STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of ADAM, MELDRUM & ANDERSON CO., 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 September 1, 1977 through February 29, 1980.	DECISION

Petitioner, Adam, Meldrum & Anderson Co., Inc., 389 Main Street, Buffalo, New York 14202, 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 September 1, 1977 through February 29, 1980 (File No. 36205).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 26, 1984 at 1:15 P.M., with all briefs to be submitted by September 4, 1984. Petitioner appeared by Steven M. Coren, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether an agreement between petitioner and Leaseway Deliveries, Inc. constituted the lease of tangible personal property and was thereby subject to sales and use taxes or whether such agreement provided for the furnishing of a transportation service not subject to tax.

FINDINGS OF FACT

1. Petitioner, Adam, Meldrum & Anderson Co., Inc. operated ten retail department stores, a warehouse and distribution center in and around Buffalo, New York.

2. On October 20, 1981, 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 petitioner covering the period September 1, 1977 through February 29, 1980 for taxes due of $16,631.69, plus interest of $3,971.30, for a total of $20,602.99.

3. Following a pre-hearing conference with the Tax Appeals Bureau, petitioner executed a Withdrawal of Petition and Discontinuance of Case whereby it agreed to a tax liability of $4,781.63. The unresolved portion of the audit ($11,850.06) represented sales tax assessed on payments made by petitioner to Leaseway Deliveries, Inc. ("LDI"). The Audit Division determined that the contractual relationship between petitioner and LDI constituted the lease of tangible personal property. Petitioner, on the other hand, took the position that LDI was providing a nontaxable transportation service.

4. For many years, petitioner had its own trucking department which transported inventory to and from its stores and warehouses using its own trucks. In 1968, petitioner was faced with union organization of its truck drivers. About the same time, petitioner's management decided that the transporting of inventory could be performed more efficiently by an independent contractor. Based on this decision, as well as the union campaign, petitioner sold all of its trucks to LDI and entered into a trucking agreement with LDI. Said agreement, dated April 29, 1968, provided that LDI agreed to transport all of petitioner's merchandise between its warehouses and its stores.

5. Under the terms of the foregoing agreement, LDI provided the vehicles used in transporting the merchandise. LDI was responsible for the maintenance and repair of the vehicles; it paid all operating expenses, including drivers' wages, insurance, tolls, permits and fuel. LDI hired the drivers, provided

training, supervision and, if necessary, fired drivers. LDI selected the routes for drivers to follow. LDI at all times had sole and exclusive control over operation of the vehicles and the manner in which its employees transported the merchandise.

6. The trucks sold to LDI were replaced with tractors and trailers within eighteen months after the agreement was signed.

7. The Audit Division's determination that the agreement between petitioner and LDI constituted a lease was based on the following provisions contained in the agreement:

1) LDI was not to be responsible for and was held harmless from any loss, damage or destruction of any merchandise transported by LDI.

2) LDI was required to dedicate ten specifically identified vehicles to the fulfillment of its obligations under the contract and, for each of these dedicated vehicles, LDI was entitled to forty hours of compensation per week, even where the vehicle was operated for less than forty hours.

3) Upon termination of the agreement by either party, LDI was to sell all the vehicles for cash. If the net sales proceeds were less than the depreciated values, the deficiency was to be paid by petitioner. If the proceeds were greater than the depreciated value, the excess amount was to be paid to petitioner.

In addition to the above provisions, the Audit Division's determination was based on the fact that LDI gave petitioner permission to place its logo on the trailers.

8. LDI is a subsidiary of Leaseway Transportation Corp. ("LTC"). LTC was incorporated in Delaware on November 9, 1960 and has more than 160 operating subsidiaries classified into three categories: Specialized Transportation,

Vehicle Leasing and Distribution. According to Form 10-K submitted by LTC to the Securities and Exchange Commission, Specialized Transportation consists of:

> "Contract and common motor carriage...subsidiaries conducting contract and common carriage operations provide a shipper with an integrated transportation system including all facets of the motor vehicle transportation package. The customer is typically furnished with vehicles, maintenance, drivers, dispatch, fuel, tires, lubricants, parts, accessories, insurance, management and engineering services. The majority of the subsidiaries' carriage operations are specialized as to commodities transported, type of equipment utilized and/or by service tailored and dedicated to an individual shipper."

LTC subsidiaries engaged in Vehicle Leasing:

> "provide their customers with fleets of vehicles and the operating supplies, maintenance and other services required therefor. Under a full service lease agreement...the customer remains responsible for drivers, dispatch and the overall operation and control of both the vehicle and the distribution system in which they are employed."

9. LDI is a subsidiary involved in contract and common carriage operations. LTC's intrastate carriage operations are normally required to obtain operating authority from State regulatory bodies. In New York, LDI has applied for and received from the New York State Department of Transportation, a permit to operate as a contract carrier of property by motor vehicle.

CONCLUSIONS OF LAW

A. That Tax Law §1101(b)(5) defines "sale, selling or purchase" as follows:

> "Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor...".

B. That the Sales and Use Tax Regulations provide that:

> "The terms 'rental, lease, license to use' refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property." 20 NYCRR 526.7(c)(1).

The Regulations further provide that:

> "Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:
>
> (i) custody or possession of the tangible personal property, actual or constructive;
> (ii) the right to custody or possession of the tangible personal property;
> (iii) the right to use, or control or direct the use of, tangible personal property." 20 NYCRR 526.7(e)(4).
>
> "When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment." 20 NYCRR 526.7(e)(6).

C. That the agreement between petitioner and LDI provided for exclusive possession and control over the vehicles by LDI; LDI did not transfer any of the attributes of possession set forth in 20 NYCRR 526.7(e)(4) and at all times retained complete dominion and control over the operation and use of the vehicles. Accordingly, the agreement did not constitute a rental or lease within the meaning and intent of section 1101(b)(5) of the Tax Law. LDI was providing transportation services which are not subject to the imposition of sales and use tax.

D. That the petition of Adam, Meldrum & Anderson Co., Inc. is granted to the extent indicated in Conclusion of Law "C". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 20, 1981; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
JUL 10 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER