

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

December 29, 1982

Radiac Research Corp.; J. Tekin, E. Foley
and A. Green, Individually & as Officers
261 Kent Ave.
Brooklyn, NY 11211

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
Leonard J. Lefkort
Gilbert & Gilbert
10 E. 40th St.
New York, NY 10016
Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 12, 1980 at 9:15 A.M. Petitioner appeared by Gilbert & Gilbert, Esqs. (Leonard J. Lefkort, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

Whether Radiac Research Corp. was subject to sales or use tax on drums and vermiculite used to dispose of radioactive waste where it provided same to customers and removed them for disposal.

1. On September 15, 1977, Radiac Research Corp., ("Radiac") signed a consent extending the period of limitation for assessment of sales and use

taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1974 through May 31, 1977 to June 20, 1978.

2. On March 6, 1978, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against Radiac, J. Tekin, E. Foley and A. Green, individually and as officers, for the period June 1, 1974 through May 31, 1977 in the amount of \$35,237.16, plus penalty and interest of \$15,768.54, for a total of \$51,005.70.

3. Radiac is in the business of removing and disposing of radioactive waste material. It is required, by Federal and state laws and regulations, to use steel drums in accordance with United States Department of Transportation specifications, and to have the drums lined with an absorbent material where liquid waste is involved. Petitioner is licensed by the State Department of Labor and the Federal Nuclear Regulatory Commission. Radiac purchases the drums together with the vermiculite. The drums are, in accordance with the requirements of law, marked "CAUTION - RADIOACTIVE MATERIAL - RADIAC RESEARCH CORP.". The drums are supplied to customers who place the radioactive waste materials into the steel drums which are sealed by the customers. Thereafter, the radioactive waste material may not be removed from the drums. Radiac then picks up the steel drums containing radioactive waste material from the customer and ships them by an independent carrier to an approved Nuclear Regulatory Commission burial site outside of New York State. During the audit period 73 percent of Radiac's customers were located outside of New York State, 18 percent in New York City and 9 percent elsewhere in New York State.

Many of Radiac's customers select the company to remove radioactive waste material by means of competitive bidding. The specifications of the proposals

require that Radiac furnish Department of Transportation approved drums as part of the service.

Radiac has customers that are tax-exempt institutions, such as hospitals and universities. In those instances where the customers were not tax-exempt, applicable sales tax was collected on both the service and the drums.

The practice of Radiac was to render one bill for the entire service consisting of providing the drums and removing the filled drums. However, in some cases, the customers requested separate billing for the steel drums and vermiculite, and this was done. In some instances, petitioner acquires a new customer which has drums and vermiculite on hand from a previous supplier, in which case the customer is billed only for the service of removing the drums containing the radioactive waste material; likewise, where a customer to whom drums and vermiculite have been delivered subsequently uses another service to remove the radioactive waste, the customer is billed only for these drums and vermiculite.

4. Certain fixed assets purchased by Radiac upon which an unpaid sales tax of \$178.56 is owing was agreed to and stipulated to be paid by Radiac.

5. Radiac purchased all its drums in New Jersey. Total purchases amounted to \$392,037.00 on which no New York State sales or use tax was paid.

6. Upon audit, the Audit Division's examiner examined the general ledger, cash receipts and disbursements, federal income tax returns, sales tax returns, billing invoices and purchase invoices. An expense test was taken of the supply account for the month of May 1977. The test disclosed that \$2,919.47 of the total purchases of \$3,947.66 were made without paying sales tax resulting in a margin of error of 73.95 percent. This margin was then applied to the entire period in issue and \$48,119.00 was disallowed.

7. Radiac maintained adequate books and records from which the actual amount of the tax liability could be determined.

8. Radiac acted in good faith and cooperated with the examiners.

CONCLUSIONS OF LAW

A. That Radiac is in the business of providing a service in removing and disposing of radioactive material, and providing to customers certain types of containers in order to perform said service. Therefore, the purchase of drums by Radiac is subject to the imposition of compensating use tax within the meaning and intent of section 1110 of the Tax Law. Total purchases amounted to \$392,037.00. Purchases involving \$13,936.00 are taxable at 7 percent and purchases involving \$378,101.00 are taxable at 8 percent for a total tax of \$31,223.00.

B. That use of a one-month test period to determine other sales or use tax liability over a period of three years, when Radiac's purchase invoices for the entire period under review were available for examination, was improper. "(R)esort to this method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit." Chartair, Inc. v. State Tax Commission, 66 A.D.2d 44, 46 (3rd Dept. 1978). Consequently, only that portion (May 1977) of the assessment based on an actual audit of Radiac's invoices can be sustained. Disallowed taxable items for the month of May 1977 was \$2,919.47 which at the 8 percent tax rate amounts to \$233.52 due, and that portion based on the one-month test (which used the margin of error percentage for the remainder of the period) is cancelled. Therefore the tax due is for the month of May 1977, only.

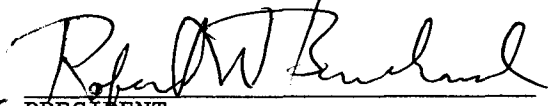
C. That section 1145(a) of the Tax Law provides that if the delay in filing or paying over any tax found to be due is found to be excusable by the Tax Commission, it may remit any or all penalties, and interest in excess of the statutory minimum. Accordingly, the delay is found to be excusable and all penalties and interest in excess of the statutory minimum are hereby cancelled.

D. That the petition of Radiac Research Corp., J. Tekin, E. Foley and A. Green, individually and as officers, is granted to the extent indicated in Conclusions of Law "B" and "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 6, 1978 is to be modified accordingly; and that except as so modified, the notice is sustained.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

P 230 844 373
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO Leonard J. Loffkorn		
STREET AND NO. 10 E. 40th St		
P.O., STATE AND ZIP CODE NEW York N.Y. 10016		
POSTAGE \$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢
	SPECIAL DELIVERY	¢
	RESTRICTED DELIVERY	¢
	SHOW TO WHOM AND DATE DELIVERED	¢
	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES \$		
POSTMARK OR DATE		

P 230 844 372
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO Radiac Research Corp		
STREET AND NO. 261 Kent Ave		
P.O., STATE AND ZIP CODE Brooklyn N.Y. 11211		
POSTAGE \$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢
	SPECIAL DELIVERY	¢
	RESTRICTED DELIVERY	¢
	SHOW TO WHOM AND DATE DELIVERED	¢
	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES \$		
POSTMARK OR DATE		

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Radiac Research Corp. :
J. Tekin, E. Foley and A. Green :
Individually & as Officers : 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 6/1/74 - 5/31/77. :
_____ :

State of New York
County of Albany

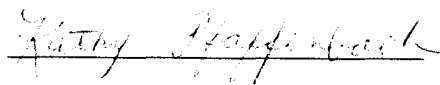
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Leonard J. Lefkort the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard J. Lefkort
Gilbert & Gilbert
10 E. 40th St.
New York, NY 10016

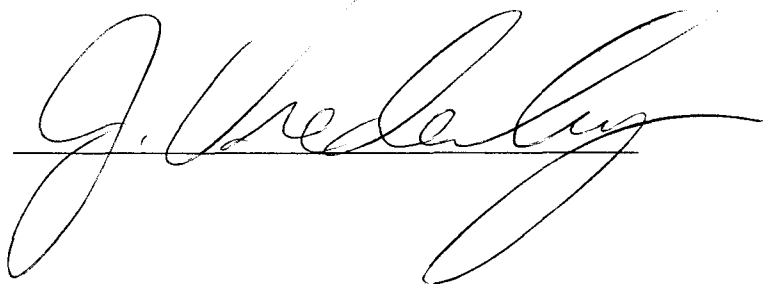
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 Haffner

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174


Jay Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Radiac Research Corp. :
J. Tekin, E. Foley and A. Green, :
Individually & as Officers : 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 6/1/74 - 5/31/77. :

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 Radiac Research Corp.; J. Tekin, E. Foley, and A. Green, Individually & as Officers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Radiac Research Corp.
J. Tekin, E. Foley and A. Green
Individually & as Officers
261 Kent Ave.
Brooklyn, NY 11211

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 Pappasbach
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

J. Vredenburg