

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

October 5, 1984

Pierce & Stevens Chemical Corp.  
c/o John J. Merlino, Controller  
P.O. Box 1092  
Buffalo, NY 14240

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: Taxing Bureau's Representative

## STATE TAX COMMISSION

Camie Chapman  
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 :  
PIERCE & STEVENS CHEMICAL 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 September 1, 1978 :  
through August 31, 1981. :

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Petitioner, Pierce & Stevens Chemical Corp., P.O. Box 1092, Buffalo, New York 14240, 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 September 1, 1978 through August 31, 1981 (File No. 37817).

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 7, 1983 at 2:45 P.M., with all briefs to be submitted by February 28, 1984. Petitioners appeared by Daniel Curry, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

I. Whether the application of "palgard" coating to storage tanks constituted a capital improvement to real property.

II. Whether "palgard" coating was a part of equipment which is exempt from tax under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Pierce and Stevens Chemical Corp., is engaged in the manufacture of coatings and adhesives.

2. On February 3, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes

due of \$4,557.00, plus interest of \$651.83, for a total of \$5,208.83. The notice resulted from an audit of petitioner's books and records for the period September 1, 1978 through August 31, 1981.

3. On audit, the Audit Division determined that petitioner was liable for tax on labor charges for the application of a coating substance called "palgard" to storage tanks owned by petitioner. The sales price for the coating material was \$18,427.00 on which sales tax was paid. Petitioner did not pay sales or use taxes, however, on the labor charges of \$65,100.00.

The Audit Division took the position that the labor charges constituted receipts from maintaining, servicing or repairing tangible personal property under section 1105(c)(3) of the Tax Law.

4. Petitioner had "palgard" applied to 32 storage tanks it owned which were located in an industrial tank farm. The tanks stored liquid solvents which were raw materials used in petitioner's manufacturing process. The tanks were exposed to the outside elements and the purpose of "palgard" was to prevent corrosion. "Palgard" was used in lieu of paint. The estimated life of "palgard" was approximately 10 years.

5. The cost of the labor and materials was capitalized for Federal and State income tax purposes.

6. The tank farm was assessed as real property by the City of Buffalo.

7. Petitioner argued that the application of "palgard" to the tanks constituted a capital improvement to real property and therefore the labor charges were excluded from the tax imposed under section 1105(c)(3) of the Tax Law.

In the alternative, petitioner argued that the tanks were equipment used directly and predominantly in production, and as such, the "palgard" was a

part of the equipment which qualifies for the exemption provided under section 1115(a)(12) of the Tax Law.

CONCLUSIONS OF LAW

A. That section 1105(c)(3) of the Tax Law imposes a tax on installing tangible personal property or maintaining, servicing or repairing tangible personal property. Subparagraph (iii) of said section excludes services for installing property which when installed, will constitute an addition or capital improvement to real property as such term is defined in section 1101(b)(9) of the Tax Law.

Section 1105(c)(5) of the Tax Law imposes a tax on maintaining, servicing or repairing real property as distinguished from adding to or improving such real property by a capital improvement.

B. That section 1101(b)(9) of the Tax Law and 20 NYCRR 527.7(a)(3) define a capital improvement as an addition or alteration to real property which (i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; (ii) 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.

Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping tangible personal property and real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition [20 NYCRR 527.5(a)(3) and 527.7(a)(1)].

C. That the application of "palgard" coating to the storage tanks did not constitute a capital improvement within the meaning and intent of sections

1105(c)(3), 1105(c)(5) and 1101(b)(9) of the Tax Law. The labor charges constituted receipts for "maintaining, servicing and repairing" and were therefore subject to the tax imposed pursuant to section 1105(c)(5) of the Tax Law.

D. That the term "part" means a replacement for any portion of a machine or piece of equipment, and any device actually attached to the machinery or equipment and used in connection with the performance of its function [20 NYCRR 528.13(e)(1)(i)].

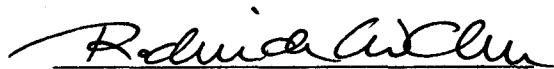
"Palgard" is not a "part" as such term is defined in 20 NYCRR 528.13(e)(1)(i) and therefore is not exempt from tax under section 1115(a)(12) of the Tax Law.

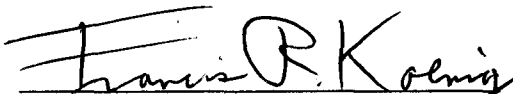
E. That the petition of Pierce & Stevens Chemical Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 3, 1982 is sustained.

DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 693 168 858

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sender	Pierce & Stevens Chemical Corp.	
Street and No.	c/o John J. Merino, Controller	
P.O., State and ZIP Code	PO Box 7092	
Postage	Buffalo, NY 14240	
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		