

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

DELTA WATER SERVICE CORP.

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

For a Redetermination of a Deficiency or  
a Refund of Sales and Use  
Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~(years)~~ periods August 1, 1965  
through August 31, 1969.

State of New York  
County of Albany

Rae Zimmerman, 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 23rd day of December, 1971, she served the within  
Notice of Decision (or Determination) by (certified) mail upon Delta  
Water Service Corp.

(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Delta Water Service Corp.  
1031 47th Avenue  
Long Island City, N.Y. 11101

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

23rd day of December, 1971.

*Martha Furber*

*Rae Zimmerman*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

DELTA WATER SERVICE CORP.

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Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~(years)~~ periods August 1, 1965  
through August 31, 1969.

State of New York  
County of Albany

Rae Zimmerman , 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 23rd day of December , 1971 , she served the within  
Notice of Decision (or Determination) by (certified) mail upon Neil Roth, C.P.A.

(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Neil Roth, C.P.A.  
1250 Broadway  
New York, N.Y.

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

23rd day of December , 1971.

Martha Foxworth

Rae Zimmerman

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application :

of :

DELTA WATER SERVICE CORPORATION : DETERMINATION

for a Hearing to Review a Determination of :  
Sales and Use Taxes due under Articles 28  
and 29 of the Tax Law for the Period :  
August 1, 1965 through August 31, 1969.

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Delta Water Service Corporation filed an application pursuant to Sections 1138 and 1250 of the Tax Law for a hearing to review a determination of sales and use taxes due under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through August 31, 1969. A hearing was duly held on May 13, 1971 before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York City. Edward H. Best, Esq. (Francis X. Boylan, Esq., of Counsel) represented the Sales Tax Bureau. Neil Roth, C.P.A., represented the applicant. The record of such hearing has been duly examined and considered.

#### ISSUES

The issues in this case relate to transactions of a plumbing subcontractor prior to September 1, 1969 and are: (A) Whether such contractor worked under lump sum contracts or time-and-materials contracts; (B) Whether his work constituted capital improvements to real property or constituted repairs to real property and whether the material he installed in whole or in part remained personal property; (C) Whether supplies purchased by applicant without the payment of a sales tax are subject to a use tax under sections 1110 and 1105(a) of

the Tax Law because of having been acquired in a retail sale as defined in section 1101(b)(4); (D) Whether the result is altered by the fact that applicant took resale certificates from his customer, and (E) Whether the result is altered because of certain advice given to applicant by the Sales Tax Bureau concerning direct payment permits and resale certificates.

FINDINGS OF FACT

1. Delta Water Service Corporation is a small business which specializes in installing underground water lines between the street and the buildings along the street, and installing water meters to such lines. In every instance their contract was with a plumbing subcontractor.

2. Delta purchased certain materials from out of State for use on its jobs.

3. In one case, stated to be typical by the applicant, the applicant worked under a contract, on its own letterhead, with a plumbing company which provided for work at an agreed net price and stated that applicant "will furnish all necessary.....materials (and) plumbing, labor..." and further that "all materials furnished under this contract shall be personal, the title thereof shall be in the contractor until fully paid for in cash". The contract added a separately stated sales tax to the price but the applicant failed to collect the tax, accepting instead a resale certificate indicating that the work would be used by the customer in performing taxable services.

4. In 1965 the applicant had requested direct payment permits from the Sales Tax Bureau and had been advised that "The nature of

your business does not require a direct payment permit. A supply of resale certificates, which we believe will serve your needs, is enclosed".

5. The tax determined to be due is \$13,318.41 plus penalty and interest in the amount of \$4,361.28, for a total of \$17,679.69.

CONCLUSIONS OF LAW

A. The contracts used by applicant were lump sum contracts.

B. The installation of the underground pipes and the meters was not shown to be the maintenance, servicing or repair of real property as distinguished from the capital improvement of such property. No evidence was adduced to prove that any of the equipment installed remained personal property.

C. Under the law in effect prior to September 1, 1969, the purchase of supplies by the applicant is subject to a use tax imposed by section 1110 of the Tax Law. Since no tax had been paid, such purchase is a retail sale within the meaning of section 1101(b)(4) and such retail sale is taxable under section 1105(a). The sale was a retail sale because once the supplies were purchased they were used in the performance of lump sum contracts and so were not sold separately as tangible personal property within the meaning of section 1101(b)(4)(i)(A), see opinion of Counsel to the Commission, June 29, 1965 (1965-3 N.Y. State Tax. Bull. 11; P-H N.Y. State and Local Taxes ¶123,008; C.C.H. N.Y. Tax Rep. transfer binder ¶98-463), and because the work done constituted capital improvements to real property so that the transaction between the applicant and his purchaser would be exempt from the tax imposed by section 1105(c)(5)

with the result that supplies used in that work were not used in the performance of a taxable service within the meaning of section 1101(b)(4)(i)(B), see Sales Tax Bureau Info. Letter No. 24 P-H N.Y. State and Local Taxes ¶23,152; C.C.H. N.Y. State Tax Rep. ¶64-354).

D. The fact that the applicant took resale certificates from his own customers is immaterial. The applicant had actual knowledge that his contracts were lump sum contracts for capital improvements and is deemed to have known that, as determined in paragraph C, his transactions with his customers could not be a sale of either property or taxable services, see opinion of Counsel to the Commission, January 31, 1967. (1967-1 N.Y.S. Tax Bull. 47; P-H N.Y. State and Local Taxes ¶23,155; C.C.H. N.Y. State Tax. Rep. ¶98-719).

E. The advice of the Sales Tax Bureau that applicant would have no use for direct payment permits but might be able to use resale certificates was correct, see Letter of Sales Tax Bureau, March 10, 1966 (P-H N.Y. State and Local Taxes ¶23,056; Sales Tax Bureau Information Letter No. 24 P-H N.Y. State and Local Taxes ¶23,152; C.C.H. N.Y. State Tax Rep. ¶64-354). In any event the use of such certificates could have in no way protected the applicant since such certificates are for the protection of a vendor from the sales tax and cannot shield a purchaser from the use tax.

DETERMINATION

The determination under review is correct and the amounts therein stated are due together with such further interest as may be due under section 1145 of the Tax Law.

DATED: Albany, New York

*December 23, 1971*

STATE TAX COMMISSION

*Norman Gallman*  
COMMISSIONER

*Bruce Mauley*  
COMMISSIONER

*William Koerner*  
COMMISSIONER