STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAWN CARE OF HAMPTON BAYS, 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, 1995 through November 30, 1997.	:	
In the Matter of the Petition	:	DETERMINATION DTA NOS. 817935 and 817936
of	:	
WILLIAM VAN HELMOND	:	
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, 1995 through August 31, 1995.	:	

Petitioner, Lawn Care of Hampton Bays, Inc., P.O. Box 1295, Hampton Bays, New York 11946-0270, 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, 1995 through November 30, 1997.

Petitioner, William Van Helmond, P.O. Box 1295, Hampton Bays, New York 11946-0270, 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, 1995 through August 31, 1995.

A consolidated hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway,

Hauppauge, New York, on March 28, 2001 at 10:30 A.M., with all briefs to be submitted by August 24, 2001, which date began the six-month period for the issuance of this determination. Petitioner Lawn Care of Hampton Bays, Inc., appeared by its corporate officer, William Van Helmond. Petitioner William Van Helmond appeared *pro se.* The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether petitioners were properly assessed sales or use tax on the acquisition and use of a tractor/ loader.

II. Whether petitioners were properly assessed sales or use tax on the acquisition of an office trailer.

III. Whether petitioners were properly assessed sales or use tax on the acquisition of a truck.

IV. Whether petitioners were properly assessed sales or use tax on the acquisition of certain radio equipment.

V. Whether petitioners have shown reasonable cause for abatement of penalties assessed.

VI. Whether, by citations to case law, statutes and regulations in its brief, the Division of Taxation has submitted new evidence after the record was closed.

FINDINGS OF FACT

1. On May 26, 1998, the Division of Taxation ("Division") issued a Notice of Determination (Assessment No. L-015034679-6) to petitioner Lawn Care of Hampton Bays, Inc. ("Lawn Care") assessing tax in the amount of $5,929.86, plus penalty and interest, for a total amount due of $10,798.57 for the sales tax quarter ended May 31, 1995.

On November 23, 1998, the Division issued a Notice of Determination (Assessment No. L-015891473-9) to petitioner Lawn Care assessing tax in the amount of $33,772.00, plus penalty and interest, for a total amount due of $61,468.87 for the sales tax quarter ended November 30, 1995.[1]

On May 19, 2000, the Division's Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order (CMS No. 172632) which reduced the tax due for the quarter ended November 30, 1995 from $33,772.00 to $1,415.00, plus penalty and interest computed at the applicable rate.

2. On June 8, 1998, the Division issued a Notice of Determination (Assessment No. L-015040318-8) to petitioner William Van Helmond assessing tax in the amount of $5,929.86, plus penalty and interest, for a total amount due of $10,834.65 for the sales tax quarter ended May 31, 1995.

On November 23, 1998, the Division issued a Notice Of Determination (Assessment No. L-015892882-7) to petitioner, William Van Helmond, assessing tax in the amount of $33,772.00, plus penalty and interest, for a total amount due of $61,468.87 for the sales tax quarter ended November 30, 1995.

Each of the notices of determination issued to petitioner William Van Helmond advised that he was liable as an officer or responsible person of Lawn Care.

---

[1] According to the Answer of the Division, five notices of determination were issued to Lawn Care, covering the period from March 1, 1995 through November 30, 1997. Some of the notices assessed tax on Lawn Care's sales; other notices assessed tax on fixed asset purchases. The Answer also states that the Conciliation Order dated May 19, 2000 modified these assessments to reduce the total tax due on sales to $3,069.00 and otherwise sustained the assessment of tax on the fixed assets purchased by Lawn Care in the amount of $4,077.50, plus applicable penalty and interest. Tax due on the purchase of a mower on December 1, 1996 ($82.50) was not contested by Lawn Care in its petition and, is not, therefore, at issue herein. Accordingly, the only amount remaining at issue in this proceeding is $3,995.00 ($4,077.50 - $82.50 = $3,995.00).

On May 19, 2000, BCMS issued a Conciliation Order which reduced the tax due for the quarter ended May 31, 1995 from $5,929.86 to $3,147.00, plus penalty and interest computed at the applicable rate and, in addition, reduced the tax due for the quarter ended August 31, 1995 to $393.00.[2]

3. At the hearing, it was stipulated by and between the parties as follows:

a. Petitioner William Van Helmond does not contest the Division's finding that, for the period at issue, he was a person responsible to collect and pay over sales and use taxes on behalf of Lawn Care;

b. The subject of this hearing is confined to tax assessed on fixed asset acquisitions by Lawn Care, to wit: a Ford tractor loader, an office trailer, a truck, and certain radio equipment;

c. The Conciliation Orders did not adjust, reduce or modify the tax assessed on the fixed assets; the notice of determination for the quarter ended May 31, 1995 includes $2,890.00 which was assessed on Lawn Care's purchase of a tractor loader and the notice for the quarter ended November 30, 1995 includes $1,105.00 assessed on Lawn Care's purchase of an office trailer, a truck and certain radio equipment; and

d. It is agreed that sales tax due on sales by Lawn Care is $3,069.00, plus penalty and interest. Accordingly, the amount remaining at issue in this proceeding is the amount of

---

[2] According to the Answer of the Division, five notices of determination were issued to William Van Helmond, as a responsible officer of Lawn Care, covering the period from March 1, 1995 through November 30, 1997. Some of the notices assessed tax on Lawn Care's sales; other notices assessed tax on fixed asset purchases by Lawn Care. The Answer also states that the Conciliation Order dated May 19, 2000, modified these assessments to reduce total tax due on sales to $3,069.00 and otherwise sustained the assessment of tax on fixed assets purchased by Lawn Care in the amount of $4,077.50, plus applicable penalty and interest. Tax due on the purchase of a mower on December 1, 1996 ($82.50) was not contested by petitioner, William Van Helmond, in his petition and is not, therefore, at issue herein. Accordingly, the only amount remaining at issue in this proceeding is $3,995.00 ($4,077.50 - $82.50 = $3,995.00).

tax assessed on Lawn Care's fixed asset purchases, $2,890.00 plus $1,105.00, or $3,995.00, plus penalty and interest.

4. Lawn Care is a landscaping contractor. A field audit of Lawn Care for the period March 1, 1995 through November 30, 1997 was assigned in February 1998. The auditor, Joseph Miller, sent an initial appointment letter to Lawn Care on March 10, 1998. In the letter, the auditor requested that Lawn Care produce for audit, among other things: a general ledger; a cash receipts journal; a cash disbursements journal; purchase invoices; sales invoices; expense purchase invoices; and fixed asset purchase invoices. On May 28, 1998, the auditor met with petitioners' former representative, Robert Fischer, C.P.A., who produced Federal income tax returns, sales tax returns and worksheets and bank deposit statements and summaries (which Mr. Fischer stated was Lawn Care's cash receipts journal). Additional requests for records were made by the auditor on May 29, 1998 and on February 24, 1999; however, the auditor never received what he asked for.

With respect to Lawn Care's purchase of fixed assets, the auditor examined the depreciation schedule on the Federal income tax return as well as the trial balance, an accounting summary of what transpired for the year. The auditor found that on April 28, 1995, Lawn Care had purchased, from Malvese Equipment Co., Inc. of Riverhead, New York, a Ford tractor with a loader for the net purchase price of $34,000.00, and that Lawn Care had not paid sales tax on this purchase. The auditor obtained a copy of a blanket resale certificate, dated August 29, 1989, which petitioner, William Van Helmond, had executed, as president of Lawn Care, and had provided to Malvese Equipment Co., Inc. Tax was, therefore, assessed in the amount of $2,890.00 ($34,000.00 x 8 ½ %). This amount was included in the notice of determination issued to Lawn Care for the quarter ended May 31, 1995.

5. From the trial balance provided to him by petitioners' former representative, Robert Fischer, C.P.A., the auditor ascertained that in September 1995, Lawn Care had purchased an office trailer for $10,000.00, a truck for $1,000.00 and certain radios and base equipment totaling $4,000.00 (the auditor examined an invoice which revealed that tax had been paid on $2,000.00 out of a total of $4,000.00 paid for this radio equipment; there was no invoice for the other $2,000.00 in radio equipment purchased by Lawn Care). Tax was, therefore, assessed on this $13,000.00 in purchases ($13,000.00 x 8 ½ %) in the amount of $1,105.00 for the quarter ended November 30, 1995.

6. The office trailer was located on real property which was purchased by Lawn Care. It was mounted on blocks; it had no basement or foundation. The trailer was utilized, from the time of its purchase until the time of its demolition in September 2000, as an office for Lawn Care. The trailer contained a filing room, bathroom, conference room and reception area.

SUMMARY OF PETITIONERS' POSITION

7. Petitioners' position with respect to each of the fixed asset purchases may be summarized as follows:

a. Petitioners admit that Malvese Equipment Co., Inc. should have charged and collected sales tax on the purchase of the tractor/loader. However, petitioner William Van Helmond contends that he was unaware that the blanket exemption certificate which he executed to Malvese in 1989 would be used in a purchase of the tractor/loader in 1995. The fact that Malvese accepted this outdated certificate and did not charge tax is completely its responsibility and Lawn Care (and Mr. Van Helmond) should not now be held responsible for this error. It was Malvese's responsibility to properly determine whether sales tax should have been charged. Moreover, at the hearing, petitioner William

Van Helmond stated that a salesman at Malvese told him that the purchase was exempt under a horticultural exemption;

b. The property where the office trailer was located was initially leased by petitioners for a year prior to its having been purchased. Petitioners contend that the office trailer was permanently affixed to the real property and remained at the same location (for approximately 31 years) until it was subsequently demolished in September 2000. Petitioners maintain that the trailer was not, in reality, a trailer, but was an office, with a filing room, bathroom, conference room and reception area;

c. The truck was given to an employee as a bona fide gift and it was understood that this employee would pay the sales tax upon its registration with the Department of Motor Vehicles;

d. Petitioners contend that the remaining $2,000.00 in radio equipment was purchased by a taxi company in Sag Harbor, New York because Mr. Van Helmond found that he did not need all of this equipment; and

e. In their reply brief, petitioners contend that the Division's brief should not be considered because it cites to various case law, the citations to which were not made on or before the date of the hearing. Petitioners allege that this constitutes additional evidence which may not be submitted after the close of the hearing when the administrative law judge closed the record.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon the receipts from every sale of tangible personal property (except as otherwise provided by Article 28 of the Tax Law). Tax Law § 1101(b)(4) defines "retail sale" as a sale of tangible personal property to any person for any

purpose, other than for resale as such or as a physical component part of tangible personal property. With respect to the tractor/loader, there is no allegation that a resale occurred. The tractor/loader was used by petitioners in Lawn Care's business.

The burden of proving that any receipt is not taxable shall be upon the person required to collect the tax and the customer (Tax Law § 1132[c]; 20 NYCRR 532.4[b][1]).

20 NYCRR 532.1(e) provides as follows:

> Where any customer has failed to pay sales tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law to the person required to collect tax, such tax shall be payable by the customer directly to the Department of Taxation and Finance, and it shall be the duty of the customer to file a return with the Department of Taxation and Finance and to pay the tax within 20 days of the date the tax was required to be paid.

B. Petitioners' contention that the liability for the sales tax on the tractor/loader falls upon the vendor (Malvese Equipment Co., Inc.) is misplaced. 20 NYCRR 532.4(b)(2) provides that:

> A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

While the record in this matter seems to indicate that the vendor did not, in fact, accept a properly completed exemption certificate from petitioners at the time of the purchase of the tractor/loader, in no event is the actual customer (Lawn Care) relieved of its responsibility for payment of the tax. Perhaps, by virtue of Malvese's failure to obtain a properly completed exemption certificate, the Division could proceed directly against Malvese for the tax due. However, it is the purchaser (in this case, Lawn Care) who bears the burden of proving the nontaxability of the transaction (20 NYCRR 532.4[b][3]).

As correctly noted in the Division's brief, if it is the exemption set forth in Tax Law § 1115(a)(6) "for use or consumption directly and predominantly in the production for sale of tangible personal property by farming," which petitioners contend is applicable to this tractor/loader, they have wholly failed to sustain their burden of proving entitlement to this exemption since the record contains no evidence as to the purpose or use of this piece of equipment.

Having failed to prove entitlement to any exemption from sales tax upon the purchase of the tractor/loader, the Division properly imposed the tax upon the purchaser, Lawn Care (and its responsible officer, petitioner William Van Helmond). The tax in the amount of $2,890.00 is, therefore, sustained.

C. Tax Law § 1115(a)(23) provides for an exemption from the imposition of sales tax for a retail sale of a used mobile home. Despite the statement in the Division's brief to the contrary, petitioners submitted a photograph of the office trailer as well as a site plan of the real property which includes the floor plan of the trailer. This evidence and petitioner William Van Helmond's credible testimony regarding its purpose and use reveal that the office trailer was, among other things, a type of manufactured housing, was not self-propelled, was built on a permanent chassis to be connected to utilities (the office trailer had bathroom facilities), was designed to be used as a permanent dwelling (with or without a permanent foundation) and was used for commercial purposes (***see***, 20 NYCRR 544.2). Accordingly, its purchase by petitioners was exempt from tax and the tax imposed by the Division in the amount of $850.00 ($10,000 x 8 ½ %) is hereby canceled.

D. Petitioners offered no credible evidence that the truck purchased for $1,000.00 was not used by petitioners and that, instead, it was transferred, as a bona fide gift, to an employee. No

documents evidencing such alleged transfer or that such employee did, in fact, pay sales tax were produced. Accordingly, the tax imposed by the Division in the amount of $85.00 ($1,000.00 x 8 ½ %) is sustained.

E. Petitioners' claim that the $2,000.00 worth of radio equipment was purchased by a taxi company in Sag Harbor, New York is unsubstantiated by this record. Absent an invoice showing payment of sales tax upon the purchase of this equipment (either by petitioners or by this third party), the imposition of tax by the Division in the amount of $170.00 ($2,000.00 x 8 ½ %) is hereby sustained.

F. Tax Law § 1145(a)(1)(i) imposes a penalty for failure to timely file a sales tax return or pay any tax imposed under Articles 28 and 29 of the Tax Law. This penalty may be abated if it is determined that the failure or delay in filing a return or paying the tax was due to reasonable cause and was not due to willful neglect. Petitioners have offered no evidence upon which it can be concluded that their failure to file returns or pay tax was due to reasonable cause and not due to willful neglect. Penalties are, therefore, sustained.

G. Finally, petitioners, in their reply brief, allege that the Division's citations to case law and to various statutes and regulations must not be considered because the record had been closed by the administrative law judge on the date of the hearing, i.e., March 28, 2001. Perhaps because petitioner William Van Helmond is not an attorney, he is unaware as to the actual definition of a legal brief.

While it is true that evidence may not be submitted after the closing of the record so as to ensure that the hearing process is defined and final (***see***, ***Matter of Schoonover***, Tax Appeals Tribunal, August 25, 1991), 20 NYCRR 3000.15(d)(6) provides that in a hearing before an administrative law judge, after the submission of evidence by the parties has been completed,

"[i]f the parties also wish to submit briefs, they may do so, within the time restrictions fixed by the administrative law judge." A "brief" is defined as follows:

> A written statement prepared by the counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws, and an argument of how the law applies to the facts supporting counsel's position (Black's Law Dictionary 174 [5th ed 1979]).

The Division's brief, submitted on August 3, 2001, complied with this definition and, accordingly, was properly considered herein.

H. The petitions of Lawn Care of Hampton Bays, Inc. and William Van Helmond are granted to the extent indicated in Conclusion of Law "C"; the Division of Taxation is hereby directed to modify the notices of determination (as previously modified by conciliation orders dated May 19, 2000) accordingly; and, except as so granted, the petitions are in all other respects denied.

DATED: Troy, New York
February 21, 2002

/s/ Brian Friedman
ADMINISTRATIVE LAW JUDGE