

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
KINGSTON OIL SUPPLY CORP.	:	DECISION
	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1979	:	
through November 30, 1981.	:	

Petitioner, Kingston Oil Supply Corp., P.O. Box 788, Port Ewen, New York 12466, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through November 30, 1981 (File Nos. 37285 and 39950).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on June 19, 1984 at 9:15 A.M. and was continued to conclusion before the same Hearing Officer, at the same location on July 2, 1984 at 11:00 A.M., with all briefs to be submitted by September 4, 1984. Petitioner appeared by O'Connell & Aronowitz, P.C. (Fred B. Wander, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether receipts from the purchases by petitioner, Kingston Oil Supply Corp., of customer lists are subject to tax.

II. If so, whether the valuation by the Audit Division of the customer list purchased from V & O Fuel Oil, Inc. was correct.

FINDINGS OF FACT

1. On February 10, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law assessing against the petitioner, Kingston Oil Supply Corp., taxes due of \$35,682.91, plus interest of \$2,162.39, for a total amount due of \$37,845.30 for the period June 18, 1981.

2. On June 18, 1982, the Audit Division, as the result of a field audit, issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law assessing against the petitioner, Kingston Oil Supply Corp., taxes due of \$3,613.04, plus interest of \$621.84, for a total amount due of \$4,234.88 for the period March 1, 1979 through November 30, 1981.

3. It is the position of the Audit Division that the receipts from the purchases by the petitioner, Kingston Oil Supply Corp. ("Kingston"), of customer lists are taxable as the purchases of tangible personal property under section 1105(a) of the Tax Law and/or as purchases of information services under section 1105(c)(1) of the Tax Law.

4. On April 27, 1982, Kingston timely filed a petition for a hearing to review the first Notice and on September 10, 1982, Kingston timely filed a petition to review the second Notice. It is the position of the petitioner that: (1) the customer lists do not constitute tangible personal property; (2) the customer lists contain information which is personal and/or confidential in nature which may not be substantially incorporated in reports furnished to other persons; and (3) the sellers were not involved on a regular basis in providing services which included the furnishing of information concerning their customers to other persons. The petitioner also contended that the tax

on receipts from the purchase of the customer list from V & O Fuel Oil, Inc. was improperly computed in that it included an amount specifically allocated to goodwill.

5. During the period at issue, Kingston, a New York corporation, was engaged in the fuel oil distribution business. Austin R. Newcombe & Co., Inc. ("Newcombe"), a New York corporation, had operated a business for the sale and distribution of petroleum products in the Kingston, New York area for over forty-five (45) years. Pursuant to an agreement dated June 18, 1981, Kingston purchased from Newcombe certain inventories, operating assets and properties used in Newcombe's business, as well as the right to continue Newcombe's business and to use Newcombe's name for a period of five (5) years. Pursuant to paragraph (2)(e) of the agreement, the purchase price for the customer list was determined as follows:

"(i) The amount determined by multiplying 4.65 cents (\$.0465) by the total gallons of gasoline sold and delivered by Seller to all customers for the period June 1, 1980 through May 31, 1981...such gallonage to be set forth, and warranted true and correct, in a statement to be furnished Purchaser at closing in accordance with this Agreement; plus

(ii) The amount determined by multiplying 11 cents (\$.11) by the total gallons of fuel oil and kerosene sold and delivered by Seller to all retail customers for the period June 1, 1980 through May 31, 1981 (excluding therefrom all such sales pursuant to contract bids), such gallonage to be set forth, and warranted true and correct, in a statement to be furnished Purchaser at closing in accordance with this Agreement; plus

(iii) The amount determined by multiplying 2 cents (\$.02) by the total gallons of fuel oil and kerosene sold and delivered by Purchaser to all wholesale customers of Seller during the one (1) year period commencing on the date of closing, such retained gallonage to be determined by Purchaser and set forth, and warranted true and correct, in a detailed schedule of such sales to be furnished Seller within thirty (30) days after the end of such one (1) year period,

which price, as so determined, Seller and Purchaser agree shall be allocated as follows:

(i) The amount of One Hundred Thousand Dollars (\$100,000.00) to Purchaser's use of Seller's Trade Name, or any variant thereof, for a period of five (5) years in accordance with paragraph (1)(f) hereof;

(ii) The amount of Ten Dollars (\$10.00) to Seller's restrictive covenant in accordance with paragraph (17) hereof; and

(iii) The balance of the purchase price to the Customer Accounts sold and transferred to Purchaser in accordance with paragraph (1)(e) hereof."

In accordance with the above, the purchase price of the customer list was computed to be \$509,755.83, with tax due thereon of \$35,682.91.

6. Both Kingston and Newcombe considered the customer list to be confidential. Paragraph 28 of the agreement provided:

"(28) Advance List of Customer Accounts. Upon the execution of this Agreement, or as soon thereafter as practicable (but prior to the closing hereunder), Seller agrees to furnish Purchaser with an advance listing of the Customer Accounts and such other information as Purchaser may reasonably require to enter such customers, their respective delivery schedules and other related account information in its computer, it being understood and agreed by Purchaser that such account information is being furnished to it as an accommodation only and to facilitate the transition of the Business at closing and that Purchaser shall acquire no right, title or interest thereto prior to the closing in accordance with this Agreement. Pending the closing hereunder Purchaser shall hold such information in trust in a fiduciary capacity for the sole benefit of Seller, and Purchaser agrees to take all necessary steps to protect and preserve the confidentiality of such account information. Should the sale of the Property fail to close for any reason whatsoever, Purchaser shall immediately erase from its computer all such account information furnished by Seller, and without making or retaining any copy thereof, shall return to Seller all computer printouts and other account information furnished to it by Seller. Purchaser understands that Seller would suffer irreparable damage in the event of the unauthorized use of such proprietary information by Purchaser, or others, and covenants and agrees that prior to closing, or at any time should the sale of the Property fail to close, it will not disclose or use, directly or indirectly, any such information which it shall have received from Seller in accordance with this paragraph (28)."

In addition, paragraph (1)(a)(v) of a Non-Competition Agreement entered into between the parties on July 1, 1981 provided, in pertinent part, the following:

"(v) Disclose or use, directly or indirectly, any confidential information relating to the business of Newcombe or (Kingston) or any affiliate thereof, which (Amos R. Newcombe) has obtained knowledge of by reason of his ownership of and prior employment by Newcombe. All such confidential information shall be retained by (Amos R. Newcombe) in trust in a fiduciary capacity for the sole benefit of (Kingston) and its affiliates. Such confidential information includes, but is not limited to, information with respect to techniques for procuring customer leads, marketing, advertising, and sales presentation methods and materials, customer lists...".

The customer list, in addition to the customer's name and address, also contained information concerning the method of delivery and customer credit. One copy of the list was prepared and given to petitioner by Newcombe. Neither party divulged the information except as provided above, and the information was used by petitioner solely to continue servicing the customers.

7. V & O Fuel Oil, Inc. ("V & O") was a New York corporation which conducted a retail heating oil and customer service business. On August 29, 1980, Kingston purchased all the business assets of V & O, except for cash and accounts receivable. The total purchase price was \$78,886.43 which was allocated as follows:

Delivery tank and trucks	\$14,000.00
Service vehicles	3,500.00
Oil burner parts	2,271.63
Office furniture and equipment	1,500.00
Restrictive covenant of Alvie Von Etten	5,000.00
Restrictive covenant of Gene Ohlson	5,000.00
Goodwill	5,000.00
Customer list	42,614.80
	<u>\$78,886.43</u>

8. A written copy of the customer list was furnished to Kingston by V & O. Although not covered by agreement, both parties agreed that the information as to the customer list would be kept confidential. Neither party divulged the information to anyone else.

9. On audit, the examiner for the Audit Division determined a tax due of \$3,613.04 based on a value of the customer list of \$51,614.80.

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 person 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; Dairymens League Co-Op Association, Inc. et al., State Tax Commission, December 14, 1984). Therefore, the Audit Division properly determined that the sales of the customer lists were subject to tax.

C. That the tax due on the purchase of the customer list from V & O Fuel Oil, Inc. is to be based on \$42,614.80 (Finding of Fact "7", supra) and not \$51,614.80 as originally determined by the Audit Division.

D. That the petitions of Kingston Oil Supply Corp. are granted to the extent indicated in Conclusion of Law "C", supra; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales

and Use Taxes Due issued June 8, 1982; and that, except as so granted, the petitions are denied.

DATED: Albany, New York

MAY 23 1985

STATE TAX COMMISSION

Roderick W. Allen
PRESIDENT

COMMISSIONER
[Signature]
COMMISSIONER

4/16/85
I abstain!!
Francis R. Koenig