

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

May 6, 1983

Brewer Dry Dock Company  
Somerville Rd.  
Bedminster, NJ 07921

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  
Harvey M. Spear  
c/o Davis & Cox  
One State Street Plaza  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
BREWER DRY DOCK COMPANY  
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 June 1, 1974  
through June 5, 1979.

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DECISION

Petitioner, Brewer Dry Dock Company, 2945 Richmond Terrace, Staten Island, New York 10303, 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 June 1, 1974 through June 5, 1979 (File No. 28043).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1982 at 1:15 P.M. Petitioner appeared by Davis & Cox, Esqs. (Harvey M. Spear, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether grit, degreasing materials, oxygen and acetylene used by petitioner in the maintenance and repair of commercial vessels primarily engaged in interstate and foreign commerce are exempt from tax by virtue of sections 1105(c)(3) and 1115(a)(8) of the Tax Law.

FINDINGS OF FACT

1. On July 11, 1979, the Audit Division issued to petitioner, Brewer Dry Dock Company, two notices of determination and demand for payment of sales and use taxes due, assessing additional sales and use taxes for the period June 1,

1974 through May 31, 1979 in the amount of \$71,308.73, plus interest, and in addition thereto, \$98,000.00 in sales taxes due upon the bulk sale of the business on June 5, 1979.

Mr. Kenneth DeForest, petitioner's executive vice president, had executed four consents extending period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law to such dates as shown below.

<u>DATE CONSENT EXECUTED</u>	<u>TAXABLE PERIODS COVERED</u>	<u>DATE THROUGH WHICH PERIOD OF LIMITATION EXTENDED</u>
9/19/77	6/74 - 5/77	9/19/78
8/14/78	6/1/74 - 5/31/78	12/20/78
11/15/78	6/1/74 - 5/31/78	6/20/79
5/8/79	6/1/74 - 11/30/78	9/20/79

2. On or about September 21, 1979, petitioner filed a petition for revision of the above-mentioned determination.

3. After discussions with representatives of the Audit Division, petitioner signed a Withdrawal of Petition and Discontinuance of Case agreeing with \$1,182.92 and disagreeing with \$64,198.35 of a revised tax due. Thereafter, the Audit Division issued notices of assessment review for the revised tax due of \$65,381.27 plus interest computed at the minimum statutory rate. Payments totaling \$65,223.61 have been applied toward the revised assessments. No evidence has been offered as to the reason for said payments.

At the formal hearing, petitioner withdrew its objection to \$27,968.79 of the disagreed tax due. Therefore, the amount of taxes remaining in dispute is \$36,229.56, representing tax upon \$453,457.00 of purchases of materials by petitioner between June 1, 1974 and June 5, 1979.

4. Petitioner's business was the repair of oceangoing ships and coastwise vessels (such as oil transportation barges) engaged in interstate and foreign commerce. Petitioner purchased all supplies with a resale certificate and thus paid no sales tax on such purchases. However, petitioner kept records of materials consumed in the repair and maintenance of its own facilities and quarterly reported and paid tax on such materials.

5. The types of repairs petitioner performed on ships and the materials used may be illustrated by the following examples.

(a) Petitioner removed deteriorated or damaged steel plates from a ship's hull by means of a burning torch. The ironworker foreman made a template of each plate removed, using a new standard-sized steel plate. After the template was cut, any steel remaining was discarded. The new plate was installed into the hull by welding or riveting.

In welding, electrical energy is applied to a welding rod composed of metal and flux. Upon application of electricity, the flux interacts with the metal, the metal melts and fuses with the seams of the steel plate, and the flux becomes a powder which drops to the floor of the dry dock.

The Audit Division did not claim any taxes due upon petitioner's purchases of such steel plates or welding rods.

(b) Petitioner replaced sections of a ship's wooden rail. Petitioner purchased lumber in very large sizes (e.g., 24 inches by 12 inches by 20 feet), which its carpenters shaped with adzes. The resulting curved rail might represent only half the original piece of lumber; the residue, wood chips and sawdust, was discarded.

The Audit Division did not claim any unpaid taxes due upon petitioner's purchases of such lumber.

(c) Petitioner repainted ships' hulls. The hull was prepared for painting by sandsweeping or sandblasting and if the customer wished, by degreasing.

The sandblaster propels grit, copper slag which has the consistency of sand, against the hull at high velocity. In sandblasting, all paint, barnacles, moss and debris are removed to restore the hull to bare metal. In sandsweeping, which requires about one-third as much grit, only the loose material is removed from the hull. After blasting, the grit falls to the dry dock floor and is discarded.

When a customer requested removal of the oil slick at the waterline of the hull, petitioner applied degreaser by brush or roller. Degreaser is a solvent which softens the oil and renders it easily removable. The oil, grease and solvent were washed away and discarded.

Paint was generally sprayed onto the hull. Although this method wasted more paint than application by brush, the cost was offset by a savings in labor. The lost paint dropped to the floor of the dry dock.

The Audit Division did not claim any unpaid taxes due upon petitioner's purchases of paint and paint thinner used in painting customers' ships.

(d) Petitioner performed repairs on engines of vessels. The Audit Division did not claim any unpaid taxes upon petitioner's purchases of engine parts installed pursuant to such repairs.

6. The materials, petitioner's purchases of which are herein at issue, are grit, degreasers, oxygen and acetylene. The grit was used in sandsweeping and sandblasting and the degreasers in the cleaning of hulls, as above-described.

The acetylene and oxygen were consumed in burning torches, the tools used to cut steel plates from the hull, also as above-described. The two gases combine in the torch to form an intense heat. Prior to the period under audit, the Audit Division had never claimed taxes to be due from petitioner upon its purchases of these materials.

7. Article 28, as originally enacted in 1965, did not contain any exemption or exception applicable to the ship repair industry (at least regarding the services rendered by the industry). At that time Mr. DeForest was president of the New York and New Jersey Dry Dock Association. He and other industry representatives immediately prevailed upon their legislators to correct this omission. The Association retained an attorney to work with the legislators in drafting a bill, which was passed by the legislature the following year (L. 1966, ch. 918). With specific regard to the items at issue in this proceeding, Mr. DeForest testified at the hearing, "Well, my understanding in connection with those three items was that [they were] no different than a piece of steel plate or any other material that either went on or did not go on the ship, so long as [they were] used directly in the maintenance and repair of the ship and...not used in our plant for our own plant maintenance."

8. Petitioner's opposition to the assessment rests upon two grounds: (a) that adoption of the Audit Division's position would substantially reduce the effectiveness of the tax relief the legislature sought to provide to the New York ship repair industry by sections 1105(c)(3) and 1115(a)(8) of the Tax Law; and (b) that according to the statutory language, the ship repair exemption is applicable, whether or not any tangible personal property is transferred in conjunction with the performance of ship repair and maintenance services.

### CONCLUSIONS OF LAW

A. That paragraph (3) of section 1105, subdivision (c) of the Tax Law, as in effect during the period under consideration, imposed tax upon the receipts from every sale (except for resale) of certain services, as follows:

"Installing tangible personal property, or maintaining, servicing or repairing tangible personal property...whether or not any tangible personal property is transferred in conjunction therewith,...except such services rendered on or after August first, nineteen hundred sixty-five with respect to commercial 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 (other than with respect to articles purchased for the original equipping of a new ship)...". (Emphasis supplied.)

Paragraph (8) of section 1115, subdivision (a) specifically exempts from sales and use taxes receipts from retail sales of certain property, as follows:

"Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

\* \* \*

"(8) Commercial 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 (other than articles purchased for the original equipping of a new ship)." (Emphasis supplied.)

B. That mindful of the legislative intent underlying section 1105(c)(3) to preserve a ship repair industry in New York, this Commission nevertheless finds the above-quoted statutory language unambiguous. The cited provisions except from the sales tax the services of repairing and maintaining commercial vessels primarily engaged in interstate or foreign commerce and exempt property used by or purchased for the use of such vessels. The grit, degreasers, oxygen and acetylene were neither sold to the owners of the vessels petitioner serviced

and repaired, nor were they incorporated as a component of the vessels.

Accordingly, the Audit Division properly treated petitioner's purchases of such supplies as taxable under section 1105, subdivision (a). This conclusion is supported by the unanimous decision of the Third Department in Matter of Todd Shipyards Corp. v. State Tax Comm., 52 A.D.2d 126.

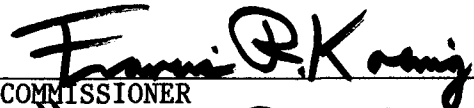
C. That the petition of Brewer Dry Dock Company is hereby denied in all respects.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Brewer Dry Dock Company	: : : : : :	: : : : : :
		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 6/1/74-6/5/79.		

State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Brewer Dry Dock Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brewer Dry Dock Company  
Somerville Rd.  
Bedminster, NJ 07921

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  
6th day of May, 1983.

David Parchuck

William D. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Brewer Dry Dock Company	: : :	: : :
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 6/1/74-6/5/79.		:

State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Harvey M. Spear the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey M. Spear  
c/o Davis & Cox  
One State Street Plaza  
New York, NY 10004

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  
6th day of May, 1983.

David Parchuck

Commie D. Hagellund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

P 481 207 715

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Harvey M. Spear</u>	
<u>elo Davis &amp; Cox</u>	
Street and No.	
<u>One State Street Plaza</u>	
P.O., State and ZIP Code	
<u>New York, NY 10004</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 207 714

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Brewer Dry Dock Company</u>	
<u>Somerville Rd.</u>	
Street and No.	
P.O., State and ZIP Code	
<u>Bedminster, NJ 07921</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982