

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Moran Towing Corp. and Emond J. Moran, : AFFIDAVIT OF MAILING  
Thomas E. Moran, Lee R. Christensen and :  
Richard H. Roe :  
Individually and as Officers :  
  
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 12/1/73 - 5/31/77. :

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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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Moran Towing Corp., & Individual Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Moran Towing Corp.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

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  
23rd day of May, 1985.

David Parchuck

Ann M. O'Day  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

Armando Rodriguez  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 23, 1985

Moran Towing Corp.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

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  
Gwynne H. Wales  
White & Case  
14 Wall St.  
New York, NY 10005  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Moline Supply Company, Inc. and  
Lee R. Christensen, E.J. Moran, T.E. Moran, :  
Martin J. Carrol, Lloyd Graham, Marie Shanahan  
and Richard H. Roe, Individually and as Officers : 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 6/1/73 - 11/30/76. :

---

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 23 day of May, 1985, he served the within notice of decision by certified mail upon Moline Supply Company, Inc., & Individual Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Moline Supply Company, Inc.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

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  
23 day of May, 1985.

David Parchuck

James A. Hurlbut

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 :  
Morine Supply Company, Inc. and :  
Lee R. Christensen, E.J. Moran, T.E. Moran :  
Martin J. Carrol, Lloyd Graham, Marie Shanahan :  
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 6/1/73 - 11/30/76. :

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AFFIDAVIT OF MAILING

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 23 day of May, 1985, he served the within notice of decision by certified mail upon Gwynne H. Wales, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gwynne H. Wales  
White & Case  
14 Wall St.  
New York, NY 10005

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  
23 day of May, 1985.

David Parchuck

James D. Daykin  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 23, 1985

Morine Supply Company, Inc.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

Gentlemen:

Please take notice of the decision of the State Tax Commission enclosed herewith.

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Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

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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  
Gwynne H. Wales  
White & Case  
14 Wall St.  
New York, NY 10005  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Moran Shipyard Corp. and E. J. Moran, :  
T.E. Moran, L.R. Christensen, L.G. Goodwin, Jr. :  
M.J. Carrol, M.S. Uttendorfer and R.H. Roe, :  
Individually and as Officers : 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 12/1/72 - 8/31/76. :

---

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Moran Shipyard Corp., & Individual Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Moran Shipyard Corp.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

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Sworn to before me this  
23rd day of May, 1985.

David Parchuck

Samuel A. Highland

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 :  
Moran Shipyard Corp. and E. J. Moran, :  
T.E. Moran, L.R. Christensen, L.G. Goodwin, Jr. :  
M.J. Carrol, M.S. Uttendorfer and R.H. Roe, :  
Individually and as Officers :  
  
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 12/1/72 - 8/31/76. :

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AFFIDAVIT OF MAILING

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

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Sworn to before me this  
23rd day of May, 1985.

David Parchuck

Barrie O'Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

May 23, 1985

Moran Shipyard Corp.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

Gentlemen:

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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.

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Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Gwynne H. Wales  
White & Case  
14 Wall St.  
New York, NY 10005  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Moran Towing & Transportation Co., Inc. and  
Thomas E. Moran and Richard H. Roe, : AFFIDAVIT OF MAILING  
Individually and as Officers  
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 6/1/73 - 5/31/77.

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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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Moran Towing & Transportation Co., Inc., & Individual Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Moran Towing & Transportation Co., Inc.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

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Sworn to before me this  
23rd day of May, 1985.

David Parchuck

Amie A. Hagelund  
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 :  
Moran Towing & Transportation Co., Inc. and :  
Thomas E. Moran and Richard H. Roe :  
Individually and as Officers :  
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 6/1/73 - 5/31/77. :

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AFFIDAVIT OF MAILING

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Gwynne H. Wales, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gwynne H. Wales  
White & Case  
14 Wall St.  
New York, NY 10005

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  
23rd day of May, 1985.

David Parchuck

William A. Hagelund  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 23, 1985

Moran Towing & Transportation Co., Inc.  
& Individual Officers  
1 World Trade Center, Suite 5335  
New York, NY 10048

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  
Gwynne H. Wales  
White & Case  
14 Wall St.  
New York, NY 10005  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
MORAN TOWING AND TRANSPORTATION CO., INC. and :  
THOMAS E. MORAN and RICHARD H. ROE, :  
Individually and as Officers :  
for Revision of a Detetmination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1973 :  
through May 31, 1977. :

---

In the Matter of the Petition :  
of :  
MORAN SHIPYARD CORP. and E.J. MORAN, :  
T.E. MORAN, L.R. CHRISTENSEN, L.G. GOODWIN, JR. :  
M.J. CARROL, M.S. UTTENDORFER and R.H. ROE, :  
Individually and as Officers :  
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, 1972 :  
through August 31, 1976. :

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DECISION

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In the Matter of the Petition :  
of :  
MORINE SUPPLY COMPANY INC. and :  
LEE R. CHRISTENSEN, E.J. MORAN, T.E. MORAN, :  
MARTIN J. CARROL, LLOYD GRAHAM, MARIE SHANAHAN :  
and RICHARD H. ROE, :  
Individually and as Officers :  
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 June 1, 1973 :  
through November 30, 1976. :

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In the Matter of the Petition	:	
of	:	
MORAN TOWING CORP. and EDMOND J. MORAN,	:	
THOMAS E. MORAN, LEE R. CHRISTENSEN and	:	DECISION
RICHARD H. ROE	:	
Individually and as Officers	:	
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, 1973	:	
through May 31, 1977.	:	

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Petitioners Moran Towing and Transportation Co., Inc. and Thomas E. Moran and Richard H. Roe, Individually and as Officers, One World Trade Center, Suite 5335, New York, New York 10048 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 June 1, 1973 through May 31, 1977 (File No. 22182).

Petitioners Moran Shipyard Corp. and E.J. Moran, T.E. Moran, L.R. Christensen, L.G. Goodwin, Jr., M.J. Carrol, M.S. Uttendorfer and R.H. Roe, Individually and as Officers, One World Trade Center, Suite 5335, New York, New York 10048 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, 1972 through August 31, 1976 (File No. 19216).

Petitioners Morine Supply Company Inc. and Lee R. Christensen, E.J. Moran, T.E. Moran, Martin J. Carrol, Lloyd Graham, Marie Shanahan and Richard H. Roe, Individually and as Officers, One World Trade Center, Suite 5335, New York, New York 10048 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 June 1, 1973 through November 30, 1976 (File No. 19217).

Petitioners Moran Towing Corp. and Edmond J. Moran, Thomas E. Moran, Lee R. Christensen, and Richard H. Roe, Individually and as Officers, One World Trade Center, Suite 5335, New York, New York 10048 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, 1973 through May 31, 1977 (File No. 21624).

On September 17, 1984, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and submitted the case to the State Tax Commission on the entire record contained in the file. After due consideration, the State Tax Commission renders the following decision.

#### ISSUES

I. Whether a tugboat which provides the necessary services to vessels engaged in interstate or foreign commerce in their entrance, berth and exit from the port of New York is itself engaged in interstate or foreign commerce within the meaning and intent of sections 1115(a)(8) and 1105(c)(3) of the Tax Law.

II. Whether regulations 20 NYCRR 528.9(a)(4) and 527.5(b)(5)(ii), which interpret the word primarily to mean 75 percent or more, are valid and constitutional.

III. Whether petitioner Moran Towing Corp.'s charter of barges, pursuant to a contract with the Water Tunnel Contractors, constitutes a sale under section 1101(b)(5) of the Tax Law.

IV. Whether penalties should be cancelled.

#### FINDINGS OF FACT

1. As the result of auditing the records of Moran Towing and Transportation Co., Inc., Moran Shipyard Corp., Morine Supply Company Inc. and Moran Towing

Corp., the Audit Division issued various notices of determination and demand for payment of sales and use taxes due against the corporations and the officers thereof. Notice number 90,742,473, issued February 9, 1978 against Moran Towing and Transportation, Inc. (sic), Thomas E. Moran and Richard H. Roe, assessed \$539,387.19 in tax due plus penalty and interest for the period June 1, 1973 through May 31, 1977. Notice number 90,740,640, issued April 6, 1977 against Moran Shipyard Corp., E.J. Moran, T.E. Moran, L.R. Christensen, L.G. Goodwin, Jr., M.J. Carrol, M.S. Uttendorfer and R.H. Roe, assessed \$91,492.46 in tax due plus penalty and interest for the period December 1, 1972 through August 31, 1976. Notice number 90,740,638, issued April 6, 1977 against Morine Supply Co., Inc. (sic), Lee R. Christensen, E.J. Moran, T.E. Moran, Martin J. Carrol, Lloyd Graham, Marie Shanahan and Richard H. Roe, assessed \$20,851.48 in tax due plus penalty and interest for the period June 1, 1973 through November 30, 1976. Notice number 90,742,050, issued December 14, 1977 against Moran Towing Corp., Edmond J. Moran, Thomas E. Moran, Lee R. Christensen and Richard H. Roe, assessed \$22,306.11 in tax due plus penalty and interest for the period December 1, 1973 through May 31, 1977.

In addition to notice number 90,742,050, notice numbers 90,742,050A, 90,742,050B, 90,742,050C and 90,742,050D were issued December 14, 1977 against Edmond J. Moran, Thomas E. Moran, Lee R. Christensen and Richard H. Roe, respectively, assessing \$21,584.31 in tax due plus penalty and interest for the period December 1, 1973 through May 31, 1977. Said notices reflected only the sales tax determined due on audit and eliminated therefrom the use taxes allegedly due on corporate purchases.

2. Timely petitions were filed contesting the aforementioned notices. Prior to a hearing, the parties agreed to the consolidation of the cases for



submission and determination. The parties submitted a stipulation of relevant facts with attached documentation and one amendment. Said stipulation and amendment provide as follows:

- "1. The respondent hereto is the New York Department of Taxation and Finance. The petitioners are: Moran Towing and Transportation Co., Inc., a New York corporation with its principal office at One World Trade Center, Suite 5335, New York, N.Y. 10048; Moran Shipyard Corp., a New York corporation with its principal office at One World Trade Center, Suite 5335, New York, N.Y. 10048; Morine Supply Company Inc., a New York corporation with its principal office at One World Trade Center, Suite 5335, New York, N.Y. 10048; and Moran Towing Corporation, a New York corporation with its principal office at One World Trade Center, Suite 5335, New York, N.Y. 10048.
2. The audit period for Moran Towing and Transportation Co. Inc. is June 1, 1973 to May 31, 1977. The audit period for Moran Shipyard Corp., is December 1, 1972 to August 31, 1976. The audit period for Morine Supply Company Inc. is June 1, 1973 to November 30, 1976. The audit period for Moran Towing Corporation is December 1, 1973 to May 31, 1977.
3. The parties hereby stipulate to the admission to the record of the following jurisdictional documents: a) tax returns, b) deficiency notices, c) petitions, d) answers, e) replies and f) powers of attorney. The parties also stipulate that the foregoing four cases are consolidated for submission to and determination by the State Tax Commission.
4. The parties hereby stipulate the submission of this matter to the State Tax Commission on the basis of the foregoing documents, this stipulation and attachments thereto and the briefs to be submitted pursuant to the directions of the hearing officer.
5. The statutory provisions of the sales tax law relevant to the issues at hand are set forth in Exhibit A hereto.
6. The regulations of the State Tax Commission which are relevant to the issues at hand are set forth in Exhibit B hereto.
7. There are two main issues in this case:

1. What constitutes interstate commerce with respect to the activities of a tug boat?
- 2(a) Does the phrase 'primarily engaged in interstate commerce' mean that a vessel must derive 75% or more of its receipts from interstate commerce?
- (b) With respect to the barges chartered out by Moran T&T to others, do these constitute vessels performing a transportation service or do they constitute containers and thus tangible personal property subject to sales tax?
8. Petitioner Moran Towing and Transportation Co. Inc. ('Moran T&T') operated, during its taxable period, 25 tug boats under bareboat charter parties pursuant to which it paid charter hire. Its business was to provide towing services to vessels using such tug boats. It also operated oil barges under bareboat charter parties which it time chartered, with crews to third parties. It never received any New York State sales tax exemption certificates.
9. Moran Towing Corp. chartered barges during the taxable period.
10. Petitioner Moran Shipyard Corp. operated a shipyard on Staten Island for the purpose of servicing and repairing the tug boats and barges owned or chartered by Moran T&T and Moran Towing Corp.
11. Petitioner Morine Supply Company during its taxable period sold ropes, sundry supplies and linens for the use of the tug boats and barges owned or chartered by Moran T&T and Moran Towing Corp.
12. The facts relevant to the Moran T&T case are as follows:
  - (a) Moran T&T paid charter hire for the 25 tug boats during the test month, August 1974. The issue is how much, if any, sales or use tax is payable on such charter hire. Sales or use tax is payable only if the tug is not 'primarily engaged in interstate commerce'.
  - (b) Moran T&T purchased operating supplies during the audit period. Sales and use tax would be due on the purchases of each tug boat not so engaged in interstate commerce.

- (c) Moran T&T purchased fuel oil, lubrication, and water for each tug during the audit period. Sales or use tax would be due on the purchases of each tug boat not so engaged in interstate commerce.
  - (d) Moran T&T time chartered out to other users barges manned by a crew employed by Moran T&T.
  - (e) There were also general administrative and non-recurring expenses incurred by Moran T&T involving purchases. The State Tax Department has alleged that the amounts of \$6,299.23 and \$1,192.56 in tax are due with respect to such purchases for general administrative and non-recurring expenses respectively. To simplify the issues in this case, Petitioner Moran T&T concedes liability with respect to such amounts of sales tax.
  - (f) Regarding Moran T&T, the New York State auditor determined that eleven out of the twenty-five tugs derived less than 75% of their revenues from interstate commerce during the test month, August 1974, and consequently determined that such eleven tugs were not primarily engaged in interstate commerce. Such eleven tugs are identified by an asterisk on page 1 of Exhibit F hereinafter described. The auditor determined that the eleven tugs earned 33.49% of the total revenue earned by all twenty-five tugs and consequently determined that 33.49% of all purchases of operating items were subject to sales or use tax resulting in \$155,958.83 of additional tax due. The auditor also determined that such eleven tugs accounted for 26.326% of total charter expense and thus \$2,747,932 of the charter hire was subject to use tax resulting in \$212,880.09 in additional tax due. The auditor also found that such eleven tugs accounted for 19.58% of total fuel oil, lubrication and water expense resulting in \$1,958,609 of purchases subject to use tax for an additional tax due of \$152,510.50. The parties stipulate that the amounts of tax alleged to be due by the New York State auditor would be due if such eleven tugs were not primarily engaged in interstate commerce.
13. The facts relevant to the Moran Shipyard Corp. case are as follows:
- (a) The shipyard performed installation and repair work on the tug boats chartered by Moran T&T.

- (b) The issue is whether any of the installations and repairs were done on tug boats primarily engaged in interstate commerce in which event sales and use tax would not be due.
  - (c) The shipyard also purchased sundry supplies. The issue is whether such purchases were subject to sales tax.
  - (d) The New York State auditor alleged the same eleven tug boats referred to above in connection with Moran T&T were not primarily engaged in interstate commerce. He then determined that such eleven boats provided 27.63% of the revenue of the Shipyard for the audit period. Thus he determined that \$1,157,708 of such revenues were taxable which would result in \$87,969.54 of tax due. The parties stipulate that if such eleven tug boats of Moran T&T were not primarily engaged in interstate commerce, the amount of tax alleged by the auditor, \$87,969.54, would be due. The Petitioner, in the interest of simplifying the proceedings, concedes liability of \$3,522.92 as sales tax due on sundry items.
14. The facts relevant to the Morine Supply Company Inc. ('Morine') case are as follows:
- (a) Morine sold ropes, sundry supplies and linens to the twenty-five tug boats of Moran T&T.
  - (b) The issue is whether any of these sales were subject to sales tax which would be the case if any such sales were to tug boats not primarily engaged in interstate commerce.
  - (c) There were also certain fixed asset additions for the audit period on which sales tax could be due.
  - (d) The New York State auditor made a determination that the same eleven tug boats were not primarily engaged in interstate commerce which determination also had a bearing on the Morine Supply Company case. Sales by Morine to such eleven tug boats amounted to 13.90% of total sales of Morine for the audit period resulting in taxable sales of \$263,479 with tax due of \$20,462.28. The parties stipulate that if such eleven tug boats were not primarily engaged in interstate commerce, the \$20,462.28 would be due. The Petitioner concedes \$389.20 of tax due on fixed asset additions in the interest of simplifying the proceedings.

15. The facts with respect to Moran Towing Corp. are as follows:
- (a) The City of New York contracted to build a water tunnel the purpose of which was to transport water into the City.
  - (b) To this end the City entered into a contract with the consortium of contractors known as the Water Tunnel Contractors.
  - (c) The Water Tunnel Contractors entered into a contract with Moran Towing Corp. for the charter hire of barges. A copy of the charter contract is attached as Exhibit C\* hereto.
  - (d) The Water Tunnel Contractors entered into a separate contract for the towing of the barges out to the dumping area. These barges were towed from the location of the water tunnel at Yonkers to the Battery which was a distance of 11 miles, and from the Battery to Ambrose Lightship which was a further distance of 17 miles and from Ambrose Lightship to the dumping site which was a further distance of  $6\frac{1}{2}$  miles making a total distance of 34 miles from Yonkers to the dumping site. This contract is attached as Exhibit D\*\* hereto.
  - (e) New York law, 56 Stat. Art. 2, §7-a (McKinney) provides as follows:
    - '§7-a. Jurisdiction and ownership of offshore waters and lands thereunder
    - 1. The jurisdiction of this state shall extend to and over, and be exercisable with respect to, waters offshore from the coasts of this state as follows:
      - (a) Those portions of the Great Lakes lying within the territorial limits of this state.
      - (b) The marginal sea to a line three geographical miles distant from the coast line and to any other line farther seaward therefrom hereinafter defined or recognized by the United States of America by international treaty or otherwise.

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\* Apparently should read "Exhibit D".

\*\* Apparently should read "Exhibit C".

(c) The high seas to whatever extent jurisdiction therein may be claimed by the United States of America, or to whatever extent may be recognized by the usages and customs of international law or by any agreement, international or otherwise, to which the United States of America or this state may be a party.

(d) All submerged lands, including the subsurface thereof, lying under said aforementioned waters.

2. The ownership of the waters and subsurface lands enumerated or described in subdivision one of this section shall be in this state unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law.
3. Nothing contained herein shall be construed to limit or restrict in any way (1) the jurisdiction of this state over any person or with respect to any subject within or without the state which jurisdiction is exercisable by reason of citizenship, residence or for any other reason recognized by law; (2) jurisdiction or ownership of or over any other waters or lands thereunder, within or forming part of the boundaries of this state. Nor shall anything herein be construed to impair the exercise of legislative jurisdiction by the United States of America over any area to which such jurisdiction has been validly ceded by this state and which remains in the ownership of the United States of America. Added L.1958, c. 648, eff. April 12, 1958.'

- (f) The barges were manned by a crew member when they were towed to the aforementioned dumping area. The Water Tunnel Contractors were billed separately for such crew members. Attached as Exhibit E hereto is a sampling of invoices from Moran Towing Corporation billing the Water Tunnel Contractors for the barge crew.
- (g) The purpose of the barge and towing contracts was to provide for the Water Tunnel Contractors a means of transporting the fill from the water tunnel they were excavating to a place where such fill could be dumped.

- (h) Moran Towing Corporation did not receive a sales tax exempt use certificate from the Water Tunnel Contractors.
  - (i) The New York State auditor alleges that the chartering of the barges was a rental of tangible personal property, and thus alleges a tax due of \$21,584.81. Petitioner alleges that it was providing a transportation service which is not subject to sales tax, and that the barges were vessels sailing in interstate commerce.
  - (j) To simplify the proceeding, the Petitioner concedes in respect of Moran Towing Corporation, liability of \$108 as sales tax due on expenses and \$613.80 as sales tax due on fixed asset additions. The total amount thus conceded is \$721.80.
16. Exhibit F hereto is a summary of the worksheets of the New York State auditor developed for the purpose of determining the extent to which each tug chartered by Moran T&T was operated in interstate or intrastate commerce. Column (a) lists all the tug boats involved. Column (b) lists the total receipts of each tug boat for August 1974. Column (c) shows the amount of such gross receipts of each tug boat which the New York State auditor determined to be in intrastate commerce. Column (d) shows such intrastate receipts, as determined by the New York State auditor, as a percentage of total receipts of each tug. Column (e) shows the receipts in dollars of each tug which the Petitioners contend are from intrastate commerce. Column (f) shows the Petitioner's calculation of intrastate receipts as a percentage of total receipts for each tug.
17. Exhibit G hereto (consisting of 35 pages) summarizes the actual invoices for each tug during the month of August, 1974, showing the customer, a description of the movement of the tug boat from point of origin to point of discharge, the New York State auditor's determination as to whether or not such movement is in intrastate commerce and the Petitioners' determination as to whether such movement is in intrastate commerce. Where the New York State auditor designated a tug boat movement as intrastate and the same movement is not also characterized by Petitioners as intrastate commerce, such movement is characterized by Petitioners as being in interstate commerce. Exhibit H (consisting of approximately 400 pages) consists of copies of each actual invoice where there is disagreement between the

New York State auditor and the Petitioners as to whether a movement was in interstate or intrastate commerce.

18. Exhibit I hereto contains an explanation of the abbreviations describing the movements used by the New York State auditor as set forth in Exhibit G. Part I of Exhibit I sets forth the identification of the geographic locations referred to by such abbreviations. Part II of Exhibit I contains a description of certain operations of tugs which may be performed at any of the geographic locations.
19. The parties stipulate to the correctness of the descriptions of the tug boat movements by the New York State auditor and the definitions of such descriptions contained in Exhibit I. The parties also stipulate the correctness of the names of the tug boats, the invoice numbers, the names of the customers, the amount of the receipts for each movement, and the total receipts of each tug for the period. The parties also stipulate that every vessel of every customer named in Exhibit G the towing of which the Petitioners characterize as being in interstate commerce, originated from or was destined for a location outside the State of New York and that each such vessel was engaged in the interstate or foreign commerce of the United States. The parties also stipulate that if the New York State auditor's determination of which tug boat movements were in intrastate commerce are correct, such auditor's determination of the dollar amounts shown in Exhibit G and percentages allocable to intrastate commerce shown in Exhibit F are correct. The parties stipulate that if Petitioner's determination of which tug boat movements were in intrastate commerce is correct, the dollar amounts and percentages shown by Petitioners to be in intrastate commerce are correct.
20. The parties stipulate that:
  - (a) If the New York State auditor's determination of which movements constitute intrastate commerce is correct, the eleven tugs so identified in Exhibit F would have less than 75% of their receipts from interstate commerce and four tugs, the Harriet, Julia C., Marie and Michael would have less than 50% of their receipts from interstate commerce.



- (b) If the Petitioners' determination of which movements constitute intrastate commerce is correct, two tugs, Barbara and Harriet, would have less than 75% of their receipts from interstate commerce and none of the tugs would have less than 50% of their receipts from interstate commerce.

- 21. With respect to all the foregoing the New York State auditor reached his determination of which activities of the tug boats were in intrastate commerce on the basis of whether the tug boat picked up the vessel in New York waters and on whether the income is derived from such services within New York waters. The New York State Auditor's position was that the origin of a vessel and/or its ultimate destination have no bearing in determining whether such activities of the tug boats constitute intrastate commerce. If this is the legal test of when a tug boat is engaged in interstate commerce, the parties stipulate that the agent correctly identified which activities of the tug boats were in intrastate commerce.
- 22. Petitioners contended that a vessel originating from or destined for a location outside the State of New York is engaged in the interstate or foreign commerce of the United States and that a tug boat which meets a vessel sailing in interstate commerce, tows such interstate vessel to a dock, docks such interstate vessel or undocks such interstate vessel, tows such interstate vessel away from the dock and discharges such vessel to sail in interstate commerce, such tug boat is the means of propulsion of such interstate vessel, becomes an extension of such interstate vessel and is thus in interstate commerce itself. The parties stipulate that if the foregoing is the correct characterization of the legal test of when an activity of a tug boat is in interstate commerce the Petitioners correctly identified which activities of the tug boats were interstate commerce.
- 23. The New York State Tax Department Regulations ¶527.5(b)(5) and ¶528.9(a)(4) provide that the word 'primarily' as used in Tax Law §§1105(c)(3) and 1115(a)(8) means 75% or more of the receipts of the vessel originated from interstate commerce. Petitioners contended that 'primarily' as used in the statute means that 50% or more of the receipts originated from interstate commerce. The parties agree that this is a question of law.

24. Exhibit J hereto is a listing of the responsible officers of the respective corporate petitioners to whom deficiency notices were directed by the Respondent with respect to the aforementioned issues. The parties stipulate that all paragraphs of the Stipulation and the First Amendment to the Stipulation shall apply equally to such individuals.
25. Regarding Moran Towing and Transportation Co., Inc., the New York State Tax Department has alleged that the amount of \$10,545.98 in tax is due with respect to barges time-chartered to outside transportation companies. To simplify the issues in this case, Petitioner Moran Towing and Transportation Co., Inc. concedes liability with respect to such amount of sales tax."

3. Petitioner Moran Towing Corp's contract with the Water Tunnel Contractors (Exhibit D) provided for the charter of vessels (steel bottom dump scows) on a "bareboat, unmanned basis". A provision on towing provided that all towing incidental to the movement of the vessels was subject to the terms and conditions of a separate agreement. Additionally, purchase orders executed by the Water Tunnel Contractors for the charter of said vessels provided for the inclusion of sales tax on the charges.

#### CONCLUSIONS OF LAW

A. That paragraph (8) of section 1115, subdivision (a) of the Tax Law specifically exempts from sales and use taxes, receipts from retail sales of certain property, as follows:

"Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

\* \* \*

"(8) Commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship)."

B. That section 1105(c)(3) of the Tax Law provides for an exception from the tax imposed on services, pursuant to said section, as follows:

"(iv) such services rendered with respect to commercial vessels and property used by or purchased for the use of such vessels, as such vessels and property are specified in paragraph eight of subdivision (a) of section eleven hundred fifteen..."

C. That 20 NYCRR 528.9(a)(4) defines "primarily" for purposes of section 1115(a)(8) of the Tax Law to be:

"(4) Primarily. Primarily means that at least 75 percent of the receipts from the vessel's activities are derived from interstate or foreign commerce."

D. That 20 NYCRR 528.9(a)(5) defines "engaged in interstate or foreign commerce" for purposes of section 1115(a)(8) of the Tax Law to be:

"(5) Engaged in interstate or foreign commerce. Engaged in interstate or foreign commerce means the transportation of persons or property for compensation between States or countries."

E. That the tugboats which petitioner Moran Towing and Transportation Co., Inc. chartered to provide services to vessels engaged in interstate or foreign commerce with respect to the entrance, berth and exit of said vessels from the harbor of New York constituted a purchase at retail. While the tugboats are related to the conduct of interstate or foreign commerce, their activities are in general a local event, separate and distinct from interstate commerce (Niagara Junction Ry Co. v. Creagh, 2 A.D.2d 299, affd. 3 N.Y.2d 831). The tugboats, supplies purchased therefor and repairs made thereon are subject to state and local sales and use tax.

F. That in Matter of Automatique, Inc. v. Bouchard (97 A.D.2d 183), the Appellate Division invalidated the interpretation of the word "primarily" for purposes of section 1115(a)(13) of the Tax Law and 20 NYCRR 528.14(b), which dealt with sales of tangible personal property through coin operated vending

machines at 10 cents or less. The court noted that the arbitrary assignment of the 75 percent figure was irrational.

Accordingly, the aforementioned regulations defining "primarily" for purposes of Tax Law §§1115(a)(8) and 1105(c)(3)(iv), are inapplicable. For purposes of Tax Law §§1115(a)(8) and 1105(c)(3)(iv), the term "primarily" is hereby determined to mean that 50 percent or more of receipts from the vessel's activities are derived from interstate or foreign commerce.

G. That in accordance with the contract between Moran Towing Corporation and Water Tunnel Contractors, Moran Towing Corporation furnished unmanned barges. The service of transportation was performed under the terms and conditions of a separate contract. Said transfer of barges for a consideration constituted a sale under 1101(b)(5) of the Tax Law and a taxable retail sale under section 1105(a).

H. That petitioners' failure to pay over the proper amount of tax was excusable and due to reasonable cause. Accordingly, the penalties are cancelled and interest is reduced to the minimum statutory rate.

I. That the petitions of Moran Towing and Transportation Co. Inc., Moran Shipyard Corp., Morine Supply Company Inc., Moran Towing Corp. and the corporate officers thereof are granted to the extent indicated in Conclusions of Law "F" and "H", supra. Also, the names of Edmond J. Moran, Thomas E. Moran, Lee R. Christensen and Richard H. Roe are to be deleted from notice number 90,742,050 in view of the fact that said parties were assessed for a lesser amount due by notice numbers 90,742,050A, 90,742,050B, 90,742,050C and 90,742,050D. Except as so granted, the notices of determination and demand for payment of sales and

use taxes due numbers 90,742,473; 90,740,640; 90,740,638; 90,742,050; 90,742,050A;  
90,742,050B; 90,742,050C and 90,742,050D are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985

*I abstain.*  
*RodrichawChu*

PRESIDENT

*Francis R. Kolmij*  
COMMISSIONER

*[Signature]*  
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Send to: *Amazon Shipyard Corp*  
*Towens & Corp.*

Street and No. *Machine Supply Co*

P.O., State and ZIP Code *1 World Trade Center*

Postage *New York, NY 10048*

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 693 169 853

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Send to: *Raymond H. Walter*

Street and No. *White & Case*

P.O., State and ZIP Code *14 Wall St*

Postage *New York NY 10005*

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