STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GERALD A. LOPER	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods March 1, 1981 through February 28, 1982, December 1, 1982 through February 28, 1983, and September 1, 1983 through November 30, 1983.	:	

Petitioner, Gerald A. Loper, P.O. Box 64, Chemung, New York 14825, 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 periods March 1, 1981 through February 28, 1982, December 1, 1982 through February 28, 1983, and September 1, 1983 through November 30, 1983 (File No. 801627).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 164 Hawley Street, Binghamton, New York, on June 6, 1989 at 1:15 P.M., with all evidence to be submitted by June 20, 1989. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed sales tax on petitioner's in-state purchases of three trucks.

II. Whether the Division properly assessed compensating use tax on petitioner's out-of-state purchases of certain trucks and trailers.

III. Whether the Division properly assessed sales tax on petitioner's in-state purchases of tires installed on his trucks.

FINDINGS OF FACT

On September 12, 1984, following an audit, the Division of Taxation issued to petitioner, Gerald A. Loper, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed a tax due of $8,649.63, plus interest, for the periods March 1, 1981 through February 28, 1982, December 1, 1982 through February 28, 1983, and September 1, 1983 through November 30, 1983.

Petitioner is in the trucking business, and during the period at issue, he owned several trucks and trailers. All of petitioner's vehicles were under contract to Elton M. Harvey Trucking, Inc. ("Harvey") of New Jersey. Under the terms of the contracts, each designated

"Lease/Agreement", petitioner was obligated to haul commodities offered by Harvey. Harvey was authorized to transport commodities pursuant to authority granted by the Interstate Commerce Commission. Petitioner held no such authority. Neither Harvey nor petitioner held any intrastate trucking authorization. Harvey paid petitioner by a percentage of the net revenue earned on each haul.

Pursuant to the terms of the contracts, petitioner retained ownership of his vehicles and was responsible for their maintenance. Petitioner was also responsible to hire and pay drivers for his trucks, to pay all operating expenses, and to select all routes. Both petitioner and Harvey were required under the agreements to insure the vehicles, but petitioner was required to indemnify Harvey for any loss or damage to Harvey arising from petitioner's trucking operation.

During the periods in question, petitioner operated a terminal near Chemung, New York, where his vehicles were garaged between trips. Dispatching of the vehicles was handled from the Chemung terminal. In addition, the vehicles were sometimes serviced or repaired at the Chemung terminal.

On audit, the Division reviewed petitioner's Federal income tax returns, with particular attention paid to petitioner's depreciation schedules. Using the information contained on the depreciation schedules, the Division determined that petitioner had improperly failed to pay sales or use tax on the following vehicles:

Vehicle	Date of Acquisition	Cost
1975 International	3/81	$ 14,000.00
1974 International	1/83	8,500.00
1975 International	8/81	16,000.00
1978 Peterbilt	9/81	27,000.00
1974 Freuhauf	8/81	4,500.00
1969 Freuhauf	12/81	4,700.00
1972 Hercules	1/83	6,500.00
1980 Peterbilt	1/83	29,500.00
1978 Freuhauf	1/83	7,800.00
	Total	$118,500.00

At hearing, petitioner established that he paid sales tax on the 1974 Freuhauf at the time of purchase. The Division thus withdrew its assessment with respect to said vehicle.

On audit, the Division also reviewed petitioner's purchase invoices and determined that petitioner had improperly failed to pay sales tax on purchases of tires in New York totaling $5,066.16. Tax assessed in respect of such purchases was $354.64.

Petitioner filed no sales tax returns with respect to the periods at issue.

Of the vehicles remaining at issue herein, petitioner purchased the 1974 International in Binghamton, New York; the 1978 Peterbilt in Buffalo, New York; and the 1975 International in Rochester, New York. Petitioner purchased the remaining vehicles out of state.

Petitioner was registered as owner of all the vehicles. The 1978 Freuhauf was registered in New York. The remaining vehicles were registered in New Jersey.

All of the vehicles purchased out of state were driven directly to the Harvey terminal in New Jersey. At that time, the vehicles became subject to the contract between petitioner and Harvey, the terms of which are outlined herein in Findings of Fact "2" and "3", supra. The

vehicles were then loaded up and sent out on the road. While hauling under contract with Harvey, the vehicles were always engaged in interstate commerce.

After the vehicles had delivered their loads, they were returned empty to petitioner's terminal near Chemung, New York. They remained in Chemung until Harvey contacted petitioner. The vehicles were then dispatched to Harvey's terminal in New Jersey to pick up their loads, and to be sent out on the road again.

The tire purchases component of the assessment results from petitioner's in-state purchases of tires from two entities, Twin Tier Tire Corporation ($2,049.18 in purchases) and Johnny Antonelli Tire ($3,016.98 in purchases). The Twin Tier tire purchases were mounted by Twin Tier and the Johnny Antonelli purchases were mounted by petitioner and his drivers.

SUMMARY OF PETITIONER'S POSITION

Petitioner contended that the 1978 Freuhauf and the 1972 Hercules were not purchased but were leased and were returned to the dealer soon after leasing.

Petitioner also contended that he paid sales tax to the State of Pennsylvania on his purchase or lease of the 1978 Freuhauf.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon the receipts from every retail sale of tangible personal property. Petitioner contended that the contractual arrangement between he and Harvey constituted a leasing of his vehicles to that company. Based upon this contention, it may be argued that petitioner's purchases of the vehicles in question were for resale and therefore not subject to sales tax. This contention is rejected. The record herein establishes that petitioner employed the drivers of the vehicles; that the vehicles were at all times under the direction and control of the drivers; and that petitioner had the right to select the routes the vehicles would travel. Harvey, the purported lessee of the equipment, thus did not have actual possession of the vehicles, right to possession, or the right to direct or control the drivers (see 20 NYCRR 526.7[e][4], [6]). The contractual arrangement between petitioner and Harvey was therefore not a lease of equipment for sales tax purposes and the purchases in question were purchases at retail (see Matter of Alascon, Inc., State Tax Commission, March 27, 1986).

B. With respect to purchases made after November 11, 1983, even if the contract between petitioner and Harvey was a lease, such purchases would nonetheless be deemed retail sales pursuant to Tax Law § 1101(b)(4)(i) which defines "retail sale" for Tax Law purposes, and further provides as follows:

> "Notwithstanding the preceding provisions of this subparagraph, the purchase of a truck, trailer or tractor-trailer combination for rental or lease to an authorized carrier, as described in paragraph twenty-two of subdivision (a) of section eleven hundred fifteen, shall be deemed a retail sale."[1] (As added by L 1981, ch 1043,

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[1] Tax Law § 1115(a)(22) provides for an exemption from sales tax with respect to the following:

> "The rental or lease of trucks, tractors or tractor-trailer combinations to an

§ 38, eff November 11, 1981.)

Accordingly, petitioner's purchases of vehicles after November 11, 1981 were, by definition, retail sales.

C. In accordance with Conclusions of Law "A" and "B", then, all of the disputed purchases made by petitioner were retail sales. Petitioner was at all times herein a resident of New York. Petitioner's purchases of the 1974 International, the 1978 Peterbilt and the 1975 International in New York were therefore properly subject to sales tax (see 20 NYCRR 525.2; cf. Tax Law §§ 1117 and 1214).

D. Tax Law § 1110 imposes a compensating use tax on the use within New York of property which would have been subject to sales tax if purchased in New York. Since the purchases in question were at retail, they are subject to tax if "used" in New York. Tax Law § 1101(b)(7) defines the term "use" as follows:

> "Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property."

E. The garaging of the vehicles in petitioner's terminal near Chemung, New York constituted a "use" of the vehicles within the plain meaning of Tax Law § 1101(b)(7) (see Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000; Matter of Xerox Corp. v. State Tax Commn., 71 AD2d 177). The Division's assessment on such vehicles was therefore proper.

F. Petitioner contended that the use of the trucks in interstate commerce while hauling for Harvey should exempt the purchases in question from tax. With respect to the trucks purchased in New York, since petitioner was a New York resident, his purchases of the trucks were subject to sales tax irrespective of their subsequent use in interstate commerce (cf. Tax Law §§ 1117 and 1214). With respect to the vehicles purchased out of state, it is noted that such vehicles were returned empty to New York to be garaged between trips. While in New York at such times, the vehicles were not engaged in interstate commerce (see Matter of Pepsico, Inc. v. Bouchard, supra; Matter of Xerox Corp. v. State Tax Commn., supra). The assessment on these vehicles was therefore proper.

G. The disputed tire purchases herein were made in New York. Such purchases were therefore properly subject to sales tax (see 20 NYCRR 525.2[a][3]). It is noted that, as with the vehicles in question, Tax Law § 1115(a)(26) would appear to offer an exemption from taxation, but the effective date of such section was subsequent to the periods at issue herein (see L 1987, ch 755, § 5, eff January 1, 1988).

> authorized carrier, pursuant to a written contractual agreement, for use in the transportation for hire of tangible personal property as augmenting equipment by such authorized carrier, provided that under such rental, lease or license to use, the owner of any such vehicle or any employee of such owner operates such vehicle."

Assuming the contractual arrangements between petitioner and Harvey are leases of vehicles, then such arrangements fall within the purview of this exemption.

H. The record fails to support petitioner's contentions as set forth in Paragraphs "13" and "14".

I. The petition of Gerald A. Loper is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 12, 1984, as adjusted per Finding of Fact "6", is sustained.

DATED: Troy, New York
January 4, 1990

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE