u>	<u>3,587.82</u>
	<u>\$40,504.90</u>	<u>\$6,826.50</u>	<u>\$86,371.90</u>	<u>\$133,703.30</u>

4(b) The amount of tax on purchases was taken directly from the taxpayer's computer records showing accrued taxes which were unpaid by reason of a claimed exemption, after such records had been verified by a test check against purchase invoices which also showed the account charged. Purchases charged to a particular contract or property account were allocated among the vessels by agreement.

5. The tax amounting to \$1,167.86 found to be due on "prior contracts" is tax due (under section 1217(b) of the Tax Law) to Erie County or New York City on purchases made on contracts entered into prior to the imposition of the New York State sales tax and so exempt from the state tax by section 1106(a) of the Tax Law. The details with respect to these are hereby found to be as stated in Exhibit 20 in evidence, but are not here repeated since the amounts are small and they raise no issues not raised by the determination of taxes due on the purchase of supplies subsequent to the imposition of the state sales tax.

6(a) The taxpayer's business consists of the deepening or extension of navigable waterways and construction of dikes, levees and similar harbor improvements in various states and possessions of the United States as well as foreign countries. Its customers are most usually various governmental entities or large corporations which themselves do an interstate business. Typical contracts provide for both dredging and disposal of the waste material. The customer usually obtains legal permission for the dredging and applicant obtains the permit for the disposal.

6(b) The petitioner's operating costs (exclusive of overhead) on typical jobs would include the costs of mobilization of equipment which could run from 3/10 of 1% to 4% of the job. Miscellaneous

costs (including the costs of surveying on land) from 3% to 5% of the job. The costs of dredging (including "clean-up" dredging) would be about 91% to 96% of the total costs. Of the total costs about 40% would be for tugs, about 25% for dredges, 25% for scows and 4% for launches. The dredges and launches (with costs approximating 29%) were used primarily in actual dredging while the tugs and scows (with costs approximating 65%) were used primarily in the disposal of the waste material.

7. It was typical that applicant's equipment was operated at job sites in more than one state and that they move across state lines for the purpose of assembling at a job site and for dispersal after the job was over. All told, the 17 pieces of equipment assessed, worked in 14 states and one foreign country and crossed state boundary lines 179 times during the taxable periods. The additional vessels for which the purchase of supplies were assessed, but which were not themselves subject to tax were subject to similar movement across state lines when assembling for a job or dispersing after it was completed. These trips are necessarily by sea and all of applicant's vessels are capable of making sea voyages. These vessels are licensed by the U.S. Coast Guard to engage in the coasting trade.

8. The taxpayer's work in New York was performed at job sites at three different locations: Albany County, Erie County, and the New York City area. A job site is typically a small area usually of no more than a few hundred square feet.

8(a) At Albany, material was dredged from the river bed and pumped ashore through a floating pipeline for the purpose of forming an embankment under a proposed interstate highway. The river was widened in this process.

8(b) In Erie County, the work was primarily the deepening of channels near piers and in the bay. The disposal of waste material was at a disposal area in New York waters.

8(c) In New York City, the work was primarily the deepening of channels near piers and in the bay. Material taken from the bay would be transported to disposal areas which are licensed by the U.S. Army Corps of Engineers. Most of the time a disposal area was used which was between three and twelve miles from shore. Occasionally a disposal area was used in Long Island Sound in Connecticut waters.

9. All equipment either subject to tax or for which taxable purchases were made performed their tasks only on rivers or harbors which are part of the navigable waters of the United States.

10. When engaged in operations at a job site, the applicant's equipment performs the following operations: (a) The dredge, drillboat and crane are basically mechanical equipment mounted on barges. The dredge removes earth and other material from the bed of the harbor by its "clamshell" or "bucket", brings it to the surface, and deposits it in a scow. Over long distances, a dredge is not self-propelled and must be towed by a tug. Applicant maintains three crews for each dredge. Each crew works an eight-hour shift and is replaced by the next crew coming from shore in a launch. The drillboat is used to drill into rock or other hard surfaces under water. The cranes are lifting devices. (b) The tugs are either sea tugs which tow scows to a dumping ground or small tugs used usually as tender tugs to tow scows between the dredges and the point where the sea tugs pick them up. Applicant maintains four separate crews for each tug. Two crews are on the tug at all times and they alternate six-hour shifts. Each crew is on board for a week at a time and a launch is used to change crews weekly. (c) A dumpscow is a small barge with several trap doors in its hull. It receives material from the dredge, carries it to a disposal area and dumps it. On long sea voyages it may

be used to transport miscellaneous equipment. It is propelled by a tug. (d) Launches are small tugs used to transport men and supplies between the shore and the other vessels and to tow empty barges. Oil barges carry fuel oil from shore to the dredges and tugs.

11. The movement of the dredges while working at the job site is very limited. Its work is performed while it is fixed in one spot by "spuds" which extend to the bed of the harbor. When the dredging is completed at one spot, the dredge can move itself to its next location by the process known as "walking". This involves using the "bucket" or "clamshell" to grasp the bed of the harbor and pull the barge along using the spuds for their lever action. The cranes and drillboats presumably have the same means of locomotion. It is found, however, that neither the dredges, drillboats or cranes moved across state lines while engaged in their usual work tasks and this is true for tasks performed at Albany and Erie Counties and the New York City area.

12(a) The movement of the tugs while on the job site is determined largely by the location of the job, the mooring points and the disposal area. In Albany and Erie Counties, this did not involve the crossing of state lines.

12(b) The movements of tugs in New York Harbor were frequently across state boundaries because of the configuration of the harbor and of the state boundary. Typical movements were as follows: A tug would tow a loaded scow from a dredge working in the vicinity of Governors Island in New York waters to a mooring point at Craven Point, New Jersey, near Jersey City and in New Jersey waters. From there, a sea tug would tow the scow, and generally two other scows, down the bay through New Jersey waters until at a point off Constable Hook, New Jersey, close to Bayonne, New Jersey,

it would necessarily pass into New York waters near St. George, Staten Island, and enter the Narrows between Staten Island and Brooklyn, New York. From the Narrows, it would proceed through the lower bay by way of the "Swash Channel" necessarily passing into New Jersey waters, pass close to Sandy Hook, New Jersey, and proceed about seven miles further in a southeastern direction to the disposal area, which is about five miles west of Highlands, New Jersey, and ten miles south of Rockaway Beach, New York. Each trip, one way, would take five to five and one-fifth hours.

When the weather at sea was bad, the tug would tow the scows from the mooring point through Hell Gate to Long Island Sound where at points off of Eatons Neck, Long Island, there were disposal areas. This necessarily involved navigating and maneuvering in the waters of the State of Connecticut. Other movements of the tugs were: to tow loaded scows from a location near the west side of Manhattan, southward traveling under navigation rules which require it to keep to the right, close to the New Jersey shore and in New Jersey waters, and to tow scows from the north side of Staten Island southerly to Tottenville at the southern end of Staten Island through the Kill Van Kull and the Arthur Kill which separates Staten Island from New Jersey necessitating travel close to the New Jersey shore in New Jersey waters.

12(c) From computations of vessel activity submitted by applicant, it is found that some tugs, e.g., Dark, Feely and Lynn, in order to get to the disposal areas, crossed state boundaries on almost all the days on which they worked in New York during each year of the audit period. The tugs, Trout and Weston, had varied activities. The Trout's ratio of days on which it crossed state boundaries was 15% in 1965, 40% in 1966 and 60% in 1967. The Weston's ratio of

days on which it crossed state boundaries was 30% in 1965, 98% in 1966 and 45% in 1967. However, the evidence is not sufficiently clear to show the extent of the use of each tug while operating solely in New York waters and between points solely in New York waters.

13. The movement of the scows was closely related to the movement of the tugs by which they would be towed. In Albany County and Erie County, they did not move across state lines while performing their tasks. In New York Harbor, the dumpscows crossed state boundaries on almost all of the days during which they were working in New York.

14(a) The movement of the launches and oil barges in Albany and Erie Counties did not involve the crossing of state boundaries.

14(b) The movement of the launches and of oil barges in New York Harbor was determined by the location of the job site, the facilities on shore and the other vessels. In New York Harbor, the applicant did dredging work at many locations in New York waters including the following: Piers 7, 74 and 76 on the New York side of the Hudson River, Pier 15 in the East River, Pier 12 in Brooklyn, Lawrence Point near Astoria, Queens, and the U.S. Coast Guard piers on Governors Island. Very often a single contract would require work on both sides of the Hudson River in waters of both New York and New Jersey. The shore facilities of applicant included its offices and yard located on the north shore of Staten Island. In addition, applicant owned a dock at Tottenville on the southend of Staten Island where it could tie up scows. Applicant received delivery of gasoline, coal and water at any of several docks in New Jersey. The crews report to work at any of several points on shore which were picked for their parking facilities and from which the crew would be carried to their vessels on a launch. Applicant would have one mooring point for

each contract. During this audit period, mooring points were located at Craven Point, New Jersey, and at the Raritan River between Perth Amboy and South Amboy, New Jersey. These were used on contracts for dredging done in New York waters.

14(c) The launches in New York Harbor each moved across state lines on less than 50% of the days they did some work in New York. There is no evidence as to the movement of the oil barges.

15. No other jurisdiction has assessed a sales or use tax on the equipment or supplies here in issue.

16. The failure to pay tax on the use of the equipment here in issue was based on the advice of counsel.

CONCLUSIONS OF LAW

A. None of the vessels, or the supplies purchased for the vessels can be found to be exempt under the interstate commerce clause of the United States Constitution. Certainly, the Commission must reject the major contention of the taxpayer that the vessels and supplies should be exempt because they are used in navigable waters and under the regulatory authority of the Federal Government. Similarly, the Commission must reject the contention that said vessels are exempt simply because they are used in other states and must come into New York waters by long sea voyages which cross state lines. The dredges, cranes and drillboats and the supplies purchased for them are subject to tax. Dredging operations themselves are closely analogous to construction operations on land and must be considered to be not an interstate, but a local activity. (See Holland Furnace Co. v. Dept. of Treasury 133 F2d 212 at 215-16, cert, den. 320 U.S. 747; James v. Dravo Contracting Corp. 302 U.S. 134 at 153, on remand 114 F2d 242.) Prior judicial authority supports the application

of a use tax to dredging equipment. (See In the Matter of Atlantic Gulf & Pacific Co. v. Gerosa 16 N.Y. 2d 1; App. Dism. 382 U.S. 368 (1966).) The use of the other vessels in this case was ancillary to the use of the dredges in dredging operations.

Furthermore, even if the dredges and also the other vessels, are construed to be operating in interstate commerce, such vessels would be subject to a use tax if only there was a "taxable moment" when they were not, in fact, being operated in interstate commerce. (See In the Matter of Atlantic Gulf & Pacific Co. v. Gerosa 16 N.Y. 2d 1 at quoting from Southern Pacific Co. v. Gallagher, 306 U.S. 167 at 177; see also Niagra Junction Railway Co. v. Greagh, 2 A D 2d 200, aff'd 3 N Y 2d 831.)

In this case the description of the vessels activity in New York State have not been detailed enough to negate the existence of such a "taxable moment" with respect to each vessel. In view especially of applicant's yard and dock facilities in New York, it can be presumed and is likely that such a "taxable moment" did exist with respect to each vessel. At any rate, the applicant has not carried the burden of proof with respect to this element of the case.

B. The statutory exemption of section 1115(a)(8) cannot be construed to apply to the vessels and supplies in issue in this case. Dredging and the operations ancillary thereto are most appropriately characterized as part of local and not interstate commerce. Furthermore, there is a lack of proof with respect to individual vessels to show the exact proportion of use of each of such vessels in local commerce in New York, local commerce in other states and in interstate commerce. The evidence submitted in terms of days of use is not refined enough to permit an evaluation of the use of each vessel.

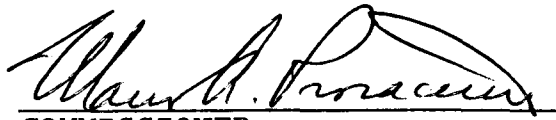
C. The failure to pay tax in this case was excusable for the purposes of the penalty provisions of section 1145(a) of the Tax Law.

DETERMINATION

The determination under review and as already redetermined under paragraph 2 above is further modified to exclude therefrom any penalty or interest to the extent either penalty or interest exceeds interest at the rate of 6% a year and, as so modified, said determination is found to be correct and is due together with such further interest from the date thereof as shall be computed under section 1145(a) of the Tax Law.

DATED: Albany, New York
March 7, 1974

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER