

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sears Oil Co., Inc. :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period March 1, 1976 through :
February 28, 1979. :

AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Rome Transfer Corporation :
for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period March 1, 1976 through :
February 28, 1979. :

State of New York :

ss.:

County of Albany :

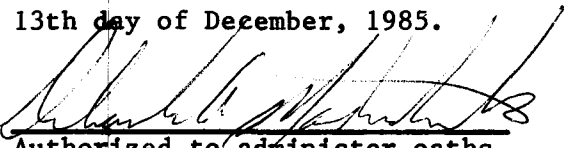
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Sears Oil Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sears Oil Co., Inc.
1914 Black River Blvd.
Rome, NY 13440

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
13th day of December, 1985.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sears Oil Co., Inc. :
for Revision of a Determination or for Refund of :
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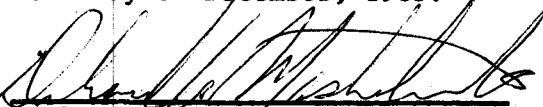
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Rome Transfer Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rome Transfer Corp.
1914 Black River Blvd.
Rome, NY 13440

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
13th day of December, 1985.



Authorized to administer oaths
pursuant to Tax Law section 174



Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
Sears Oil Co., Inc. :

for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period March 1, 1976 through :
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AFFIDAVIT OF MAILING

In the Matter of the Petition :
of :
Rome Transfer Corporation :

for Revision of a Determination or for Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Period March 1, 1976 through :
February 28, 1979. :

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

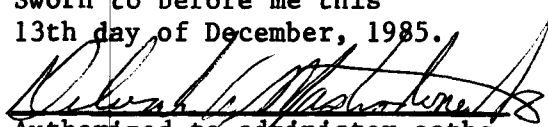
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon E. Parker Brown, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

E. Parker Brown
Hancock, Estabrook, Ryan, Shove & Hust
1400 MONY Plaza
Syracuse, NY 13202

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
13th day of December, 1985.


Authorized to administer oaths
pursuant to Tax Law section 174



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

December 13, 1985

Sears Oil Co., Inc.
1914 Black River Blvd.
Rome, NY 13440

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
E. Parker Brown
Hancock, Estabrook, Ryan, Shove & Hust
1400 MONY Plaza
Syracuse, NY 13202
Taxing Bureau's Representative

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

December 13, 1985

Rome Transfer Corp.
1914 Black River Blvd.
Rome, NY 13440

Gentlemen:

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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
E. Parker Brown
Hancock, Estabrook, Ryan, Shove & Hust
1400 MONY Plaza
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SEARS OIL COMPANY, INC. :
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 March 1, 1976 :
through February 28, 1979. :

DECISION

In the Matter of the Petition :
of :
ROME TRANSFER CORPORATION :
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 March 1, 1976 :
through February 28, 1979. :

Petitioner Sears Oil Company, Inc., 1914 Black River Boulevard, Rome, New York 13440, 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 March 1, 1976 through February 28, 1979 (File No. 29102).

Petitioner Rome Transfer Corporation, 1914 Black River Boulevard, Rome, New York 13440, 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 March 1, 1976 through February 28, 1979 (File No. 29690).

A consolidated hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on September 20, 1984 at 1:15 P.M., with all briefs to be submitted

on or before March 29, 1985. Petitioners appeared by Hancock & Estabrook (Joseph H. Murphy, Esq. and E. Parker Brown, II, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether regulation 20 NYCRR 528.9(a)(4), which defines "primarily", for purposes of Tax Law §1115(a)(8), to mean that at least seventy-five percent of the receipts from a vessel's activities are derived from interstate or foreign commerce, is valid.

II. Whether the vessels at issue were primarily engaged in interstate or foreign commerce rendering the receipts therefrom or the expenses incurred thereon exempt from sales and use taxes pursuant to Tax Law §1115(a)(8).

FINDINGS OF FACT

1. On January 25, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Sears Oil Co., Inc. ("Sears Oil") assessing sales and use taxes for the period March 1, 1976 through February 28, 1979 in the amount of \$17,943.81, plus interest of \$2,424.78, for a total amount of \$20,368.59.

2. On February 8, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Rome Transfer Corporation ("Rome Transfer") assessing sales and use taxes for the period March 1, 1976 through February 28, 1979 in the amount of \$22,141.70, plus interest of \$5,430.03, for a total of \$27,571.73.

3. To the extent at issue herein, the notice issued to Sears Oil was premised upon the conclusion that sales and use tax was due on the receipts from the rental of barges by Sears Oil. The notice issued to Rome Transfer was based upon the Audit Division's conclusion that sales and use tax was due on barge and tug rental expenses.

4. During the period in issue, Sears Oil was in the business of importing fuel oil and petroleum products which were sold to industrial, commercial and residential customers. Sears Oil also made sales of petroleum products to branches of the federal, state and local governments. In addition, Sears Oil engaged in the sale of automotive gasoline. The automotive gasoline was sold for resale and was also sold directly through Sears Oil retail outlets.

5. Industrial and business customers were generally supplied pursuant to contracts of about one year's duration. A substantial portion of this business was on a continuing basis, from year to year. In addition, during the onset of the periods in issue, federal rules required fuel oil customers, including governmental customers, to remain with their existing suppliers.

6. As a result of the foregoing, when Sears Oil purchased petroleum products, it generally knew the specific customers involved and the ultimate destination of the products.

7. All of Sears Oil petroleum products were brought to one of three locations in central New York for subsequent distribution. These locations were in Marcy, Rome and Belgium, New York.

8. Approximately sixty-two percent of the petroleum purchased by Sears Oil came from Venezuela or other foreign countries. About thirty-one percent of the petroleum came from states other than New York, primarily New Jersey. The remaining seven percent of the petroleum products were purchased from New York sources.

9. It was Sears Oil's practice to purchase its product on the spot market, through brokers. The spot market's supply arose from the surplus product of refiners and other marketers.

10. The petroleum purchased on the spot market was a finished product ready for its ultimate use. Generally, the petroleum fell into one of two categories - "clean" or "dirty". The clean product consisted of number 2 fuel oil, kerosene and gasoline. The latter was number 6 fuel oil and residential oil.

11. Most of Sears Oil's purchases were made in the middle to late summer, when the prices tended to be low, and delivered to the terminals in central New York shortly thereafter.

12. When Sears Oil bought an entire cargo, title to the petroleum passed at the time the vessels were loaded. When Sears Oil bought a portion of a tanker-size load, it would have title to a certain portion of the load.

13. The sales territory of Sears Oil was concentrated in central New York State but ranged from Rochester, New York on the west, the Southern Tier on the south, Little Falls on the east and the Canadian border on the north.

14. When the origin of the petroleum was outside the United States, it was Sears Oil's practice to charter seagoing tankers to bring the oil to the New York harbor. The petroleum of foreign origin would be imported into the United States under a federal oil import license.

15. The tankers chartered by Sears Oil ranged in weight from 20,000 to 50,000 tons. These tankers were smaller than supertankers which range in weight from 150,000 to 200,000 tons.

16. If the tanker weighed approximately 20,000 tons, it would leave the foreign point of origin and travel directly to Albany, New York via New York harbor. If the tanker weighed approximately 50,000 tons, it would travel from the foreign point of origin to the New York harbor where a portion of the

petroleum would be loaded onto a barge, known as a lighter, which would carry the product to its destination. The use of a lighter was necessary because the draft of a fully-loaded 50,000-ton ship was too great to be able to navigate the Hudson River.¹

17. When lightering was required, the tanker would go to a site off of Staten Island, New York, where it would converge with lighters. Thereafter, a portion of the petroleum would be transferred to the lighter.

18. When petroleum was purchased in states other than New York, Sears Oil would acquire the oil at a designated site, which would frequently be in a New Jersey port on the New Jersey side of New York harbor. It would then be transported by barge up the Hudson River to Albany. The size of barges used for this purpose ranged from 30,000 barrels to 120,000 barrels.

19. The petroleum products purchased in New York generally came from oil terminals located on the New York side of New York harbor. This petroleum was generally transported up the Hudson River in the same manner as the New Jersey source petroleum. Sears Oil may have acquired some petroleum during the periods in issue from sites located in central New York.

20. When the vessels from the various locations reached Albany, they would dock and transport their cargo ashore. Thereafter, Sears Oil would load the petroleum products onto shallow draft or canal draft vessels. The canal draft vessels would then proceed the balance of the distance up the Hudson River to the Barge Canal and proceed to central New York to the location of the Sears Oil terminals.

1 The receipts from these barges are not at issue in this proceeding.

21. The petroleum could not have been pumped directly from a river barge to a canal barge because the draft of a river barge was up to thirty-one feet whereas the maximum draft of a canal barge was twelve feet. The physical limitations of the locks also prevented the use of river barges.

22. There were several reasons why the petroleum could not have been pumped directly from a tanker or river barge to a canal barge. First, there was a risk of an oil spill. Second, there would have been a hazard to navigation because of a blocking of the channel. Lastly, the United States Coast Guard prohibited the direct pumping of petroleum from tanker or river barge to canal barge.

23. The tank farm through which Sears Oil's petroleum passed was owned by Sears Petroleum & Transport Corporation ("Sears Petroleum"). Sears Oil and Sears Petroleum were separate entities, although each corporation was owned by members of the Sears family.

24. The tank farm at the Port of Albany contained twelve tanks of varying sizes which, in total, had a capacity in excess of two million barrels. The tanks were used for the storage of Sears Petroleum's own customers as well as the storage of Sears Oil's petroleum. Rent or other fees were not paid by Sears Oil to Sears Petroleum for the use of the tanks. In addition, Sears Oil did not have a lease or make other formal arrangements for the use of the tanks.

25. Sears Oil tried to move its petroleum as quickly as possible through the tank farm because the Barge Canal would close on December 1st of each year. Consequently, usually only a minimal amount of oil would usually be left in the tanks after the Barge Canal closed.

26. During the 1979 navigation season (which was from approximately April 15, to December 1st), Sears Oil paid Rome Transfer ninety cents a barrel

to bring petroleum, on a barge known as the Syracuse Sears, from Albany to central New York.² In order to meet the needs of Sears Oil, Rome Transfer needed additional vessels. Accordingly, in 1976, Rome Transfer chartered three vessels, the Rome Sears, the Albany Sears and the Utica Sears, from Sears Oil.

27. The charters from Sears Oil were referred to as bare boat charters under which the charterer assumes all the risks and liabilities of ownership, employs his own crew and obtains his own insurance. The contracts evidencing the charter were designated "Demise Charter Agreements" and required Sears Oil to pay Rome Transfer \$350.00 a day for the use of each vessel.

28. The Demise Charter Agreements were entered into in Rome, New York.

29. During the 1976 navigation season, Rome Transfer also chartered two tugboats from another Sears family affiliated corporation known as Midstate Marine Corporation ("Midstate Marine"). These tugboats, known as the Midstate I and the Midstate II, were used exclusively to move barges containing Sears Oil's petroleum.

30. During the 1977 and 1978 navigation seasons, Sears Oil's petroleum was transported on the Barge Canal by the Hudson-Seneca Transportation Company ("Hudson-Seneca") for a fee per barrel. Hudson-Seneca bare boat chartered the Albany Sears and the Rome Sears from Sears Oil under bare boat charters for this service. In accordance with Demise Charter Agreements, Sears Oil charged Hudson-Seneca \$350.00 per day for the use of each vessel.

2 The charge for the Syracuse Sears did not give rise to any matters in dispute in this proceeding.

31. Nearly all of Rome Transfer's barge income in its fiscal year ended February 28, 1977 resulted from the transportation of petroleum for Sears Oil. Similarly, most of Hudson-Seneca's barge income in its fiscal years ended February 28, 1978 and February 28, 1979 resulted from the transportation of petroleum for Sears Oil.

32. Each of the barges were of the same size and had the same carrying capacity. However, unlike the other barges, the Utica Sears had the capability of being self-propelled. Generally the transportation of Sears Oil's petroleum was accomplished in the form of a tow - a tug pushing a barge.

33. The petroleum transported by Rome Transfer and Hudson-Seneca were unloaded at one of three terminals used by Sears Oil. These terminals were located in Utica, Rome and Belgium, New York. Sears Oil owned the terminals in Utica and Rome, New York. Sears Realty owned the terminal in Belgium, New York. The total tank capacity of the the three terminals was about two million barrels.

34. It would take a barge approximately five days to make a round trip from Albany to Belgium and approximately four days to make a round trip from Albany to Rome. A barge could make up to thirty round trips from Albany to central New York during the navigation season.

35. In late 1976, Rome Transfer subchartered one of the vessels, the Albany Sears, to a firm known as MacAllister Brothers. In early 1977, Hudson-Seneca resumed the charter.

36. During the periods in issue, the barges which conveyed Sears Oil's petroleum did not transport any other firm's products.

37. While the Barge Canal was closed, the vessels utilized to transport the petroleum were docked at either Rome or Albany.

38. Upon audit of Rome Transfer, the Audit Division considered the barge rentals to be taxable rentals of tangible personal property. Further, the Audit Division determined that the amount of the omitted barge rental expense for the fiscal year ended February 28, 1977 was \$316,310.00, consisting of \$141,240.00 paid to Midstate Marine and \$175,070.00 paid to Sears Oil. The Audit Division applied a sales tax rate of seven percent resulting in the sales tax allegedly due of \$22,141.70.

39. In the course of the audit of Sears Oil, the Audit Division found that the total of Sears Oil's total charter income for its fiscal year ended February 28, 1978 was \$158,900.00 and that its total charter income for the fiscal year ended February 28, 1979 was \$85,400.00. The Audit Division applied a sales tax rate of seven percent to this income resulting in additional tax due of \$17,101.00. The balance of the amount asserted by the Audit Division is not at issue herein.

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 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."

C. 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."


D. That in Matter of Moran Towing and Transportation Co., Inc. (State Tax Commission, May 23, 1985), it was decided, on the basis of Matter of Automatique, Inc. v. Bouchard (97 A.D.2d 183), that notwithstanding 20 NYCRR 528.9(a)(4), the term "primarily" for purposes of Tax Law §1115(a)(8) means fifty percent or more of receipts from a vessel's activities are derived from interstate or foreign commerce. While the vessels involved herein were related to the conduct of interstate or foreign commerce, their activities were, in general, a local event which was separate and distinct from interstate or foreign commerce (see Matter of Niagara Junc. Ry. Co. v. Creagh, 2 A.D.2d 299, *affd.* 3 N.Y.2d 831). Accordingly, the Audit Division properly concluded that the rental expenses of Rome Transfer and the charter income of Sears Oil were subject to New York State and local sales and use taxes. It is noted that the Audit Division properly applied the highest rate in effect in any jurisdiction in which the vessels were used (cf. 20 NYCRR 541.9(c)(2) which, although pertaining to the leasing of motor vehicles, is analogous to the instant situation).

D. That the petitions of Sears Oil Company, Inc. and Rome Transfer Corporation are denied and the notices of determination and demand for payment of sales and use taxes due are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 684 313 058

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Trans Air Co. Inc.</i>	
Street and No. <i>1917 Black River Blvd.</i>	
P.O. State and ZIP Code <i>Same N.Y. 13440</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	

P 684 313 060

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Le Porew Bros</i>	
Street and No. <i>Howard Estabrook Express</i>	
P.O. State and ZIP Code <i>1410 Montgomery Plaza</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	

★ U.S.G.P.O. 1983-403-517
PS Form 3800, Feb. 1982

P 684 313 059

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Same Trans Air Co. Inc.</i>	
Street and No. <i>1917 Black River Blvd.</i>	
P.O. State and ZIP Code <i>Same, NY 13440</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	

★ U.S.G.P.O. 1983-403-517
PS Form 3800, Feb. 1982