

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

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 31st day of July, 1984, he served the within notice of Decision by certified mail upon Niagara Lubricant Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Niagara Lubricant Co., Inc.
101-105 Manitoba St.
Buffalo, NY 14206

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
31st day of July, 1984.

David Parchurch

James P. Hayden
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Niagara Lubricant Co., Inc. :
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 12/1/76-5/31/80. :
_____ :

AFFIDAVIT OF MAILING

State of New York }
County of Albany } ss.:

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 31st day of July, 1984, he served the within notice of Decision by certified mail upon Harry G. Brown, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry G. Brown
Beckman & Brown
2005 Sheridan Dr.
Buffalo, NY 14223

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 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
31st day of July, 1984.

David Parchuck

James J. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Niagara Lubricant Co., Inc.
101-105 Manitoba St.
Buffalo, NY 14206

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
Harry G. Brown
Beckman & Brown
2005 Sheridan Dr.
Buffalo, NY 14223
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NIAGARA LUBRICANT 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 December 1,	:	
1976 through May 31, 1980.	:	

Petitioner, Niagara Lubricant Co., Inc. 101-105 Manitoba Street, Buffalo, New York 14206, 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 December 1, 1976 through May 31, 1980 (File No. 35703).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on December 8, 1983 at 10:45 A.M. Petitioner appeared by Harry G. Brown, CPA. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the service of cleaning and painting drums, which were used to distribute a manufactured product, is subject to sales and use taxes.

FINDINGS OF FACT

1. Petitioner, Niagara Lubricant Co., Inc., was engaged in the manufacture of automobile and industrial lubricants such as oils, greases and soaps.
2. On August 25, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due covering the period December 1, 1976 through May 31, 1980 for taxes due of \$18,029.56, plus interest of \$4,101.63, for a total of \$22,131.19.

3. An audit of petitioner's books and records disclosed that no sales or use taxes were paid on outside services of cleaning and painting drums which were used to distribute petitioner's products. The purchase of these services resulted in the total tax deficiency of \$18,029.56.

4. Counsel for the Audit Division conceded at the hearing that the amount of tax due was revised to \$12,292.30 following a pre-hearing conference.

5. Petitioner's products are either distributed in returnable drums or delivered directly to the customers' storage tanks. When a drum is returned, it is sent to an outside firm to be cleaned and painted before it is reused. The inside of the drum is sanitarily cleaned of residue to maintain the integrity of the product and prevent contamination. The drum is painted on the outside for the sake of appearance.

6. The bulk price per gallon of petitioner's products is twenty-five cents less than the drum price.

7. Petitioner considered the cleaning and painting of drums as an integral part of its manufacturing process. It also argued that the extra 25 cents per gallon for products sold in a drum covered the handling, cleaning and painting of the drum, and since sales tax was collected from the customer on the total charge, the cleaning and painting services would be taxed twice if it were held liable for tax at the time such services were purchased.

8. The Audit Division took the position that the cleaning and painting of the drums are services subject to tax under section 1105(c)(3) of the Tax Law as servicing, maintaining or repairing tangible personal property.

Petitioner argued that the cleaning and painting process does not extend the useful life of a drum nor restore it to a condition of fitness, readiness, efficiency or safety. Petitioner therefore concluded that the cleaning and painting services do not fall under the purview of section 1105(c)(3) of the Tax Law.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides an exemption from sales and use taxes for machinery or equipment used directly and predominantly in the production of tangible personal property for sale. The drums used by petitioner in the distribution phase of its operation do not constitute machinery and equipment under said section of the Tax Law.

B. That section 1105(c)(3) of the Tax Law in pertinent part imposes a tax on the services of installing, maintaining, servicing or repairing tangible personal property unless such services are purchased for resale.

Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition [20 NYCRR 527.5(a)(3)].

The cleaning and painting of the drums constituted such services and accordingly are subject to the tax imposed under section 1105(c)(3) of the Tax Law.

C. That petitioner in the course of its business operations did not resell the cleaning and painting services in the form in which purchased nor did such services become a physical component part of other property or services.

Although petitioner's expense for the cleaning and painting of drums was reflected in the final selling price, the purchase of these services was not

for resale within the meaning and intent of sections 1101(b)(4)(i)(B) and 1105(c) of the Tax Law.

D. That the petition of Niagara Lubricant Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 25, 1981 is sustained.

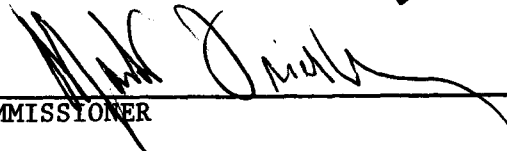
DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 977 360

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Darryl G. Brown</i>	
Street and No. <i>2005 Sheridan Dr.</i>	
P.O., State and ZIP Code <i>Buffalo, NY 14223</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 440 977 359

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Diagara Lubricant</i>	
Street and No. <i>101-105 Manitoba St.</i>	
P.O., State and ZIP Code <i>Buffalo, NY 14206</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