

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
DAIRYMENS LEAGUE CO-OP ASSOCIATION, 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 December 1, 1975
through February 28, 1979.

DECISION

In the Matter of the Petition
of
DAIRYLEA COOPERATIVE, INC. - METRO BRANCH
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 June 1, 1975
through May 31, 1978 and September 1, 1977
through February 28, 1978.

Petitioner, Dairymens League Co-op Association, Inc., c/o Anne Van Lent-Splinter, One Blue Hill Plaza, Pearl River, New York 10965, 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, 1975 through February 28, 1979 (File No 28850).

Petitioner, Dairylea Cooperative, Inc. - Metro Branch, c/o Anne Van Lent-Splinter, One Blue Hill Plaza, Pearl River, New York 10965, 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 June 1, 1975 through May 31, 1978 and September 1, 1977 through February 28, 1978 (File Nos. 28849 and 32691).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 27, 1982 at 9:15 A.M., with all briefs to be submitted by March 31, 1983. Petitioners appeared by Thomas J. Valenti, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

- I. Whether certain installations constituted capital improvements to real property.
- II. Whether certain capital assets acquired were exempt from sales and use taxes.
- III. Whether the rental of a Hyster forklift was subject to tax.
- IV. Whether the Audit Division properly used a "test period" as a basis for determining tax liability on expense purchases.
- V. Whether the purchase of a customer list, which was included as part of a bulk sale of a business, is subject to tax and whether the subsequent sale of a portion of said customer list is subject to tax.
- VI. Whether an assessment of additional taxes for the period June 1, 1975 through May 31, 1978 precluded the Audit Division from issuing subsequent assessments for the same period.

FINDINGS OF FACT

1. Dairylea Cooperative, Inc. is a New York cooperative corporation owned by and operated for the benefit of dairy farmers. Farmers send their milk to Dairylea processing plants in several locations where the milk is processed into fluid milk or consumer products, such as butter, cheese and ice cream.

Petitioners, Dairylea Cooperative, Inc. - Metro Branch ("Metro") in Woodside, New York and Dairymens League Co-Op Association, Inc. ("League") in Binghamton, New York, each operate a Dairylea processing plant.

2. On September 20, 1979, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Metro covering the period June 1, 1975 through May 31, 1978 for taxes due of \$94,341.65, plus interest of \$20,328.76, for a total of \$114,670.41 (Notice #790920150C).

A second Notice was issued to Metro on October 27, 1980 for taxes due of \$62,877.52, plus interest of \$15,085.45, for a total of \$77,962.97 (Notice #801027131C). This Notice was for the period September 1, 1977 through February 28, 1978 and was in addition to the taxes due assessed on the above Notice.

3. The Audit Division also issued a Notice against League on September 20, 1979 covering the period December 1, 1975 through February 28, 1979 for taxes due of \$12,419.37, plus penalty and interest of \$4,438.79, for a total of \$16,858.16 (Notice #S790920217C). Said Notice resulted from an audit of League's books and records.

4. The additional taxes of \$94,341.68 assessed against Metro in the first assessment (Finding of Fact "2") and \$3,795.67 of the assessment against League were attributable to the purchases of returnable milk cases. At the hearing, counsel for the Audit Division conceded that the Division changed its position regarding the taxability of milk cases subsequent to the audit and therefore cancelled Notice #S790920150C issued on September 20, 1979 to Metro in total and cancelled \$3,795.67 of Notice #S790920217C issued to League.

5. The audit of League's books and records disclosed the following areas of deficiency:

recurring purchases	\$10,533.17
rental of Hyster lift truck	466.27
milk cases	3,795.67
capital assets	2,484.75
electricity	<u>1,459.85</u>
	\$18,739.71
less: credit for tax paid	
on fuel oil	<u>6,320.34</u>
	\$12,419.37

The tax due on the milk cases is no longer at issue. Also, League is not contesting the tax due on electricity or the credit allowance on fuel oil, leaving an unresolved portion of \$8,623.77.

6. The taxes due on recurring purchases were based on an examination of purchase invoices for the fiscal year March 1, 1977 through March 31, 1978. The Audit Division found taxable purchases of \$50,629.29 for that year. This amount was related to the number of gallons of milk processed for the same period to arrive at an error factor of .0065578 percent. The error rate was used to estimate the taxes due on expense purchases for 1976 and 1978.

The auditor advised League at the time the audit was started that he intended to use a test period for expense purchases and suggested the fiscal year 1977. At that time, League agreed to the test period audit and to the period selected.

League did not contest the taxability of any of the recurring purchases held taxable by the Audit Division. However, it argued that the Audit Division's resort to a test period audit was not necessary because purchase invoices were available for the entire period under audit.

7. The capital assets portion of the audit included the following purchases:

1) conveyor	\$ 2,400.00
2) labor charges to change a conveyor system, work on CIP lines and change a loading dock	9,351.88

3) labor to install stainless milk lines and hangers, installation of cooler doors and tracks	1,339.50
4) two model 350 dairy wall cases and one model 707 dairy sales case	2,260.05
5) fixtures and equipment purchased from Goodrich Dairy	10,200.00
6) equipment purchased from Allen Dairy	2,400.00
7) labor charges for the installation of a boiler	8,733.47
8) stainless steel piping	868.70

The Audit Division conceded that the conveyor [item (1)] was not taxable. (League paid 6% sales tax on the conveyor at the time of purchase. Therefore, it is entitled to a credit of \$144.00.) League conceded that the following capital assets are subject to tax:

a) that portion of the labor charges in (2) related to the conveyor system and CIP lines	\$ 6,172.24
b) labor charges in (3) related to the milk lines and hangers	884.00
c) all the dairy cases in (4)	2,260.05
d) fixtures and equipment in (5) and (6)	12,600.00

The remaining assets at issue are the labor charges to change the loading dock, installation of cooler doors and tracks, installation of a boiler and the pipe.

8. The loading platform was located at the exit doors of the milk cooler and was used primarily for distribution purposes. It was attached to the building. League did not provide a description on the nature of the work involved in changing the loading platform.

League also did not provide any information regarding the installation of the doors on the milk cooler.

League maintained, however, that both of the above labor charges were incurred in connection with a capital improvement to real property.

9. The boiler was permanently affixed to real property.

10. The stainless steel piping purchased by League was used to move the milk products from the receiving area through the pasteurizing and homogenizing process to the fillers. The piping was also used for making a plastic gallon container machine. League submitted an invoice subsequent to the hearing showing that sales tax of \$9.41 was paid on a portion of the piping it purchased.

11. The Hyster lift truck was used by League to load and unload trucks and move materials throughout the plant. League estimated that the truck was used 70 percent of the time moving raw materials; however, insufficient evidence was offered to support such estimate.

12. Notice #801027131C, issued to Metro for additional taxes of \$62,877.52 (Finding of Fact "2") resulted from Metro's purchase of the business assets of Jerome Dairy, Inc.

On November 16, 1977, Metro purchased the assets of Jerome Dairy, Inc. for \$816,014.18. The assets included the following:

customer equipment	\$ 50,000.00
motor vehicles	50,000.00
routes and customer lists	691,959.50
goodwill, trademarks, licenses	24,054.68

In January, 1978, Metro sold part of the above customer lists to Parklane Dairy for \$94,009.00.

The Audit Division held Metro liable for tax on both transactions on the basis that "customer lists" constituted the sale of information services under section 1105(c)(1) of the Tax Law.

Metro's position with respect to customer lists is threefold:

(1) a customer list is an intangible asset, akin to goodwill, and therefore, is not subject to sales or use taxes;

(2) the sale of a customer list is not taxable under section 1105(c)(1) of the Tax Law when sold by a vendor not in the business of furnishing information services;

(3) if it is determined that the sale of a customer list is taxable, the portion of the list resold to Parklane should not be subject to tax since it would result in double taxation.

13. The Audit Division had conducted an audit of Metro's books and records which resulted in the issuance of the first assessment of additional taxes of \$94,341.65. As indicated in Finding of Fact "4", the entire assessment was attributable to the purchase of milk cases. During the course of the audit, the Audit Division examined the above transactions involving customer lists, however, at that time it considered them as being nontaxable sales of intangible assets.

Based on its interpretation of court rulings, the Audit Division later issued the assessment against Metro for the transactions it had previously reviewed during the audit.

Metro argued that the Audit Division was barred from issuing the assessment for the customer lists because it covered the same periods for which an assessment for additional taxes had already been issued.

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law imposes a tax on the service of maintaining, servicing or repairing real property as distinguished from adding to or improving real property by a capital improvement.

That section 1105(c)(3) imposes a tax on installing tangible personal property except for installing property which, when installed, constitutes an addition or capital improvement to real property.

That a capital improvement is an addition or alteration to real property (i) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, and (ii) which becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself, and (iii) is intended to become a permanent installation [20 NYCRR 527.7(a)(3)].

That with respect to the work described as "change loading platform" and "install cooler doors and track", League failed to establish that such work constituted capital improvements as required by section 1132(c) of the Tax Law.

That the boiler installation constituted a capital improvement to real property within the meaning and intent of section 1105(c)(3) of the Tax Law, and therefore, the labor charges of \$8,733.47 for installation thereof are not subject to tax.

B. That the stainless steel piping constituted equipment exempt from the imposition of sales and use taxes under section 1115(a)(12) of the Tax Law. Accordingly, League shall be given a credit of \$9.41 for the sales tax paid thereon. League shall also be credited with the payment of \$144.00 as indicated in Finding of Fact "7".

C. That the Hyster lift truck was multi-purpose and League has not established that it was used directly and predominantly in production within the intendment of section 1115(a)(12) of the Tax Law and 20 NYCRR 528.13. Accordingly, the rental payments are subject to tax.

D. That the uncontradicted testimony of the auditor established that League agreed to the use of a "test period" as basis for determining its tax liability on recurring purchases for the entire audit period, and, as such, the Audit Division was not required to perform a complete review of purchase invoices, regardless of their availability.

E. That the sum of \$691,959.50 paid by Metro to Jerome Dairy, Inc. for routes and customer lists was subject to sales tax. Section 1105(a) of the Tax Law imposes a tax upon the "receipts from every retail sale of tangible personal property except as otherwise provided in [Article 28]." Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the service of "furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons..."

A customer list is a business asset the sale of which constitutes "the sale of information and is, therefore, taxable under section 1105 [subd. (c)] of the Tax Law (citation omitted)" (Long Island Reliable Corp. v. Tax Commission, 72 A.D.2d 826).

F. That the \$94,009.00 received by Metro when it resold a portion of the customer routes and lists to Parklane Dairy two months after acquiring them from Jerome Dairy, Inc., was subject to tax for the same reasons cited in Conclusion of Law "E".

G. That the Notice issued to Metro on September 20, 1979 for the period June 1, 1975 through May 31, 1978 did not bar the Audit Division from issuing a second assessment against Metro which included periods covered by the first Notice. The Audit Division is authorized to make an assessment of additional taxes any time before the expiration of more than three years from the date of the filing of a return in accordance with section 1147(b) of the Tax Law.

H. That in accordance with Findings of Fact "4" and "7", Notice #S79092050C is cancelled and Notice #S790920217C is reduced by \$3,795.67 and \$168.00, respectively.


I. That the petition of Dairymens League Co-Op Association, Inc. is granted to the extent indicated in Conclusions of Law "A", "B" and "H"; that the petition of Dairy Lea Cooperative, Inc. - Metro Branch is granted to the extent indicated in Conclusion of Law "H"; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued September 20, 1979 and October 27, 1980; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 14 1984


PRESIDENT


COMMISSIONER


COMMISSIONER