

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Callanan Marine Corporation	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 8/1/65-11/30/68 & 6/1/70-11/30/73.	:	

State of New York
County of Albany

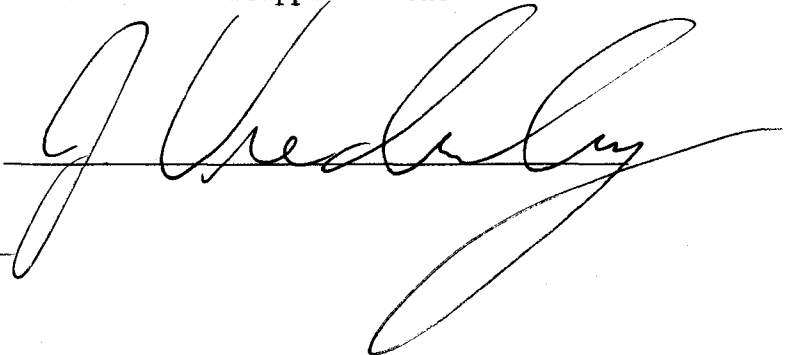
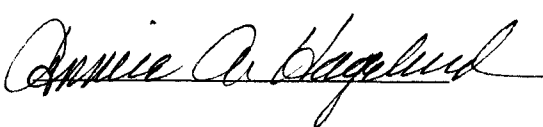
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of July, 1982, he served the within notice of Decision by certified mail upon Callanan Marine Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Callanan Marine Corporation
South Bethlehem, NY 12161

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
16th day of July, 1982.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Callanan Marine Corporation :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of July, 1982, he served the within notice of Decision by certified mail upon Charles A. Simmons the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles A. Simmons
Rogers & Wells
200 Park Ave.
New York, NY 10017

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the 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
16th day of July, 1982.

Conrad A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 16, 1982

Callanan Marine Corporation
South Bethlehem, NY 12161

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Charles A. Simmons
Rogers & Wells
200 Park Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CALLANAN MARINE CORPORATION	:	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 Periods August 1, 1965	:	
through November 30, 1968 and June 1, 1970	:	
through November 30, 1973.	:	

Petitioner, Callanan Marine Corporation, South Bethlehem, New York 12161, 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 August 1, 1965 through November 30, 1968 and June 1, 1970 through November 30, 1973 (File No. 00249).

Formal hearings were held before Michael Alexander, Hearing Officer, on February 24, 1977 and April 4, 1978 and before Jerome Hesch, Hearing Officer, on March 14, 1980 and June 24 and 25, 1980, at the offices of the State Tax Commission, State Campus, Albany, New York. Petitioner appeared by Rogers & Wells (Charles Simmons and James Benedict, Esqs., of counsel) and Hayes & Lapetina (Harry Hayes, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. and Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether there existed a valid business or navigational purpose for petitioner's scow tows to traverse New Jersey waters on the Hudson River where the points of embarkation and disembarkation were both located in New York State.

II. Whether petitioner was engaged in the type of interstate commerce envisioned by section 1115(a)(8) of the Tax Law so that its purchases for scow tows between points located in New York State were exempted from the sales tax.

FINDINGS OF FACT

1. On September 30, 1969, the Audit Division issued to Callanan Marine Corporation, the petitioner, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period August 1, 1965 through November 30, 1968, showing sales and use taxes due in the amount of \$42,410.49, plus interest and penalties of \$13,421.13.

2. On July 23, 1974, the Audit Division issued a similar notice for the period from June 1, 1970 through November 30, 1973, showing sales and use taxes due in the amount of \$85,927.64, plus interest and penalties of \$27,436.09.

3. The deficiencies resulted from petitioner's failure to pay sales or use taxes on (a) the purchase of a tugboat on July 14, 1967; (b) the purchase of three barges (scows) on May 3, 1972; (c) rentals paid for the use of scows during both audit periods; and (d) the purchase during both audit periods of fuel for its tugboat and provisions, supplies, repairs and maintenance for its tugboat and scows.

4. Petitioner timely filed petitions for revision of the determination that its purchases were not exempt from the state sales tax under section 1115(a)(8) of the Tax Law.

5. At the April 4, 1978 hearing the parties were directed to clarify the amount of sales tax in dispute for both audit periods.

6. As a result, the original deficiencies were reduced to \$38,180.58 and \$67,821.98 in sales taxes for the two audit periods.

7. Petitioner transports crushed stone, brick and sand in scows drawn by tugboats for its parent company, Callanan Industries, Inc. Petitioner is paid a fee for the towing services it provides.

8. The scows are loaded at the parent's quarries near Kingston, New York and Secaucus, New Jersey, or at unrelated brick companies near Albany, New York.

9. The loaded scows are assembled for the tow and towed on the river to a pier in New York harbor. Once at the pier the tow is disassembled and the individual scows are delivered to the customers' docks for unloading. The customers' docks are located in New York City, New Jersey and Connecticut.

10. After the scows are unloaded at the customers' docks, the empty scows are gathered together and towed back up the Hudson River to be reloaded. The return trips following each delivery took place immediately after the scows were unloaded.

11. Petitioner used its own tugboat for these tows until July 24, 1972. At this time it hired an independent towing company, River Towing Company, Inc. ("River Towing"), to tow its scows. River Towing leased petitioner's tugboat as part of the agreement.

12. The Audit Division concedes that the scow tows conducted (a) between points in the Albany/Kingston area and customers' docks in New Jersey or Connecticut, and (b) between Secaucus, New Jersey and customers' docks in New York, New Jersey and Connecticut were engaged in the type of interstate commerce described in section 1115(a)(8) of the Tax Law so that any purchases related to these trips were exempt from the State sales tax.

13. The Audit Division contends that the scow tows originating on the Hudson River in the Albany/Kingston area of New York State for delivery to

customers' docks in the New York City area were not engaged in the type of interstate commerce described in section 1115(a)(8) of the Tax Law even though the scow tows traversed 20 miles of New Jersey waters while traveling the 90 miles on the Hudson River. Therefore, it is contended that the purchases related to these scow tows were not exempt from the State sales tax.

14. The scow tows originating in the Albany/Kingston area proceeded south on the Hudson River in New York waters toward New York harbor. When the scow tows reached Stony Point in New York, they proceeded west towards the New Jersey side of the river. The scow tows then proceeded south for 20 miles on the New Jersey side of the river. At this point the scow tow crossed the river to dock at a pier on the New York side of the river.

15. Prior to July 24, 1972, the scow tows were berthed by petitioner at a pier located in New York for purposes of disassembling the tows and delivering the individual scows to customers' docks for unloading. At no time did these scow tows ever berth in a state other than New York. Their only connection with another state was the 20 miles they traveled on the New Jersey side of the Hudson River.

16. Following July 24, 1972, when River Towing took over the transportation of the scow tows, River Towing followed the same route on the Hudson River with one exception. Instead of proceeding directly to a pier in New York for purposes of disassembling the scow tows and delivering the individual scows to various customers, River Towing first tied up the scow tows at a pier in Hoboken, New Jersey, from which the scows were taken across the river to a pier in New York for eventual delivery to customers.

17. The return trips to the Albany/Kingston area with the empty scows followed the same route through 20 miles of New Jersey waters as loaded scows followed on the trip down the river.

18. The scow tows crossed from the New York side of the Hudson River to travel for 20 miles in New Jersey waters for the following reasons:

(a) it was necessary for safety and navigational reasons to stay in New Jersey waters on this part of the Hudson River;

(b) it was necessary in order to avoid deep-draft ships which could travel only in the deeper areas of the river located on the New York side;

(c) by staying in the shallow waters on the New Jersey side of the river, the scow tows were able to partially mitigate the adverse effects of the tides and currents, thereby saving time and fuel.

19. It was an accepted custom and practice for scow tows to traverse the New Jersey side of the Hudson River in the New York City area.

20. Petitioner's corporate franchise tax return, filed under section 184 of the Tax Law, required an allocation of corporate earnings between New York and non-New York sources so that the portion of petitioner's earnings from scow tows between points in New York attributable to the 20 miles traveled in New Jersey waters were exempted from the franchise tax.

21. No evidence was presented that New Jersey could levy a sales tax on purchases related to the scow tows during the period they traversed 20 miles of New Jersey waters.

22. Petitioner's comptroller testified that no sales taxes were paid to New Jersey for any of the purchases made in relation to its scow tows.

CONCLUSIONS OF LAW

A. That there existed valid business and navigational reasons for the scow tows to take a detour and traverse 20 miles of New Jersey waters on the west side of the Hudson River even though the scow tows embarked and disembarked from points located in New York State.

B. That section 1115(a)(8) of the Tax Law exempts from sales and use taxes "(c)ommercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs...".

C. That the policy of the State Tax Commission, regarding section 1115(a)(8) of the Tax Law has always been consistent and is affirmed in its current regulations. Regulation 20 NYCRR 528.9(a)(5) provides "(e)ngaged in interstate or foreign commerce means the transportation of persons or property for compensation between states or countries".

D. That the passage of petitioner's scow tows through New Jersey waters as well as the use of the Hoboken, New Jersey pier by River Towing were incidental to what were essentially trips made between New York points. The mere crossing of state lines does not constitute primary engagement in interstate commerce [Circle Line-Statute of Liberty Ferry, Inc., STC, July 18, 1980].

E. That accordingly the tugs and scows used by petitioner in its towage activities on the Hudson River were not engaged in interstate commerce required by section 1115(a)(8) of the Tax Law.

F. That based on Finding of Fact "6" the additional sales or use tax due is \$38,180.58 and \$67,821.98 for the periods August 1, 1965 through November 30, 1968 and June 1, 1970 through November 30, 1973, respectively.

G. That the penalties are hereby cancelled and interest is reduced to the minimum statutory rate.

H. That the petition of Callanan Marine Corporation is granted to the extent indicated in Conclusions of Law "F" and "G" above; that the Audit Division is hereby directed to accordingly modify the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued September 30, 1969 and July 23, 1974; and that, except as so granted, the petition is in all other respects denied.

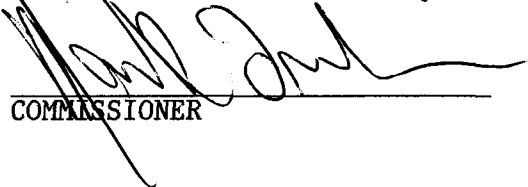
DATED: Albany, New York

JUL 16 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER