

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

May 6, 1983

Nepco Terminal Corp.
c/o Charter Oil Co. - ATTN: Ronald E. Currey
21 W. Church St, P.O. Box 4726
Jacksonville, FL 32232

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

In the Matter of the Petition :
of :
Nepco Terminal Corp. :
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 11/1/77-11/1/78. :

AFFIDAVIT OF MAILING

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 Nepco Terminal Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nepco Terminal Corp.
c/o Charter Oil Co. - ATTN: Ronald E. Currey
21 W. Church St, P.O. Box 4726
Jacksonville, FL 32232

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

James A. Schellman

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
NEPCO TERMINAL 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 November 1, 1977	:	
through November 1, 1978.	:	

Petitioner, Nepco Terminal Corp., c/o Charter Oil Co., 21 West Church Street, P.O. Box 4726, Jacksonville, Florida 32232, 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 November 1, 1977 through November 1, 1978 (File No. 30749).

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 March 24, 1982 at 9:15 A.M. Petitioner appeared by Douglas J. Brown and Ronald E. Currey. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether the refurbishment of petitioner's oil storage tanks and the dike areas appurtenant thereto constituted, in whole or in part, repairs to real property.

FINDINGS OF FACT

1. On or about June 29, 1979, petitioner, Nepco Terminal Corp., submitted to the Audit Division an Application for Credit or Refund of State and Local Sales or Use Tax, covering the period December, 1977 through November, 1978 and

seeking a refund in the amount of \$76,443.65. Petitioner explained in the application that work commenced by various contractors, upon which petitioner had paid sales tax, had evolved into capital improvements for which certificates of capital improvement were issued; hence, petitioner sought refund of the sales taxes because the nature of the project, when viewed as a whole, was a capital improvement. Appended to the application was a schedule listing the contractors, the amounts of the invoices, the sales taxes paid and the refunds claimed. The schedule may be summarized as follows:

<u>CONTRACTOR</u>	<u>TOTAL AMOUNT PAID</u>	<u>SALES TAXES PAID</u>	<u>REFUND CLAIMED</u>
Chicago Bridge & Iron Company	\$751,806.03	\$57,512.47	\$57,512.47
Kelle Corporation	143,151.55	10,603.17	10,603.17
Astro Pak	160,869.42	6,082.90	6,082.90
Hownor Associates, Inc.	20,752.20	1,537.20	1,537.20
Weldrite Company, Inc.	8,516.88	597.28	597.28
Expert Concrete Breakers, Inc.	1,493.49	110.63	110.63

Appendix A, attached to this decision, sets forth by contractor the date of each invoice, a description of the work encompassed by the invoice and the amount billed to petitioner by the contractor.

2. On June 27, 1980, the Audit Division denied petitioner's refund claim in full, offering the following explanation therefor:

"The original work performed on your firm's oil tanks was repair and maintenance to real property pursuant to Section 1105(c)(5) thus the contractors rightly charged you sales tax on the amount of their billing to your firm. When at a later date, your firm entered into contracts for capital improvements to real property and your firm issued Certificates of Capital Improvement (ST-124) to the contractors performing said capital improvements, the certificates would not be retroactive and change the nature of the original repair and maintenance work performed."

3. In April, 1977, petitioner discovered a leak in the space between two oil storage tanks at its complex "B" on North First Street in Brooklyn, New York.

The two tanks, numbers 500 and 600, each hold approximately 350,000 barrels of oil.

4. On May 4, 1977, petitioner engaged Coastal Services, Inc. to remove the oil from the dike area around tank 600, to prepare the walls and floor of the dike for sealing and to make the walls and floor water- and oil-tight. (Sales taxes, if paid, on services rendered by Coastal Services, Inc. were not encompassed by petitioner's refund claim.)

In July, 1977, petitioner engaged Chicago Bridge & Iron Company ("CBI") to inspect and report on the damaged tanks. CBI pumped the oil out of the tanks but did not perform any special cleaning. CBI determined that a substantial number of braces inside the tanks had sheared or bowed, and that the lower portions of the plates (the coffer dam walls between the tanks) were deformed, possibly due to severe winter weather conditions. This contractor recommended both tanks be thoroughly cleaned in order to permit "elevation measurements and further inspection."

On October 27, 1977, petitioner ordered the complete chemical cleaning of tanks 500 and 600 by Astro Pak at an initial estimated cost of \$30,000.00. The contract price was increased on five subsequent occasions to cover additional cleaning services.

