

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
WATSON OIL 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 December 1, 1978 :
through November 30, 1981. :

DECISION

In the Matter of the Petition :
of :
AMOS POST, 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, 1978 :
through November 30, 1981. :

Petitioner, Watson Oil Co., Inc., Route 81, West Coxsackie, New York 12192, 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 November 30, 1981 (File No. 37952).

Petitioner, Amos Post, Inc., One Amos Post Road, P.O. Box 351, Castleton, New York 12414, 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 November 30, 1981 (File Nos. 42504 and 42833).

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. Petitioners appeared by O'Connell and 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 sale of a customer list are subject to tax.
- II. If so, whether the valuation of the customer list by the Audit Division was correct.

FINDINGS OF FACT

1. On March 8, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Watson Oil Co., Inc. ("Watson Oil") for taxes due of \$22,905.26, plus interest of \$568.28, for a total amount due of \$23,473.54 for the period December 1, 1978 through November 30, 1981.

2. On the same date, the Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Amos Post, Inc. ("Amos Post") in the same amount for the same period.

3. It is the position of the Audit Division that the receipts from the sale of a customer list are taxable as the sale of tangible personal property under section 1105(a) of the Tax Law and/or as the sale of an information service under section 1105(c)(1) of the Tax Law.

4. On May 28, 1982, Watson Oil timely filed a petition for a hearing to review the notice of determination. On April 28, 1982, Amos Post timely filed a petition to review the notice of determination. Both petitioners claim that the customer list does not constitute tangible personal property; that the customer list contains information which is personal and/or confidential in nature which may not be substantially incorporated in reports furnished to

other persons; that Watson Oil is not involved on a regular basis in providing services which include the furnishing of information concerning its customers to other persons; and that the method of valuation of the customer list used by the Audit Division was incorrect.

5. During the period at issue, Watson Oil, a New York corporation, was engaged in the retail distribution of fuel oil (home heating oil) and kerosene. On July 27, 1981, Watson Oil and Amos Post, also a New York corporation, executed an agreement for the purchase of the assets of Watson Oil by Amos Post. The total purchase price, which was estimated to be \$417,118.00, was allocated as follows:

Fuel oil and kerosene amounts	\$327,218.00
Equipment	36,275.00
Tanks and pumps	40,000.00
Skid tanks	13,625.00
	<u>\$417,118.00</u>

6. Paragraph 1(a) of the agreement provided, in pertinent part, the following:

"1. (a) The Seller agrees to sell and the Purchaser agrees to purchase all of the said fuel oil accounts and kerosene oil accounts owned by the Seller on the dated fixed herein for transfer thereof, which consists of 2,181,454 gallons of fuel oil and kerosene oil, (being the volume of sales during the fiscal period of October 1, 1980 to September 30, 1981), at the agreed purchase price of fifteen cents per gallon, estimated to be the sum of \$327,218.00, at this time, but the exact amount shall be determined at the time of closing and substituted in the selling price at that time, and to be paid in the manner as hereinafter set forth...

It is understood and agreed that the purchase price for the sale of the fuel oil and kerosene oil accounts has been fixed based upon the gallonage sales for the fiscal period of October 1, 1980 to September 30, 1981, at the rate of fifteen cents per gallon. The said purchase price shall be adjusted at the end of the first year following closing of title based upon the retained gallonage of fuel oil and kerosene oil during that period. In the event that the total gallonage of the accounts transferred or purchased during that period of time shall increase, the purchase price shall be adjusted upward accordingly at the rate of fifteen cents per gallon and said increased amount shall be paid within thirty days in cash or certified

check to the Seller. In the event that the total gallonage of fuel oil and kerosene oil shall decrease at that time, the purchase price shall be adjusted downward at the rate of fifteen cents per gallon and shall be repaid by the Seller to the Purchaser by deducting the same from the next installment of principal due on note. However, in no event shall the purchase price for the said fuel oil and kerosene oil accounts be less than the sum of \$264,000."

The closing of title took place on October 1, 1981.

7. The fuel oil accounts and kerosene accounts, also referred to as the customer list, were transferred from Watson Oil to Amos Post in written form. In addition to the name and address of the customer, the list contained the customer credit, tank size, when to deliver to the customer on a degree day basis, tank location and fill location. Both parties considered the customer list to be confidential information.

8. On or about one year following the closing of title, the purchase price of the customer list was reduced to \$264,000.00.

9. On audit, the examiner for the Audit Division found that neither petitioner paid tax on the transfer of the customer list.

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; Dairymens League Co-op Association, Inc. et al. , State tax Commission, December 14, 1984). Therefore, the Audit Division properly determined that the sale of the customer list is subject to tax.

C. That the tax due on the customer list is to be based on \$264,000.00 (Finding of Fact "8", supra) and not \$327,218.00 as originally determined by the Audit Division.

D. That the petitions of Watson Oil Co., Inc. and Amos Post, Inc. are granted to the extent indicated in Conclusion of Law "C", supra; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued March 8, 1982; and that except as so granted, the petitions are denied.

DATED: Albany, New York

MAY 23 1985

STATE TAX COMMISSION

Rodwin C. W. Cline
PRESIDENT

COMMISSIONER

Mark
COMMISSIONER

Frank

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