

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Monroe Tree & Landscape, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 6/1/76-5/31/79. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of August, 1984, he served the within notice of Decision by certified mail upon Monroe Tree & Landscape, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Monroe Tree & Landscape, Inc.
225 Ballantyne Rd.
Rochester, NY 14623

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of August, 1984.

David Parchuck

Annice [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 9, 1984

Monroe Tree & Landscape, Inc.
225 Ballantyne Rd.
Rochester, NY 14623

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Sherman F. Levey
Harris, Beach, Wilcox, Rubin & Levey
Two State St.
Rochester, NY 14614
Taxing Bureau's Representative

additional tax due of \$88,134.84 plus interest for the period June 1, 1976 through May 31, 1979.

2. The Audit Division audited petitioner's expense purchases and capital acquisitions. The part of the deficiency arising from the audit of petitioner's expense purchases, or \$15,243.96, is not at issue herein. The remainder, or \$72,890.88, represents sales and use tax which the Audit Division alleges was due on petitioner's purchase of vehicles and equipment in the amount of \$1,050,560.37 which petitioner claims was not subject to tax because the vehicles and equipment were purchased for resale to its customers, Long Island Lighting Company (hereinafter "LILCO") and Rochester Gas and Electric (hereinafter "R G & E").

3. On March 1, 1977, Lewis Tree Services, Inc.¹ (hereinafter, Lewis Tree Services) entered into a contract with LILCO to "do and perform all work necessary in connection with the trimming or removal of trees or other woody growth in certain areas to provide adequate clearance for the overhead electric lines, both transmission and distribution...". Lewis Tree Services agreed to furnish "all labor, supervision, tools, transportation and other equipment to perform and carry out completely the work...". Included in the contract were a "labor rate schedule" and an "equipment rate schedule" which set forth hourly rates for labor and for the use of trucks and equipment. The equipment rate schedule listed in detail various types of equipment and noted the rate per hour for the use of each particular piece of equipment or type of truck. The contract provided that such rates "include fuel, maintenance, taxes, insurances, travel

¹ Monroe Tree Experts, Inc. is a holding company which wholly owns two subsidiaries, petitioner and Lewis Tree Services. Petitioner purchased the equipment which its fellow subsidiary, Lewis Tree Services, used to perform the LILCO contract.

and transportation expenses, overhead, profit and all other operating costs".

The agreement further provided that:

"Equipment breakdown and maintenance of repairs will be at no additional expense to Long Island Lighting Company and the rental charge for the equipment will cease at the time the equipment becomes inoperative and commence when the equipment is back in service."

LILCO was granted a discount for providing "parking area for work equipment required to accomplish the assigned work...".

4. Petitioner purchased twenty-one bucket trucks and other types of trucks and equipment in order to fulfill the contract obligations of Lewis Tree Services with LILCO. Because the trucks and equipment were used near energized power lines, they had to be insulated and, as a result, were substantially more costly than similar trucks and equipment used for non-utility purposes. The trucks and equipment were stored at various LILCO service centers and were not used for any purpose other than to perform the services under the LILCO contract.

5. For approximately forty years, petitioner has provided labor and equipment to R G & E for tree trimming purposes. It has no written contract with this utility, but on an annual basis hourly rates for the use of equipment and for labor are negotiated. John R. Hetzler, who was responsible for petitioner's R G & E account, testified that the utility generally submitted a set of specifications for particular pieces of equipment and that trucks and equipment, which petitioner purchased with R G & E in mind, were not what petitioner would routinely purchase for non-utility use and were only used for R G & E projects. However, they were delivered and stored at petitioner's main office with the exception of four units stored at the home of petitioner's crew chief. Petitioner was responsible for the service and maintenance of the trucks and equipment.

6. A forester, who is an employee of R G & E, works with petitioner's dispatcher to send crews to various places where trees require trimming away from power lines. The forester also inspects the work being done by petitioner's crews. Similarly, tree trimming coordinators who are employees of LILCO direct the dispatch of crews of Lewis Tree Services to trim trees away from power lines and inspect the work being done.

7. Examples of sales invoices of Lewis Tree Services and petitioner issued to LILCO and R G & E, respectively, show separate itemizing of labor and equipment costs. However, two of the five invoices in evidence have the following description of services rendered above the itemized billing: "Furnished labor/equipment to trim trees around Rochester and vicinity during 1978 (1979) as per instructions...".

A third invoice, in the space for job number, notes "tree trimming" and the remaining two invoices describe the services being rendered by petitioner as follows: "[T]o load poles as directed", and "to work as directed".

8. According to the audit report, petitioner's books and records did not show a ledger account to which income from the rental of equipment would be posted.

9. Included in petitioner's brief are proposed findings of fact numbered one through four and proposed ultimate findings of fact numbered one and two. Proposed findings of fact numbered one and three are not adopted and incorporated into this decision because they are not supported by the evidence herein. The remaining proposed findings of fact and proposed ultimate findings of fact are more in the nature of conclusions of law and, under the State Administrative Procedure Act §307, the State Tax Commission is not required to rule upon them.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law §1105(a), sales tax is imposed on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article".

B. That Tax Law §1101(b)(4) excludes sales for resale from the definition of "retail sale".

C. That Tax Law §1101(b)(5) defines "sale, selling or purchase" as follows:

"Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor..."

D. That the Sales and Use Tax Regulations provide that:

"The terms 'rental, lease, license to use' refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property." 20 NYCRR 526.7(c)(1) (effective date, September 1, 1976).

The Regulations further provide that:

"Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property". 20 NYCRR 526.7(e)(4) (effective date, September 1, 1976).

E. That the petitioner did not either (i) rent or lease the trucks and equipment at issue or (ii) transfer title or possession or both to such trucks and equipment to the utility companies. Rather, the sales invoices described in Finding of Fact "7", supra, support the conclusion that petitioner's fellow subsidiary (Lewis Tree Services) was providing a tree trimming service to LILCO

and petitioner was providing a tree trimming service to R G & E. Neither company was renting or leasing equipment. The separate itemizing of labor and equipment costs in calculating the tree trimming fee does not transform an arrangement to provide services into leases of trucks and equipment. We note that the trucks and equipment with respect to R G & E were at all times in petitioner's possession, as noted in Finding of Fact "5", supra, and that LILCO received a discount for permitting Lewis Tree Services to store the trucks and equipment in its service centers, as noted in Finding of Fact "3", supra. Furthermore, although the employees of LILCO and R G & E directed where tree trimming services would be performed, they did not control the actual use or operation of the trucks and equipment. Rather, petitioner and Lewis Tree Services, respectively, retained actual and exclusive possession of the trucks and equipment and controlled the use thereof. Their employees operated the trucks and equipment and all repairs, maintenance and costs for operating the trucks and equipment were their responsibility. Cf. Matter of Firelands Sewer & Water Construction Co., Inc., State Tax Commission, October 7, 1983 and Grand Island Transit Corporation, State Tax Commission, January 31, 1984.

F. That, in addition, it is impossible to conclude that petitioner was reselling equipment and vehicles to LILCO because, in fact, Lewis Tree Services was the actual entity contractually obligated to LILCO. Furthermore, petitioner did not introduce any evidence to show that it was reselling the equipment and vehicles to Lewis Tree Services.

G. . That the petition of Monroe Tree & Landscape, Inc. is denied.

DATED: Albany, New York

AUG 09 1984

STATE TAX COMMISSION

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

Landscape, Inc.
(See Reverse)

Sent to	
<i>Monroe Tree &</i>	
Street and No.	
<i>225 Ballantyne Rd.</i>	
P.O., State and ZIP Code	
<i>Rochester, NY 14623</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

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
<i>Sherman F. Lacey</i>	
Street and No.	
<i>Two State St.</i>	
P.O., State and ZIP Code	
<i>Rochester, NY 14614</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