The final cleaning of tank 600 was completed in December, 1977 and of tank 500 in January, 1978.

In December, 1977, CBI furnished the services of a senior engineering specialist and a senior construction specialist to conduct a thorough inspection of the two tanks. This further inspection revealed that the floor of tank 500 and various sections of the walls of both tanks had suffered extensively from corrosion, thereby necessitating the replacement of the entire floor of tank

500 and of the affected areas of the walls. This work was completed by CBI in 1978.

Meanwhile, after the dike area was cleaned, examination thereof disclosed that all anchor bolts in the tank and walls had sheared. (On February 1, 1978, petitioner engaged Hownor Associates, Inc. to break up and remove all concrete above the foundation slab in the dike area around tanks 400, 500 and 600 at a cost of \$9,600.00.) Replacement of the bolts was completed by CBI in August, 1978. In addition, based on an initial inspection of tank 400 in complex "A", petitioner discovered that this tank sustained damage similar to that of tanks 500 and 600. Work on tank 400, including installation of an elevated cover, was concluded late in 1978.

On December 29, 1979, petitioner had entered into a contract with Kelle Corporation for "performance of fire watch duties, as required by the N.Y.C. Fire Department, during the reconstruction of Tanks 500 and 600 at owner's terminal facility..." at an estimated price of \$19,170.00. The term of the contract was extended and the price raised on several subsequent occasions, for provision of fire watch until work on all three tanks was carried to completion.

Purchase orders introduced in evidence by petitioner reveal the services performed and materials furnished by the various contractors. Appendix B, attached to this decision, provides a summary of these invoices, including the date and amount of each invoice and a description of the work ordered.

5. The work as above-described was initially undertaken to repair the leak between tanks 500 and 600. After examination revealed the extensive corrosion and deterioration sustained by the tanks, and petitioner concluded that the work was in the nature of a capital improvement, it issued Certificates

of Capital Improvement to its various contractors. Petitioner issued a certificate to CBI on October 26, 1978 and to Kelle Corporation and to Weldrite Company, Inc. on November 15, 1978.

6. The original cost to petitioner of complex A was \$996,008.00; the cost of complex B was \$1,126,452.00. Petitioner began calculating and deducting depreciation in 1965, utilizing a 20-year useful life.

The total cost of restoring the three tanks was approximately 3.7 million dollars. The improvements were placed in service in April, 1979 and are being depreciated over a 30-year useful life.

CONCLUSIONS OF LAW

A. That subdivision (a) of section 1105 of the Tax Law imposes a tax on the receipts from the retail sale of tangible personal property. Paragraph (5) of subdivision (c) of the same section imposes tax on the receipts from the service of maintaining, servicing or repairing real property. Excepted from taxation is the service of installing tangible personal property "which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law...". Tax Law section 1105(c)(3)(iii).

B. That the regulations define the term "capital improvement" to mean "an addition or alteration to real property:

"(i) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, and

(ii) which becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself, and

(iii) is intended to become a permanent installation."
20 NYCRR 527.7(a)(3).

See also Tax Law section 1101(b)(9), effective July 7, 1981; Matter of Building Contractors Association, Inc. v. Tully, (3d Dept. April 1, 1982). The end result of the services performed determines whether such services are taxable under Article 28. 20 NYCRR 527.7(b)(4); Matter of Tishman Realty & Construction Co., Inc., State Tax Commission, November 27, 1981 (TSB-H-82(14)S).

C. That inasmuch as the end result of the services performed by the contractors in the course of the restoration of petitioner's oil tanks satisfied the criteria set forth in 20 NYCRR 527.7(a)(3), such services are excepted from sales tax. The restorative materials became an integral and permanent part of the tanks. Petitioner incurred expenses of approximately 3.7 million dollars, representing 1.6 million dollars over the initial cost of the tanks. And, assets expected to be fully depreciated in 1985 are now expected to remain useful to petitioner until 2009.

D. That the petition of Nepco Terminal Corp. is hereby granted, and the Audit Division is directed to process petitioner's application for refund.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

Rodrica Asch
PRESIDENT

Francis R. Kang
COMMISSIONER

[Signature]
COMMISSIONER

APPENDIX A

Contractor: Chicago Bridge & Iron Company

<u>DATE OF INVOICE</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
3/3/78	install new bottom in tank 500	\$139,312.64
3/8/78	clean, inspect and repair tie braces and diagonal bracing in dike area between tank shells and dike shells; clean, inspect and repair all butt welds in same area	65,194.13
3/8/78	remove section of bent shell plate in east wall of tank 500; replace and weld	1,184.23
3/8/78	repair bottom in coffer dam between tanks 500 and 600, adjacent to north diaphragm	15,311.40
3/8/78	clean out doors, various locations of dike walls, tanks 400 and 600; weld hinges and hasp on each	667.66
3/8/78	repair diagonal bracing on north and south walls of tank 600: repair involves 26 possible cracks in weld of shoe to bottom, 15 possible cracks in weld of angle to shoe located by magnetic particle test	1,550.04
3/8/78	sandblast weld seams on shell of dike walls, tanks 500 and 600	11,446.78
3/9/78	reweld shoes to tank bottom; reweld diagonal angles to shoes on north-south walls; remove and straighten long braces on north and south walls	30,254.42
3/9/78	drill holes for test in bottom of tanks 500 and 600; cut and weld patches over test holes; vacuum test patch welds	882.80
3/23/78	drill test holes in bottom of tanks 500 and 600; fit patch plates and weld	625.62
4/19/78	inspect, scaffold and sandblast dike area; repair gussets, angles and welds	153,738.08
4/19/78	test tank and firewall shells, tanks 500 and 600	6,543.05
4/19/78	additional repairs to complex B	150,605.99
5/10/78	scaffold and sandblast dike area; repair gusset plates and tank shell	46,069.68
5/11/78	additional repairs to complex B	95,519.60

Contractor: Kelle Corporation

<u>DATE OF INVOICE</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
12/20/77	fire watch labor	\$ 8,210.30
1/9/78	"	9,054.98
1/23/78	"	10,064.33
2/9/78	"	6,976.57
2/16/78	"	7,324.89
3/2/78	"	8,181.63
3/16/78	"	8,904.30
3/29/78	"	7,086.31
4/13/78	"	8,318.14

5/1/78	"	8,161.81
5/16/78	"	7,546.00
5/23/78	"	8,480.80
6/6/78	"	7,292.64
6/20/78	"	8,480.80
6/30/78	"	6,308.64
7/21/78	"	5,270.16
8/7/78	"	6,886.08

Contractor: Astro Pak

<u>DATE OF INVOICE</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
11/17/77	provide materials, equipment and technical personnel and labor within requirements of P.O. N3167 and contract changes no. one and two	\$ 79,963.94
12/1/77	"	26,189.92
12/6/77	"	29,001.22
12/7/77	"	13,798.08

Contractor: Hownor Associates, Inc.

<u>DATE OF INVOICE</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
11/15/77	as per contract dated November 7, 1977	\$ 4,100.00
1/11/78	as per contract dated December 29, 1977	4,100.00
1/11/78	as per contract dated January 11, 1978	775.00
2/17/78	contract work 90% complete	8,640.00
4/4/78	break ground with compressor and pavement breakers and excavate as directed with backhoe	800.00
4/4/78	"	800.00

Contractor: Weldrite Company, Inc.

<u>DATE OF INVOICE</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
11/15/77	labor to saw cut access holes in dike wall, #500 and #600 tank	\$ 1,430.00
12/23/77	tank 400: jack up and install 18" blind flange on main cargo line; remove 10" check valve from pump and install 10" blind flange on discharge line tank 500: jack up and install 18" blind flange on main cargo line; remove 10" check valve from pump and install 10" blind flange; remove 16" check valve from pump and install 10" blind flange; remove 14" check valve from pump and install 14" blind flange tank 600: jack up and install 18" blind flange on main cargo line; remove 10" check valve from pump and install 10" blind flange	

	tanks 500 and 600: remove by cold cutting 16"	
	expansion joint between tanks; remove by cold	
	cutting four 4" foam lines and weld caps on	
	remaining stubs; fabricate two fire hydrant adaptors	5,936.00
2/9/78	labor to weld 2" deaerator line	132.00
2/17/78	labor to cut four 4" foam lines and furnish and	
	weld four 4" caps to end of foam lines	388.00

Contractor: Expert Concrete Breakers, Inc.

<u>DATE OF INVOICE</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
2/2/78	as per memorandum agreement #594	\$ 1,382.86

APPENDIX B

Contractor: Coastal Services, Inc.

