

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Sea-Land Restoration, 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 9/1/75-8/31/78.

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Sea-Land Restoration, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sea-Land Restoration, Inc.
Route 104
Hannibal, NY 13074

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
5th day of October, 1984.

David Parchuck

James A. Hendon

Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

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

Charles J. Engel Jr.
Engel, Engel & Lahm
510 State Tower Bldg.
Syracuse, NY 13202

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.

David Parshuck

Ernie R. Henderson
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Sea-Land Restoration, Inc.
Route 104
Hannibal, NY 13074

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
Charles J. Engel Jr.
Engel, Engel & Lahm
510 State Tower Bldg.
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SEA-LAND RESTORATION, 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 September 1,	:	
1975 through August 31, 1978.	:	

Petitioner, Sea-Land Restoration, Inc., Route 104, Hannibal, New York 13074, 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, 1975 through August 31, 1978 (File No. 27249).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 18, 1983 at 9:15 A.M., with all briefs to be submitted by February 1, 1984. Petitioner appeared by Charles J. Engel, Jr., Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner purchased equipment, materials and supplies as agent for the United States Coast Guard.

II. Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioner.

III. Whether petitioner is liable for sales taxes collected from customers and not paid over to New York State.

FINDINGS OF FACT

1. Petitioner, Sea-Land Restoration, Inc., was engaged in the service of removal or cleanup of pollutants, usually oil spills, from bodies of water in New York State.

2. On February 26, 1979, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1975 through August 31, 1978 for taxes due of \$146,871.92 plus penalty of \$2,715.48 and interest of \$21,722.40, for a total of \$171,309.80.

3. On audit, the Audit Division examined purchase invoices for the entire audit period and found that petitioner failed to pay sales or use taxes as indicated below:

a) fixed assets (per depreciation schedule)	\$ 36,234.66
b) equipment rentals	45,541.70
c) tools and supplies	17,518.52
d) equipment repairs	11,533.27
e) equipment purchases	10,925.53
f) miscellaneous	1,272.39
	<u>\$123,026.07</u>

The Audit Division also examined all sales invoices for work performed other than for exempt organizations. This examination revealed that on certain sales petitioner collected sales tax but did not remit the same on sales tax returns filed. On other sales, sales tax was not collected and no exemption certificates were on file. The additional tax due on these errors amounted to \$2,273.67.

Petitioner failed to file sales tax returns for the periods ending February 28, 1978, May 31, 1978 and August 31, 1978. The sales tax collected and not paid over for these periods after allowing credits of \$1,298.43 was \$21,572.24. The

Audit Division prepared returns showing no tax due for these periods and included the taxes due in the audit assessment (Finding of Fact "2").

4. During the period in issue, petitioner was primarily involved in the performance of the following contracts with the United States Coast Guard ("Coast Guard") for cleanup of oil spills:

- 1) NEPCO 140 Oil Spill located between Clayton and Alexandria Bay on the St. Lawrence River.
- 2) PAS Oil Spill (Pollution Abatement Services) at Oswego, New York.
- 3) Peekskill Bear Mountain Oil Spill at Peekskill, New York.

Petitioner argued that most of the untaxed purchases found on audit were used in the performance of these contracts. Petitioner, however, offered no evidence to establish the amount or type of purchases used for these contracts as distinguished from those used for all other work.

5. The contracts entered into with the Coast Guard were time and material contracts in accordance with subpart 1-3. 406-1 of the Federal Procurement Regulations. Said section regulates time and material contracts and provided for the procurement of property or services on the basis of (1) direct labor hours at specified fixed hourly rates (which include direct and indirect labor, overhead and profit) and (2) material at cost. This type of contract was to be used only where provision was made for adequate controls, including appropriate surveillance by government personnel during performance to give reasonable assurance that inefficient or wasteful methods are not being used.

6. The Coast Guard had the right to and exercised control and supervision of what was to be performed, where it was to be performed and the means and methods of performance. This control included the personnel on the job, the kind and number of pieces of equipment and the kind and quantity of materials and supplies.

7. The contracts contained the following provisions regarding materials:

- a) The Coast Guard had the right to audit invoices or vouchers and substantiating materials as it deemed necessary.
- b) The contractor agreed that any refunds, rebates or credits accruing to or received by the contractor which arises from the materials portion of the contract was to be paid to the Government.
- c) All materials furnished under the contracts were subject to inspection and testing by the Government prior to acceptance.
- d) The Coast Guard was free to make changes in material specifications without notice.

8. Incorporated into the contracts was Form D.O.T. F 4220.17. Clause 36 of the Form "Federal State and Local Taxes", provides in part that "except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties".

9. The purchases referred to in Finding of Fact "3" were invoiced to and paid for directly by petitioner.

10. Petitioner's position is that based on the nature of the contract (Finding of Fact "5"), and the control exercised by the Coast Guard over the manner in which the work was performed and the purchases, there was an agency relationship between itself and the Coast Guard and that the exemption under section 1116(a)(2) of the Tax Law was applicable. Petitioner adduced no evidence regarding its failure to file sales tax returns or the unsubstantiated nontaxable sales.

CONCLUSIONS OF LAW

A. That section 1116(a)(2) of the Tax Law provides an exemption from sales and use taxes to the United States of America and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer.

That the contracts petitioner entered into with the Coast Guard did not create a principal - agent relationship for purposes of making purchases, nor did the actions of the parties and the control exercised by the Coast Guard over the work establish such a relationship.

Petitioner was an independent contractor which purchased equipment, materials and supplies on its own behalf for use in performing service contracts for the Coast Guard and other persons. Accordingly, such purchases were subject to the tax imposed under section 1105(a) of the Tax Law.

B. That section 1132(c) of the Tax Law provides in part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax. Unless a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe to the effect that the property was purchased for resale or some use by reason of which the sale is exempt from tax under section 1115. When such a certificate has been furnished to the vendor, the burden of proving that the receipt is not taxable shall be solely upon the customer.

Petitioner failed to sustain the burden of proof required by section 1132(c) on those sales for which no exemption certificates were on file. Accordingly, petitioner is liable for the tax it failed to collect from the customers pursuant to section 1133(a) of the Tax Law.

Moreover, petitioner is liable for the tax collected and not paid over to New York State.

C. That the petition of Sea-Land Restoration, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 26, 1979 is sustained.

DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION

Richard W. Chan
PRESIDENT

Francis R. Koenig
COMMISSIONER

~~Mark J. Smith~~
COMMISSIONER

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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	Sent to	Charles J. Engel Jr.	
	Street and No.	Engel, Engel & Lohm	
	P.O., State and ZIP Code	570 State Tower Bldg.	
	Postage	Syracuse, NY 13202	
	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			

P 693 168 831

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	Sent to	Sea-Land Restoration, Inc.	
	Street and No.	Route 104	
	P.O., State and ZIP Code	Hannibal, MO 63074	
	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			