

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

April 1, 1983

Morania Oil Tanker Corp.  
Att: Raymond Tekverk, V.P.  
136 E. 57th St.  
New York, NY 10022

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of

Morania Oil Tanker Corp. :

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:  
6/1/73-2/28/77.

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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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Morania Oil Tanker Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morania Oil Tanker Corp.  
Att: Raymond Tekverk, V.P.  
136 E. 57th St.  
New York, NY 10022

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  
1st day of April, 1983.

David Parchuck

James A. Haglund  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MORANIA OIL TANKER CORP.	:	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, 1973	:	
through February 28, 1977.	:	

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Petitioner, Morania Oil Tanker Corp., 136 East 57th Street, New York, New York 10022, 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, 1973 through February 28, 1977 (File No. 26288).

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 29, 1982 at 9:15 A.M. Petitioner appeared by Raymond Tekverk, Vice President and Treasurer. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the exemption for commercial vessels "primarily" engaged in interstate commerce, as provided in section 1115(a)(8) of the Tax Law, is to be applied on an individual vessel basis or on an entire fleet basis.

FINDINGS OF FACT

1. On October 5, 1977, the Audit Division issued to petitioner, Morania Oil Tanker Corp. ("Morania"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing additional sales and use taxes for the

period June 1, 1973 through February 28, 1977 in the amount of \$170,240.98, plus penalty and interest thereon.

Raymond Tekverk, petitioner's vice president and treasurer, signed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the taxable period June 1, 1973 through August 31, 1976, to and including December 19, 1977.

2. Petitioner is principally engaged in the marine transportation of petroleum products, including asphalt, fuel oil, diesel oil and gasoline, along the eastern seaboard and along the southern coast of the United States in the Gulf of Mexico. Most of petitioner's trips originate at a refinery, but petitioner also transports petroleum products between its customers' storage facilities. During the period under consideration, petitioner owned and operated 8 tugboats, 3 self-propelled barges and 9 dumb barges (barges with no propulsion unit which are pulled on hawsers or pushed by tugs).

3. Petitioner's principal offices are situated on 57th Street in Manhattan. Morania also maintains a shipyard where its employees perform some repairs to machinery; not all repairs to petitioner's vessels are done at the shipyard because the facilities are inadequate for drydocking. Since September, 1974, the shipyard has been located on Staten Island; prior thereto it was in Jersey City, New Jersey.

4. In addition to petroleum products, petitioner also hauled sand and gravel during a portion of the audit period for the McCormack Sand Company, a division of Penn Industries (petitioner's parent corporation). The material was loaded onto the barges in South Amboy, New Jersey, and occasionally transported up the Hudson River to New York customers.

5. During the audit period, one of petitioner's barges (Number 130) and one tug (Number 8) were dedicated to the service of Consolidated Edison to supply that corporation with additional storage space for fuel oil. Consequently, these vessels operated approximately 50 percent of the time within this state.

6. Morania billed its customers by invoice for each trip made and retained a copy of each invoice. For bookkeeping purposes and to ascertain profitability, petitioner attributed 60 percent of the revenue of a trip to the tug and the remaining 40 percent to the barge. A higher allocation was made to the tug because tugs require a larger crew and are therefore more costly to operate.

7. The auditing methods used by the sales tax examiner are summarized below. (Those portions of the audit not in dispute herein are not discussed.)

(a) The examiner made a test of the receipts from vessel usage for 1975, a test period agreed to by Mr. Tekverk on behalf of petitioner, to determine which vessels were not primarily engaged in interstate commerce. For each individual vessel, the examiner determined the percentage of revenue derived from intrastate trips as compared to total revenue derived from all trips made by that vessel in the test year. He concluded that tugs 6, 8 and 14 and barges 130, 170, 180 and 190 were not primarily engaged in interstate commerce, based upon his computations that each enumerated vessel had derived more than 25 percent of its 1975 revenue from intrastate transportation.

(b) The examiner found purchases of \$424,780.00 made by petitioner in the test year for fuel and supplies for and repair services to vessels 6, 8, 14, 130, 170, 180 and 190. Using the test year as a base, the examiner calculated \$1,770,489.00 of expense purchases applicable to the allegedly taxable vessels for the entire audit period.

(c) Fixed asset purchases were examined for the entire audit period. The examiner found \$8,515.00 in purchases of equipment used on the allegedly taxable vessels upon which purchases petitioner had not paid tax.

(d) Finally, the examiner assessed petitioner taxes on charter fees for rentals of the allegedly taxable vessels.

8. Petitioner's fundamental disagreement with the audit concerns the method by which the examiner determined whether vessels were primarily engaged in interstate commerce. Petitioner asserts that the test should be applied on a fleet basis, and not an individual vessel basis. When considered as a fleet, the revenue from intrastate transportation totalled \$1,266,555.00 for 1975, or 16.06 percent of all petitioner's revenue from transportation for that year. Petitioner further asserts that insofar as the vessels are interchangeable, it could easily have diverted any vessel approaching the 25 percent point (of revenue from intrastate trips) to interstate business thenceforth, thereby avoiding its designation as taxable for that year.

9. After the audit was completed, Mr. Tekverk reviewed all receipts from vessel usage for the entire period June 1, 1973 through February 28, 1977 and ascertained that according to the Audit Division's individual vessel method, only 4 of petitioner's vessels were not primarily engaged in interstate commerce: tugs 8 and 14 and barges 130 and 180. The sales tax examiner confirmed Mr. Tekverk's calculations, and the Audit Division conceded that the correct amount of tax is \$98,824.89, and not \$170,240.98.

#### CONCLUSIONS OF LAW

A. That paragraph (8) of section 1115, subdivision (a) of the Tax Law 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)."

The regulations promulgated under the above-quoted provision furnish the following definition for the term "primarily":

"Primarily means that at least seventy-five percent of the receipts from the vessel's activities are derived from interstate or foreign commerce." (Emphasis supplied.) 20 NYCRR 528.9(a)(4), effective September 1, 1976.

B. That, in general, the burden of proving that any receipt is not taxable under Articles 28 and 29 falls upon the person required to collect the tax or the customer. Section 1132(c). Petitioner herein, seeking entitlement to an exemption, must shoulder a somewhat heavier burden:

"It is clear beyond dispute that, when we are dealing with a claim for exemption from taxation, 'it must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption' (People ex rel. Savings Bank of New London v. Coleman, 135 N.Y. 231, 234). 'The policy of the law is to construe statutes exempting property from taxation somewhat rigidly, and not to permit such exemption to be established by doubtful implication' (People ex rel. Mizpah Lodge v. Burke, 228 N.Y. 245, 247-248)." Matter of Young v. Bragalini, 3 N.Y.2d 602, 605-606.

C. That petitioner has failed to establish that tugs 8 and 14 and barges 130 and 180 were primarily engaged in interstate commerce during the period June 1, 1973 through February 28, 1977. Petitioner's position that the 75-percent test is properly applicable on a fleet basis, and not an individual vessel basis, cannot be sustained. Application of the test to petitioner's entire fleet would exempt four vessels, each of which derived over 25 percent of its

receipts from intrastate business, contrary to the language and intendment of section 1115(a)(8).

The Commission's treatment of vessels on an individual basis for purposes of the exemption was at least tacitly approved by the Court of Appeals in Matter of Great Lakes Dredge & Dock Co. v. Dept. of Taxation and Finance, 39 N.Y.2d 75. In summarizing the findings of the Tax Commission, the Court stated that certain vessels involved in the corporation's dredging activities were not exempt under section 1115(a)(8) because they did not move across state lines while engaged in their usual work tasks. However, the Court further stated that as to some tugboats and scows which hauled waste materials across state lines, the Commission did not find the evidence submitted sufficient to show that the activity of these vessels was within the exemption. The determination of the Commission was confirmed. See also Matter of Circle Line-Statue of Liberty Ferry, Inc., State Tax Comm., July 18, 1980, wherein each vessel in question was treated individually.


D. That the petition of Morania Oil Tanker Corp. is hereby denied, and the assessment, as reduced by the stipulation of the Audit Division to \$98,824.89, plus interest, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 01 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 389 758 760  
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Morania OPI Tanker</u>	
<u>Attn: Raymond Tekverk, V.P.</u>	
Street and No. <u>136 E. 57th St.</u>	
P.O., State and ZIP Code <u>New York, NY 10022</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