<u>DATE OF PURCHASE ORDER</u>	<u>DESCRIPTION</u>	<u>PRICE</u>
5/4/77	remove all oil from dike area around No. 600 tank, pumping it into designated tank; clean and prepare interior walls and floor of dike for sealing; make dike wall, joint and floor water- and oil-tight	\$ 5,000.00
5/25/77	revised estimated aggregate price	30,000.00
11/15/77	"	137,373.60
11/23/77	"	177,373.60
1/5/78	"	277,373.60
2/24/78	"	606,358.36

Contractor: Chicago Bridge & Iron Company

<u>DATE OF PURCHASE ORDER</u>	<u>DESCRIPTION</u>	<u>PRICE</u>
10/27/77	furnish all material and equipment, all labor, supervision, construction tools, equipment and facilities, and perform all work and services necessary for and incidental to proper completion of repair to tanks 500 and 600 remove and replace the lower 89" of 21 scalloped shell sections along west wall of T-600 and along east wall of T-500 repair, on individual basis, any shell plate buckles that extend above 89" elevation test tank bottom plates in local area of corner weld to identify cracks or flaws remove and replace angles in diagonal ties along east and west walls of T-500 and T-600 remove and replace gusset plates remove 10" channels that serve as bottom attachments for existing diagonals; test bottom plates in local area of channels; repair observed defects examine and test diagonal to floor connections along north and south walls of T-500 and T-600; correct observed defects install elevated cover over space between T-500 and T-600	\$304,150.00
11/7/77	CBI proposal, 10/19/77, for repairs to T-500 and T-600 made an integral part of contract	70,000.00
12/4/77	services of senior engineering specialist and senior construction specialist	2,875.00
12/14/77	remove mill scale and shop prime external surface of replacement shell plates for tanks 500 and 600;	

	provide and install curb plate at west wall of tank 500	6,700.00
1/6/78	install new $\frac{1}{4}$ " welded steel floor over existing floor in tank 500	76,000.00
3/2/78	install plate curb on roof of tank 400 and provide elevated cover	
	inspect and repair cracked welds in dike area around tanks 400, 500 and 600; backfill braces, horizontal ties and dike walls	
3/13/78	cut, straighten and reweld bowed horizontal ties	169,065.00
	install new retaining wall anchor bolts to encompass all of complex B	
	install approximately 100 shear bars along retaining walls of complex B	
	inspect and repair angle attachment welds at all elevations of horizontal tension members in tanks 500 and 600	
3/17/78	test epoxies at CBI Research Facility	281,000.00
	repair corroded areas of tanks 500 and 600, tank shells and appurtenances (shell plates, retaining wall plates, slips, gussets, braces, etc.)	235,000.00
6/20/78	repair/replace lower $1\frac{1}{2}$ '-2' of T-500 and T-600 shell	
	provide angle iron supports between valley angles of dike wall	315,000.00
6/22/78	increase in estimated price	140,000.00

Contractor: Astro Pak

<u>DATE OF PURCHASE ORDER</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
10/27/77	complete chemical cleaning of tanks 500 and 600	\$ 30,000.00
11/8/77	increase in estimated price	40,000.00
11/14/77	"	30,000.00
11/22/77	"	30,000.00
4/4/78	"	31,321.32
4/10/78	"	31,021.47

Contractor: Kelle Corporation

<u>DATE OF PURCHASE ORDER</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
12/29/77	all labor and supervision necessary for and incidental to performance of fire watch duties	\$ 17,750.00
2/8/78	increase in estimated price	10,345.97*
2/21/78	"	7,534.70*
3/1/78	"	7,910.88*
3/13/78	"	8,836.16*
3/22/78	"	9,616.65*
4/5/78	"	7,653.22*
4/11/78	increase in compensation of foreman and fire watchmen	

5/12/78	increase in estimated price	17,798.34*
6/1/78	"	8,149.00*
6/12/78	"	9,159.26*
6/22/78	"	7,876.05*
7/19/78	"	9,159.26*
7/21/78	"	6,813.33*

Contractor: Hownor Associates, Inc.

<u>DATE OF PURCHASE ORDER</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
2/1/78	furnish all equipment and material, all labor, supervision, tools and facilities, and perform all work and service necessary for and incidental to break up and remove all concrete above foundation slab, in dike area around tanks 400, 500 and 600	\$ 9,600.00

* Includes sales tax.

P 389 758 890
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Nepeco Terminal Corp.
410 Charter Oil Co. - ATTN: Ronald E. Currey
 Street and No. 21 W. Church St. P.O. Box 4726
 P.O., State and ZIP Code Jacksonville, FL 32232

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