

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

October 7, 1983

Firelands Sewer & Water Construction Co., Inc.
P.O. Box 864
Mansfield, OH 44901

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James C. Hinckley
Maloney, Gallup, Roach, Brown & McCarthy
1620 Liberty Bank Bldg.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Firelands Sewer & Water Construction Co., Inc. :
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 6/1/76-11/30/78. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Firelands Sewer & Water Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Firelands Sewer & Water Construction Co., Inc.
P.O. Box 864
Mansfield, OH 44901

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
7th day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Firelands Sewer & Water Construction Co., Inc. :
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 6/1/76-11/30/78. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon James C. Hinckley the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James C. Hinckley
Maloney, Gallup, Roach, Brown & McCarthy
1620 Liberty Bank Bldg.
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
7th day of October, 1983.

Susan Powell

Connie Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
FIRELANDS SEWER & WATER CONSTRUCTION CO., INC. : 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 Period June 1, 1976 :
through November 30, 1978.

Petitioner, Firelands Sewer & Water Construction Co., Inc., P.O. Box 864, Mansfield, Ohio 44901, 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, 1976 through November 30, 1978 (File No. 31261).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on April 21, 1982 at 1:15 P.M. Petitioner appeared by Maloney, Gallup, Roach, Brown & McCarthy, P.C. (James E. Morris and James C. Hinckley, Esqs. of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the contract between petitioner and a subcontractor for trucks to haul material to and from a job site constituted the rental of tangible personal property or whether the transaction was for transportation services.

FINDINGS OF FACT

1. Petitioner, Firelands Sewer & Water Construction Co., Inc. ("Firelands") signed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1976 through November 30, 1978 to December 20, 1980.

2. On August 11, 1980, based upon an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Firelands in the amount of \$47,074.44 plus interest of \$14,388.10 for a total of \$61,462.54.

3. Petitioner timely filed a petition for a hearing to review the aforementioned notice.

4. At the hearing, the Audit Division conceded to a reduction of \$2,572.25 in the notice due to the overstatement, at the time of the audit, of the value of the tugboat "Bell". The sole remaining issue is petitioner's contract with Spezio Hauling and Excavating Corp. on which tax of \$13,254.47 was assessed by the notice.

5. The following findings of fact proposed by petitioner are accepted herewith. Proposed Finding "o" is rejected because it is conclusory.

a. Petitioner, a general contractor, entered into a contract with Rochester Pure Waters District, Monroe County, New York, as owner, for sewer and water line construction work.

b. Pursuant to such general contract, petitioner entered into a subcontract agreement with Spezio Hauling and Excavating Corp., dated March 3, 1976.

c. Under the terms of said subcontract, Spezio agreed to furnish petitioner with gravel, sand, fill and topsoil at a fixed price per cubic yard including delivery, "as required, scheduled and directed by Firelands authorized personnel".

d. Additionally, under the terms of said subcontract, Spezio agreed to "furnish the necessary tandem dump trucks as required, scheduled and directed by Firelands authorized personnel".

e. Under the terms of the subcontract, Firelands was to pay Spezio for the dump trucks, including driver, at an hourly rate.

f. Spezio's duties under the subcontract were to remove excavated materials from the jobsite if the materials were unsuitable as backfill, or if the materials were suitable

for backfill, to transport the materials to the area to be backfilled.

g. The truck drivers were paid employees of Spezio and not of Firelands. All wages, fringe benefits, withholding taxes, and workman's compensation insurance premiums were paid by Spezio.

h. The dump trucks were owned either by Spezio or by independent owner-drivers employed by Spezio. All gasoline, oil, repairs and maintenance were furnished by Spezio.

i. The dump trucks were loaded by backhoes operated by Firelands personnel. Unloading was done under the general supervision of Firelands personnel in so far as Firelands personnel directed the drivers where to unload.

j. Routes taken by drivers removing material from the jobsite were chosen by the drivers.

k. The dump trucks were not left on the job site during nights or weekends.

l. Spezio furnished Firelands with a payment bond and a performance bond in connection with the subcontract.

m. The subcontract contained an indemnity agreement, liquidated damages clause, non-segregatged (sic) facilities clause and other provisions not generally found in vehicle rental contracts.

n. The only reference in the subcontract to "truck rentals" was a clause typed in by the vendor, Spezio, to protect himself from premium labor costs on weekends and holidays.

CONCLUSIONS OF LAW

A. That section 1105 of the Tax Law imposes, in part, a sales tax on receipts from retail sales, including rentals, of tangible personal property and certain services. Transportation is not one of the enumerated services.

B. That petitioner did not rent trucks. Spezio Hauling and Excavating Corp. had exclusive possession of the trucks and a sufficient degree of control over them while in the hire of petitioner so as to be furnishing a transportation service exempt from the imposition of sales tax (Matter of C.D. Perry & Sons, Inc., State Tax Commission, June 24, 1977).

C. That in accordance with Finding of Fact "4" the tax determined due on petitioner's tugboat the "Bell" is excessive by \$2,572.25.

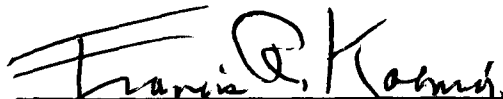
D. That the Petition of Firelands Sewer & Water Construction Co., Inc. is granted to the extent indicated above in Conclusions "B" and "C"; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 11, 1980; that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 049

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Firelands Sewer & Water Const. Co. Inc.</i>	
Street and No. <i>PO Box 864</i>	
P.O., State and ZIP Code <i>Manassas OH 44901</i>	
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 470 316 050

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>James C Hinckley</i>	
Street and No. <i>1670 Liberty Bank Bldg</i>	
P.O., State and ZIP Code <i>Buffalo NY 14202</i>	
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