

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SKAGGS WALSH, INC.	:	DECISION
	:	
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, 1979	:	
through October 30, 1980.	:	

Petitioner, Skaggs Walsh, Inc., 119-02 23rd Avenue, College Point, New York 11356, 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, 1979 through October 30, 1980 (File No. 33220).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1983 at 9:15 A.M., with all briefs to be submitted by August 30, 1983. Petitioner appeared by Nicholas J. Damadeo, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether the sale of a customer list as part of the bulk sale of business assets constituted the furnishing of an information service subject to tax under section 1105(c)(1) of the Tax Law.

II. Whether the sale of such customer list constituted a retail sale of tangible personal property.

FINDINGS OF FACT

1. On January 13, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Skaggs

Walsh, Inc., covering the period December 1, 1977 through October 31, 1980 for taxes due of \$6,560.00, plus interest of \$92.96, for a total of \$6,652.96. The notice indicated that the taxes were determined due from McAllister Fuel Oil, Inc. and that petitioner, as purchaser in a bulk sale transaction, was liable for such taxes in accordance with section 1141(c) of the Tax Law.

2. Petitioner was engaged in the retail fuel oil business. On October 20, 1980, petitioner entered into an agreement to purchase the business assets of McAllister Fuel Oil, Inc. ("McAllister") for \$135,000.00. The agreement allocated the total sales price as follows:

goodwill	\$ 3,000.00
customer list	82,000.00
equipment	30,000.00
restrictive covenants	20,000.00

The customer list referred to above consisted of 44 pages and was annexed to the sale agreement as Exhibit "A".

3. The Audit Division considered that the sale of the customer list was the furnishing of information, subject to the tax imposed under section 1105(c)(1) of the Tax Law.

The total tax due on the notice issued to petitioner represented the tax computed on the portion of the sales price allocated to the customer list.

At the hearing, counsel for the Audit Division also argued that the customer list was taxable under section 1105(a) of the Tax Law as a retail sale of tangible personal property.

4. The customer list annexed to the sale agreement was divided into three columns. The first column of each page stated the name and address of the customer. The second column indicated whether or not the customer had a service contract with McAllister. The third column indicated the expiration date of the service contract, if applicable.

With the exception of the above information, all other facts concerning the customer, i.e., degree day cards, size of tank, location of fill, service records and credit, are reflected in the business records.

5. McAllister had contracts with its customers for the delivery of fuel oil and for service. These contracts were either written or oral, but in all cases were indefinite in duration. Under a typical contract, McAllister supplied fuel oil to a customer on an automatic delivery basis. Consumption factors were calculated for each individual customer on a degree day basis so that the company could anticipate when each customer was due for a delivery. In some cases, customers were on a "will call" basis.

McAllister notified its customers that, as of a certain date, petitioner would be supplying their fuel oil and service. Petitioner also notified the same customers advising them that it was assuming the responsibilities of McAllister.

Petitioner took the position that the sale of the customer list was an assignment of contractual rights and obligations which is not subject to the imposition of sales and use taxes.

6. As part of the sale agreement, the principals of McAllister executed restrictive covenants which prohibited, inter alia, the soliciting or accepting of business from any of the customers on the customer list or disclosure of the names on such list to other persons.

Petitioner also required employees to execute restrictive covenants in which they agreed not to disclose the names of petitioner's customers.

CONCLUSIONS OF LAW

A. That 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 in reports furnished to other persons...".

B. That 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, mot. for lv. to app. den. 49 N.Y.2d 707; Matter of Meadowbrook Removal Corp., State Tax Commission, December 17, 1984).

C. That the petition of Skaggs Walsh, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 13, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

Rodolph W. Clem
PRESIDENT

Francis Q. Kalnig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER