

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

AUDELL PETROLEUM CORP.

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, 1978
through September 15, 1981.

DECISION

Petitioner, Audell Petroleum Corp., 549 Larkfield Road, East Northport, New York 11731, 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, 1978 through September 15, 1981 (File No. 36178).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1983 at 2:45 P.M., with all briefs to be submitted by October 1, 1983. Petitioner appeared by Jackson, Sullivan & Beckert (Francis J. Sullivan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether the receipts from the sale of a customer account list in connection with the purchase of the assets of a home heating oil company were subject to tax as the sale of tangible personal property.

II. Whether the receipts from such sale were subject to tax as the sale of an information service.

FINDINGS OF FACT

1. On December 18, 1981, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Audell Petroleum Corp., in the amount of \$50,833.74, plus interest of \$2,426.31, for a total due of \$53,260.05 for the period December 1, 1978 through September 15, 1981.
2. On December 16, 1981, petitioner, by its president, John O'Loughlin, had executed a Consent to Fixing of Tax Not Previously Determined and Assessed partially consenting to the assessment to the extent of \$6,472.20. Petitioner made payment of the \$6,472.20 and timely filed a petition for a hearing with respect to the remainder of the assessment.
3. Petitioner was engaged in the business of home distribution of fuel oil and oil burner servicing for approximately 12,000 residents of Suffolk County, New York. According to testimony offered by petitioner, the home heating oil business is of a personal nature such that, to remain competitive, vendors must offer customers good service and good credit terms. Since petitioner had no contracts with customers to deliver oil for set periods of time, customers could transfer their business to any one of a number of competing companies; therefore, petitioner's good name was an important asset.
4. On September 15, 1981, Meenan Oil Co., Inc. ("Meenan") purchased all the assets, both tangible and intangible, of petitioner. The total purchase price was \$811,932.00 which was allocated as follows:

Furniture & Fixtures	\$ 5,000.00
Motor Vehicles	94,350.00
Merchandise - Inventory	95,227.00
Goodwill & Other Assets (Customer List)	617,466.00
	<u>\$811,932.00</u>

The customer list referred to was actually a set of cards containing customer names and addresses and other information such as past oil usage and types of service contracts used. These cards were never actually transferred from petitioner to Meenan; rather, the information they contained was to be entered in Meenan's computer after the transaction had been consummated. The computer transfer process took approximately one month to complete.

5. The parties to the sale agreed to treat the customer list as a trade secret to insure that Meenan had the opportunity to retain as many of petitioner's customers as possible. One of Meenan's managers testified that, typically, a purchaser of a home heating oil business will lose 20 percent of the former owner's customers and this figure is taken into consideration in determining the purchase price of the customer list. In Meenan's case, two of petitioner's employees left to join a rival oil company and were able to solicit some of petitioner's customers whose names and addresses they knew from the time spent working for petitioner. As a result, Meenan lost 27 percent of petitioner's former customers in its first year of operation, thus demonstrating the necessity of maintaining the strictest confidentiality with respect to the customer list.

6. The purchase price of the customer list was determined based on guarantees from petitioner that it sold a certain number of gallons of oil the previous year. The agreed price of the list was "\$617,335.00 plus the product of 18¢ times the number of degree day adjusted gallons sold by [Meenan] in excess of 3,429,750 gallons during the one year period from the date of closing...", but not on any gallonage sold in excess of 4,035,000 gallons. The final value of the list was thus based on the expectation of future profits as measured by petitioner's past performance.

7. On audit, the Audit Division determined that the sale of the customer list was a sale of tangible personal property and an information service and, as such, taxable under sections 1105(a) and 1105(c)(1) of the Tax Law. Of the \$50,833.74 assessed, petitioner consented to the tax due of \$5,713.00 and submitted a check in payment of that amount plus interest. The remaining \$45,120.74 represented the bulk sales tax due on the sale of the customer list and furniture and fixtures.¹

8. Petitioner argues that the sale of the customer list was not a sale of tangible personal property because the subject of the transfer was not a physical piece of paper or card, but rather a transfer of the knowledge and information contained on the cards, which information was intangible and confidential. Moreover, petitioner maintains that the sale of the list was not the sale of an information service because Meenan was, in fact, purchasing access to the customers of petitioner, not information. Petitioner argues that even if the sale was to be deemed a sale of an information service, the list was of such a personal and confidential nature as to fall within the exclusion for such information provided for in section 1105(c)(1) of the Tax Law.

9. The Audit Division argues that the sale of the list was a sale of tangible personal property because Meenan bought the set of cards containing customer information and, since the cards could be used in any manner Meenan wanted, they were tangible personal property. Alternatively, the Audit Division maintains that the sale of the list was the sale of information within the meaning and intent of section 1105(c)(1) of the Tax Law.

¹ The tax due on the sale of the furniture and fixtures was \$362.50 which has not been paid and was not contested by petitioner.

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). Therefore, the Audit Division properly determined that the sale of the customer list to Meenan was subject to tax.

C. That the petition of Audell Petroleum Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 18, 1981 is sustained.

DATED: Albany, New York

DEC 14 1984

STATE TAX COMMISSION

Roderica G. Clun
PRESIDENT

Francis R. K. Oamy
COMMISSIONER

Mark J. [Signature]
COMMISSIONER