

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :
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of :
 :
C. H. HEIST CORP. : DETERMINATION
 :
for Revision of a Determination or for :
Refund of Sales and Use Taxes under :
Articles 28 and 29 of the Tax Law for :
the Periods September 1, 1969 through :
August 31, 1972. :
_____ :

Petitioner, C. H. Heist Corp., with offices at Anderson Road, Buffalo, New York, 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 periods September 1, 1969 through August 31, 1972 (File No. 00614).

A formal hearing was held before Paul B. Coburn, Esq., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on December 1, 1976 at 9:15 a.m. Petitioner appeared by Borins, Halpern, Snitzer, Levy, Fradin & Loonsk (Harold Halpern, Esq. of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Alexander Weiss, Esq. of counsel).

ISSUES

I. Whether petitioner's sales income derived from service contracts (and performance thereunder) with DuPont and Mobil are exempt from sales taxes.

II. Whether the purchase of integral parts, assembly and fabrication of those parts into capital assets of petitioner, taken in conjunction with on-the-job utilization of said assets for testing purposes, renders petitioner liable for sales and use taxes on said capital assets.

III. Whether the petitioner was subject to the imposition of penalties and interest in excess of the minimum for the failure to properly file and/or pay the appropriate amount of sales and use taxes because of good faith reliance by petitioner upon advice of counsel or accountants.

FINDINGS OF FACT

1. Petitioner, C. H. Heist Corp., timely filed quarterly sales tax returns for each quarter during the periods between September 1, 1969 and August 31, 1972.

2. Petitioner signed Consents Extending Period of Limitation for Assessment covering the periods of September 1, 1969 through August 31, 1972, on October 16, 1972, December 3, 1973 and November 18, 1974.

3. The Sales Tax Bureau issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due" on April 7, 1975 covering the periods September 1, 1969 to August 31, 1972, based upon an audit, requiring payment of additional tax of \$65,553.78 and penalty and interest of \$32,035.29, all totaling \$97,589.07 as taxes due for unreported taxable sales and purchases of capital assets subject to use tax.

4. Petitioner, acting through counsel, Harold Halpern, Esq., filed a "Petition for Revision of a Determination or for Refund of Sales and Use Taxes" on or about April 11, 1975.

5. A prior opinion by Michael F. Seereiter, District Tax Supervisor for the Buffalo Office, written on January 10, 1966, to Kermit Smith, Senior Tax Administrative Supervisor of the Instructions and Interpretations Unit, was copied and forwarded to petitioner, and a copy of a further letter of opinion by Fred W. Tierney, Director of the Sales Tax Bureau, to Michael F. Seereiter, dated January 12, 1966, was also copied and delivered to petitioner, and receipt of both of the above opinion letters was acknowledged by petitioner.

6. The aforementioned opinion letters clearly stated that the income from services rendered by petitioner for DuPont and Mobil were subject to sales tax in that said service "is the type contemplated by the basic provisions of Section 1105(c)(1) and (5), and not the limited cleaning and maintenance services mentioned in the latter portion of Section 1105(c)(5)," which latter paragraph provides exemption from sales taxes. Said opinion letters further made reference to the existence of departmental releases defining "cleaning and maintenance" and conclude that petitioner does not qualify thereunder.

7. Petitioner alleges the aforementioned opinion letters to be inapplicable since petitioner now seeks exemption due to the existence of contracts covering periods longer than thirty days, which contracts did not exist in 1966. However, petitioner's own request for the above-referenced opinion letters specifically stated that petitioner's "services are performed normally under annual contracts ...", which is clearly inconsistent with petitioner's present allegation.

8. Said opinion letters are precisely applicable in that they were responsive to any inquiry setting forth a situation, whether hypothetical or otherwise, which is identical to the issue herein.

9. Petitioner's claims with regard to the issue of whether or not certain capital assets are subject to use tax are inconsistent with petitioner's other claims in that petitioner, on one hand, alleges exemption from use tax because said assets are shipped out of New York State for use and only assembled and tested in New York State; however, on the other hand, petitioner seeks exemption from use tax because "none of the equipment is taxable since its sole purpose and function is to enable C. H. Heist Corp. to engage in a taxable cleaning service. The cleaning service requires the imposition of sales tax to the customer of C. H. Heist pursuant to Section 1105(c)(3) of the Tax Law."

10. Long-term contracts do exist calling for performances of services by petitioner for DuPont and Mobil, which services are of a specialized, technical nature requiring custom-fabricated equipment and skilled laborers.

11. All tax returns at issue herein were prepared and filed based upon the advice of counsel and a certified public accountant.

12. Petitioner assembled and tested certain of its machines in New York State though said machines were ultimately shipped out-of-State for use after on-the-job

testing ranging between 8½ hours and 132 hours. The number and identity of those machines was the object of stipulation by petitioner and the Sales Tax Bureau.

13. Petitioner has thorough but cumbersome records regarding the testing of said machines, but clearly said machines were tested by using them in performance of contracts with petitioner's customers yielding income to petitioner.

14. Petitioner paid no sales tax (and apparently collected none from its customers, DuPont and Mobil) incident to sales income received by petitioner from two of its customers, DuPont and Mobil.

15. Petitioner made no payment of compensating use tax relative to the utilization (in production of income) by petitioner of certain of its capital assets within the territorial confines of New York State, and petitioner submitted no proof that sales taxes were either collected from the customers benefiting from the use of said machines or paid by petitioner in lieu of use taxes.

16. Petitioner had knowledge prior to the tax periods in question of the Sales Tax Bureau's position regarding both issues herein by reason of the various opinion letters dating back to 1966, and petitioner had further knowledge of the Bureau's position on both issues prior to the issuance of the "Notice of Determination and Demand for Payment of Sales and Use Taxes Due" in that letters were received by petitioner from Francis Person, Chief, Instructions and Interpretations Unit, in 1974, namely, Exhibits 6A and 6B of the Department of Taxation and Finance.

CONCLUSIONS OF LAW

A. That petitioner knew or should have known of its liability for sales taxes on sales to DuPont and Mobil due to the existence and receipt of opinion letters dated January 10, 1966 and January 12, 1966, as well as departmental releases (for definition purposes) and relevant sections of the Tax Law notwithstanding advice received from petitioner's counsel and accountants upon which petitioner may have relied.

B. That petitioner's services to DuPont and Mobil yielding sales income to petitioner are subject to sales taxes in that the exemption contained in section 1105(c)(5) is not applicable to petitioner since petitioner's services (and specialized equipment) go far beyond the parameters contemplated by the statute and as defined in the releases which limits the exclusions to ordinary janitorial services such as cleaning floors, waxing, dusting of furniture and venetian blinds and oiling door hinges.

C. That the petitioner in its counsel's letters of April 26, 1973 (petitioner's Exhibit 3), alleged its services to be subject to sales tax which sales tax was, in turn, imposed on petitioner's customers pursuant to section 1105(c)(3) of the Tax Law, but petitioner failed to meet its burden of proof that such sales were either imposed, collected or paid.

D. That petitioner sought the aforementioned opinion letters of 1966 offering the information that its gross income was ordinarily derived from annual contracts (even though that was not the case), but petitioner failed to submit any proof to support its claim that said opinion letters were inapplicable or that the Sales Tax Bureau had taken anything but consistent positions between 1966 and 1976.

E. That petitioner alleged that certain machines were not, as capital assets, subject to compensating use taxes since they were made for use out-of-state, but those same machines were used to produce income within New York State for petitioner from its customers, in New York State, not unlike any other machine, and despite petitioner's submissions as to the existence of a testing program, insufficient documentation exists to support a conclusion that said assets were dedicated to any primary use other than income production since the alleged testing program was irregular, erratic and undistinguishable to its customers relying upon prompt service with specialized equipment of a proven nature.

F. That petitioner failed to submit proof that sales taxes were imposed and collected from its customers and paid over by petitioner to New York State in lieu of compensating use taxes due for the use of the specified capital assets in performance of petitioner's services to its customers prior to the shipment of said assets outside New York State.

G. That the application of C. H. Heist Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 7, 1975 is sustained.

DATED: Albany, New York
August 26, 1977

STATE TAX COMMISSION

/S/ James H. Tully, Jr.
PRESIDENT

/S/ Milton Koerner
COMMISSIONER

/S/ Thomas H. Lynch
COMMISSIONER

AUDIT POLICY

The determination reached herein is to be followed in audits of vendors engaged in similar business activities.