

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Great Lakes-Dunbar-Rochester	:	
A Joint Venture	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/69-5/31/74.	:	

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Great Lakes-Dunbar-Rochester, A Joint Venture, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Great Lakes-Dunbar-Rochester
A Joint Venture
228 N. La Salle St.
Chicago, IL 60601

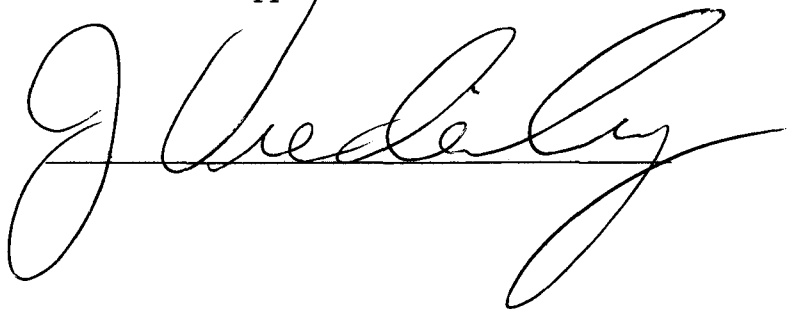
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
29th day of December, 1982.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Great Lakes-Dunbar-Rochester	:	
A Joint Venture	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/69-5/31/74.	:	

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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Peter D. Cook the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter D. Cook
Kavinsky, Cook, Sandler, Gardner, Wisbaum & Lipman
120 Delaware Ave.
Buffalo, NY 14202

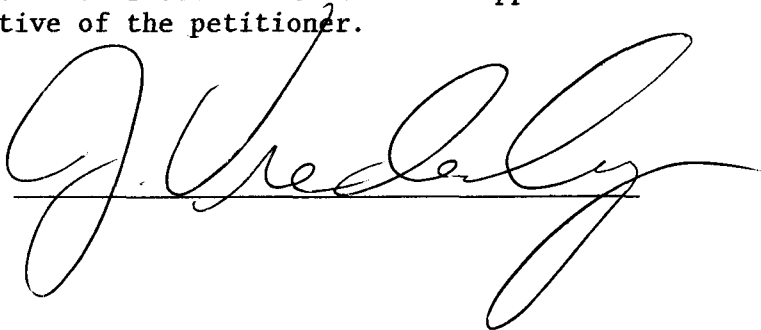
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
29th day of December, 1982.

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 29, 1982

Great Lakes-Dunbar-Rochester
A Joint Venture
228 N. La Salle St.
Chicago, IL 60601

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 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
Peter D. Cook
Kavinsky, Cook, Sandler, Gardner, Wisbaum & Lipman
120 Delaware Ave.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GREAT LAKES - DUNBAR - ROCHESTER	:	DECISION
A JOINT VENTURE	:	
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 December 1, 1969 through	:	
May 31, 1974.	:	

Petitioner, Great Lakes - Dunbar - Rochester, a joint venture, 228 North LaSalle Street, Chicago, Illinois 60601, 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 December 1, 1969 through May 31, 1974 (File No. 10148).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building #9, Albany, New York, on October 31, 1978. Petitioner appeared by Kavinoky, Cook, Hepp, Sandler, Gardner & Wisbaum, Esqs. (Peter D. Cook, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether the petitioner has the burden of proving that any receipt from a sale is nontaxable.

II. Whether a joint venture is a separate entity for sales and use tax purposes.

III. Whether the residence of the joint venture was Monroe County, New York.

IV. Whether the use, by the joint venture, of vessels and equipment owned by the joint venturers constituted a contribution of capital or a rental.

V. Whether penalty and interest in excess of the statutory minimum should be waived.

FINDINGS OF FACT

1. On August 16, 1974, the Sales Tax Bureau, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Great Lakes - Dunbar - Rochester, a joint venture, for the period December 1, 1969 through May 31, 1974 in the amount of \$334,795.65, plus penalty and interest of \$119,321.39, for a total of \$454,117.04. Petitioner timely filed a petition for revision of the aforesaid determination.

2. The notice of determination was based on the following:

Vendor purchases at 6 percent	\$ 31,587.80
Vendor purchases at 7 percent	8,146.70
Equipment rentals at 6 percent	293,920.05
Equipment purchases	1,141.10
	<u>\$334,795.65</u>

It represented use tax due on the rental vessels and parts and supplies charged to the vessels. At the hearing, petitioner only contested the tax on equipment rentals amounting to \$293,920.05.

3. Great Lakes Dredge and Dock Company is a New Jersey corporation with offices in Cleveland, Ohio and Chicago, Illinois. Dunbar & Sullivan Dredging Co., Inc. is a New York corporation with offices in Cleveland, Ohio and Warren, Michigan. In 1969 Great Lakes and Dunbar & Sullivan entered into an oral agreement to form a joint venture for the purpose of bidding on the construction of a sewage treatment plant for the City of Rochester, State of New York. The joint venture was the successful bidder for the aforementioned project. On September 12, 1969, the aforementioned venture, known as Great Lakes - Dunbar -

Rochester, entered into a written contract with the City of Rochester, State of New York, for the construction, complete, of a 10 foot diameter steel pipe outfall sewer approximately 18,000 feet long, extending out into Lake Ontario from a point on the south shore near the main sewage treatment plant west of Durand, Eastman Park, in accordance with certain plans and specifications at a cost of \$18,683,900.00. A performance bond was issued in connection with the said project.

4. On September 30, 1969, Great Lakes and Dunbar entered into a written agreement as joint venturers for the purpose of performing and completing the construction contract. The joint venture was to be known as "Great Lakes - Dunbar - Rochester". The agreement provided, in part, that each party was to be reimbursed for equipment, tools and/or machinery furnished to the joint venture at rental rates as set forth therein. It also provided that the agreement was to be construed to be a joint venture for the carrying out of the construction contract and nothing contained therein was to be considered to constitute the parties as partners nor constitute any party the general agent of the other.

5. The construction contract required the joint venture, during the performance of the contract, to maintain a suitable office at or near the site of the work. The records of the joint venture were kept and maintained at the office of Great Lakes in Chicago, Illinois.

6. The joint venture agreement further provided, in part, that the interests of the joint venturers were to be Great Lakes 66 2/3 and Dunbar 33 1/3. It also provided that:

"Insofar as reasonably possible, it is the intent that the parties hereto will participate in the furnishing of rental equipment and supervisory personnel balanced proportionate to the interest of each party as set forth above."

7. Over the life of the joint venture the individual venturers entered into various agreements with the joint venture. The invoices for these agreements charged the petitioner for salaries for supervisory personnel, towing charges and leasing of vessels. Each charge was clearly delineated. Petitioner drew checks from its own account made to the order of the individual venturer supplying the equipment and services.

8. In determining liability the Audit Division had included the aforementioned salaries and towing charges within the taxable rental amount. At the hearing, the Audit Division conceded that salaries and towing charges should have been excluded and the only charges taxable should have been those for the leasing of vessels.

9. At the hearing petitioner also contended that the burden of proof was on the Audit Division to show that the transactions in issue were taxable, that a joint venture is not a separate entity for sales and use tax purposes, and that, if taxable, petitioner was not a New York resident subject to use tax.

10. Although the joint venture did not file any sales or use tax reports in connection with the construction project, petitioner acted on advice of counsel and in good faith at all times and there was no intent to evade the tax.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that the burden of proving that any receipt is not taxable is on the taxpayer or person required to collect tax. Moreover, "once an assessment has been made, the burden of proof is on the taxpayer to show it was not properly applied to him" (Petrolane Northeast Gas Service, Inc. v. State Tax Commission, 79 A.D.2d 1043).

B. That a joint venture constitutes a separate and distinct person within the meaning and intent of section 1101(a) of the Tax Law (Matter of Ready Mix and Supply Corp., State Tax Commission, February 9, 1977) and is treated as a partnership for tax purposes (R. C. Glock and Co. v. Tankel, 12 A.D.2d 339, 345).

C. That each of the rental agreements entered into between petitioner and the individual venturers were separate and distinct contracts entered into on various dates after the joint venture established New York State and Monroe County residence by establishing an office and doing business at the work site. Petitioner was, therefore, a resident for use tax purposes.

D. That in accordance with the concession made by the Audit Division discussed in Finding of Fact "8", all sales and use taxes based on salaries and towing charges are hereby cancelled.

E. That the provisions of the joint venture agreement itself, together with the fact that the rental agreements in issue were entered into by separate and distinct entities and cash payments flowed among the separate bank accounts of the entities, more than provides "substantial evidence and a reasonable basis for the...conclusion that" the leasing of vessels and equipment by the joint venturers to the joint venture constituted the rental of tangible personal property and not a contribution of capital and was therefore subject to sales and use tax (see Concrete Delivery Co. v. State Tax Commission, 71 A.D.2d 330).

F. That penalty and interest in excess of the minimum prescribed by section 1145(a) of the Tax Law are waived.


G. That the petition of Great Lakes - Dunbar - Rochester, A Joint Venture is granted to the extent indicated in Conclusions of Law "D" and "F" above; that the Audit Division is hereby directed to modify the Notice of Determination

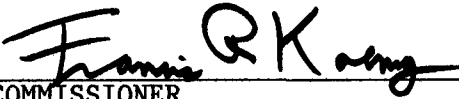
and Demand for Payment of Sales and Use Taxes Due issued August 16, 1974; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION


~~ACTING~~ PRESIDENT


COMMISSIONER


COMMISSIONER

TA-36 (9/76)

State of New York - Department of Taxation and Finance
Tax Appeals BureauREQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	UnTax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 1/13/83
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number ?	Date of Petition Dec F 12/29/82
Name Great Lakes - Hunbar - Rochester	
Address A Joint Venture 228 N. La Salle St. Chicago, Ill. 60601	

Results of search by Files

<input type="checkbox"/> New address:	AR file no found 1/13/83
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other: 914 856-9234	

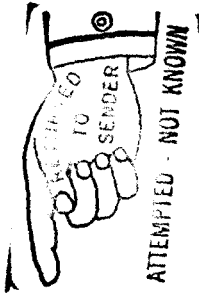
Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

TA 26 (9-79)

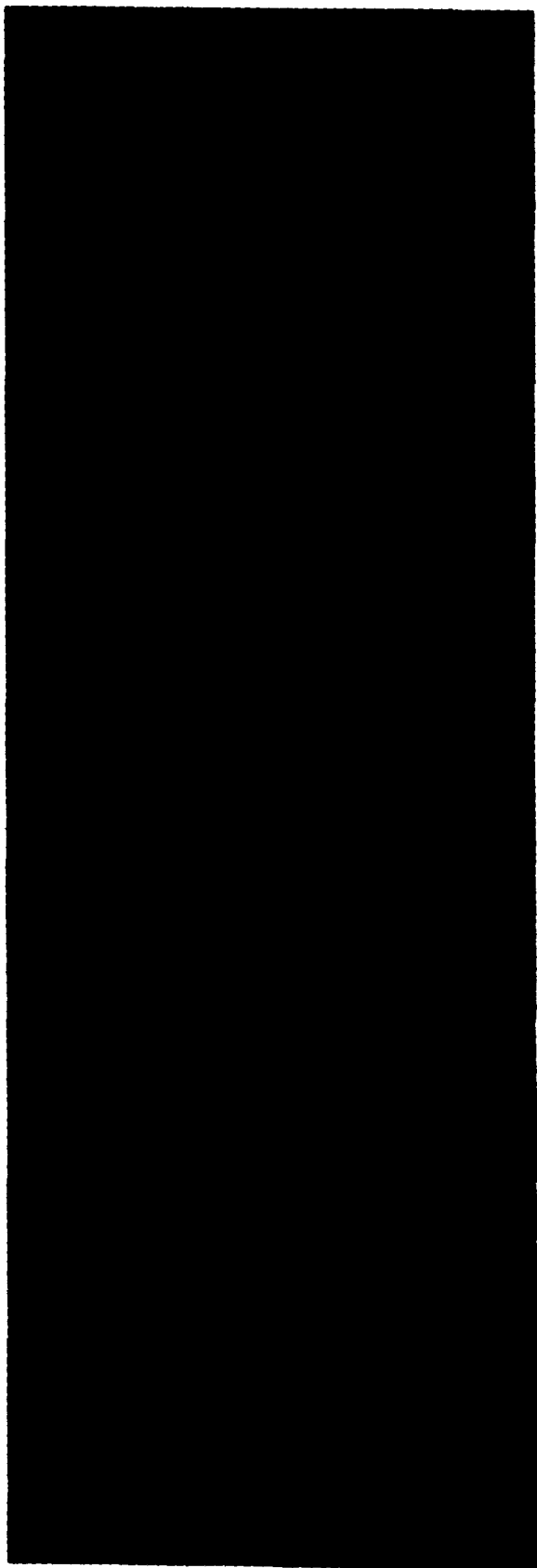
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N. Y. 12227



Unknown

Great Lakes-Dunbar-Rochester
A Joint Venture
228 N. La Salle St.
Chicago, IL 60601



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

December 29, 1982

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Very truly yours,

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Buffalo, NY 14202
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STATE OF NEW YORK

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and Demand for Payment of Sales and Use Taxes Due issued August 16, 1974; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 29 1982


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER