

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
BRIGHTON SOUND, 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 March 1, 1979	:	
through February 28, 1982.	:	

---

Petitioner, Brighton Sound, Inc., 315 Mt. Read Boulevard, Rochester, New York 14606, 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 March 1, 1979 through February 28, 1982 (File No. 38574).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Room 1300, Rochester, New York, on April 25, 1984 at 1:15 P.M., with all briefs to be submitted by May 21, 1984. Petitioner appeared by Webster, Walz, Sullivan, Santoro & Clifford (James R. Sullivan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

#### ISSUE

Whether petitioner's lease of a tractor and trailer was not subject to sales and use taxes on the basis of the resale (or re-lease) exclusion provided for under section 1101(b)(4) of the Tax Law.

#### FINDINGS OF FACT

1. On May 20, 1982, the Audit Division, as the result of a field audit, issued a Notice and Demand for Payment of Sales and Use Taxes Due (hereinafter

"Notice") against petitioner, Brighton Sound, Inc. Said Notice assessed additional tax due of \$4,476.37, plus interest of \$957.45, for a total due of \$5,433.82. The Notice encompassed the period March 1, 1979 through February 28, 1982.

2. The aforementioned Notice was premised on the Audit Division's assertion that petitioner's rental of a tractor and trailer from Ryder Truck Rentals (hereinafter "Ryder") was subject to compensating use tax. During the period March 1, 1979 through May 31, 1981, petitioner made lease payments to Ryder totalling \$63,948.15. No sales tax was paid by petitioner on said lease payments since it had given a resale certificate to the lessor. The Audit Division considered the lease payments taxable as a purchase subject to use tax. The \$4,476.37 of tax due shown on the Notice dated May 20, 1982 was computed by multiplying the lease payments of \$63,948.15 by the 7 percent tax rate.

3. Petitioner's business activities consisted, inter alia, of the rental of sound and/or lighting systems to musicians on concert tours which were held throughout the United States. Petitioner also provided for the transportation of the sound and/or lighting equipment between concert sites via the tractor and trailer it leased from Ryder. Brighton Sound, Inc. also provided a driver for the tractor and trailer, although the tractor was leased, at least on one occasion, without the services of petitioner's driver.

4. The same tractor and trailer were continuously leased by petitioner from Ryder during the period in question. Said tractor and trailer were specially equipped to meet petitioner's specific needs and, when not being utilized, the tractor and trailer were stored at petitioner's place of business

in Rochester, New York. Ryder billed petitioner via weekly invoices, the rental charge being determined on a per mile basis. Petitioner had a "full service" lease with Ryder which required Ryder to pay for all insurance charges and to make all necessary repairs to the tractor and trailer. The lease between Brighton Sound, Inc. and Ryder was not submitted into evidence.

5. Petitioner maintains that a portion of the rental payments made to Ryder for the tractor and trailer was not subject to tax since the tractor and trailer were re-rented or re-leased. Of the \$63,948.15 in lease payments made to Ryder, petitioner asserts that \$42,658.42 apply to re-rentals. Petitioner presented no argument or evidence with respect to the taxable status of the balance of lease payments of \$21,289.73 (\$63,948.15 - \$42,658.42).

6. Petitioner utilized a standard contract entitled "Public Address System Rental and Operation Contract" (received and marked into evidence as petitioner's exhibit "1"). Pursuant to the terms of the standard contract, petitioner retained complete direction and control over the tractor and trailer. The Audit Division was under the impression that petitioner utilized the standard contract at all times and, therefore, determined that Brighton Sound, Inc. was not re-renting the tractor and trailer since it had retained complete dominion and control over said vehicles.

7. Petitioner, on certain occasions, did not utilize the standard contract but, in lieu thereof, used a letter to establish the terms of the agreement. Petitioner maintains that in each instance where a letter agreement was used, complete direction and control of the tractor and trailer were relinquished to the lessee, thereby creating a valid rental, which in turn would allow petitioner to lease the tractor and trailer from Ryder tax free since it was leased for

resale or re-lease. Petitioner claims that the following letter agreements constitute valid rentals where complete direction and control of the tractor and trailer were relinquished to the lessee:

(a) Agreement dated February 23, 1979 (received and marked into evidence as petitioner's exhibit "2"). Petitioner provided its customer with a sound system including two technicians, lighting system including two technicians and the tractor and trailer, driver, fuel and permits. Petitioner charged the lessee a flat fee of \$1,775.00 per show with a minimum of five performances per week. In the event that the sound and lighting systems were not used for a performance, the customer paid \$500.00 for transportation charges. Weekly lease payments made by petitioner to Ryder for the period the tractor and trailer were used in the performance of this agreement amounted to \$8,608.02.

(b) Agreement dated February 16, 1980 (received and marked into evidence as petitioner's exhibit "3"). Petitioner leased only the tractor for a seven week period to a competitor. This transaction was a straight lease of the tractor, petitioner not providing any sound or lighting equipment. The lessee provided a driver for the tractor. Weekly lease payments made by petitioner to Ryder for the period the tractor was used in the performance of this agreement amounted to \$10,217.34.

(c) Agreement dated August 23, 1979 (received and marked into evidence as petitioner's exhibit "4"). Petitioner provided its customer with a sound system including two technicians, lighting system including two technicians and transportation for the sound, lighting and band equipment including a driver for the tractor and trailer and all fuel and tolls.

Petitioner charged its customer a flat fee of \$6,300.00 per week. Weekly lease payments made by petitioner to Ryder for the period the tractor and trailer were used in the performance of this agreement amounted to \$6,474.42.

(d) Agreement dated October 31, 1979 (received and marked into evidence as petitioner's exhibit "5"). This agreement contained the same conditions as 7(c), supra, except the weekly guarantee was \$7,700.00. Weekly lease payments made by petitioner to Ryder for the period the tractor and trailer were used in the performance of this agreement amounted to \$2,481.15.

(e) Agreement dated September 8, 1980 (received and marked into evidence as petitioner's exhibit "6"). Petitioner, in conjunction with Virgolight, Inc. of Boston, Massachusetts, entered into an agreement wherein Virgolight provided the customer with a lighting system and petitioner provided a sound system and the tractor and trailer with driver. A flat fee of \$7,500.00 per week was charged for five shows per week. Weekly lease payments made by petitioner to Ryder for the period the tractor and trailer were used in the performance of this agreement amounted to \$13,032.37.

8. Petitioner's president, Mr. G. T. Sweeney, testified at the hearing held herein that the tractor and trailer were also leased to Brighton Lites, Inc. and that Brighton Lites, Inc. provided its own driver and had complete dominion and control over said vehicles. The contract or agreement between Brighton Sound, Inc. and Brighton Lites, Inc. was not submitted into evidence. It appears from the record that petitioner and Brighton Lites, Inc. are related entities. Both corporations are located at the same address and, in the agreements dated February 23, 1979 and August 23, 1979 (Findings of Fact "7(a)

and (c)", supra), Mr. Sweeney thanked the customer for calling on Brighton Sound and Brighton Lites. The record contains no further specifics detailing the relationship between Brighton Sound, Inc. and Brighton Lites, Inc.

9. Mr. Sweeney also testified that in those transactions identified in Findings of Fact "7(a), (c), (d), and (e)", supra, the road manager for the concert tour had complete direction and control over the tractor and trailer including the right to select the route or routes to be utilized by petitioner's driver. The agreements submitted into evidence dated February 23, 1979, August 23, 1979, October 31, 1979 and September 8, 1980 contain no provisions which would indicate that dominion and control over the tractor and trailer passed from petitioner to its customers.

#### CONCLUSIONS OF LAW

A. That pursuant to Tax Law §1105(a), sales tax is imposed on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article".

B. That Tax Law §1101(b)(4) excludes sales for resale from the definition of "retail sale".

C. 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..."

D. 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) (effective date, September 1, 1976).

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) (effective date, September 1, 1976).

E. That the transactions identified in Findings of Fact "7(a), (c), (d) and (e)", supra, did not constitute a resale or re-lease within the meaning and intent of section 1101(b)(4) of the Tax Law and 20 NYCRR 526.7(c)(1) and 20 NYCRR 526.7(e)(4). The bare assertion of Mr. G. T. Sweeney that the road manager of the concert tours had complete direction and control over the tractor and trailer is insufficient, by itself, to show a transfer of possession. It is noted that the standard contract used by petitioner clearly indicates there was no transfer of possession of the tractor and trailer to petitioner's customers. The letter agreements identified in Findings of Fact "7(a), (c), (d) and (e)", supra, are completely devoid of any provision which would show that dominion and control over the tractor and trailer passed from petitioner to its customer. Furthermore, in all of these agreements, petitioner provided a driver for the tractor and trailer, paid the wages of said driver, and also retained responsibility for the operation of the vehicles including all fees, tolls, permits and fuel. On this record, it cannot be found that there was a transfer of possession of the tractor and trailer pursuant to 20 NYCRR 526.7(e)(4) with respect to the transactions identified in Findings of Fact "7(a), (c), (d) and (e)", supra. See: Matter of Monroe Tree & Landscape, Inc., State Tax

Commission, August 9, 1984; Matter of Firelands Sewer & Water Construction Co., Inc., State Tax Commission, October 7, 1983 and Matter of Grand Island Transit Corporation, State Tax Commission, January 31, 1984.

F. That with respect to the transaction identified in Finding of Fact "8", supra, petitioner has failed to sustain its burden of proof to show that there was a transfer of possession of the tractor and trailer to Brighton Lites, Inc. pursuant to 20 NYCRR 526.7(e)(4). The contract between Brighton Sound, Inc. and Brighton Lites, Inc. was not submitted into evidence and, as noted in Finding of Fact "8", supra, petitioner and Brighton Lites, Inc. appear to be related entities. The bare assertion by petitioner's president that complete direction and control over the tractor and trailer passed to Brighton Lites, Inc. is insufficient to meet its burden of proof.

G. That petitioner has shown that \$10,217.34 in lease payments made to Ryder (Finding of Fact "7(b)", supra) were made for the exclusive purpose of re-rental or re-lease to a customer where transfer of possession of the tractor and trailer passed to said customer. Since payments were made to Ryder on a week-to-week basis, each payment constituted a transaction pursuant to 20 NYCRR 525.2(a)(2). (Matter of RKO General, Inc., State Tax Commission, May 15, 1981 and Matter of Micheli Contracting Corporation, State Tax Commission, May 27, 1983.) Accordingly, the lease payments made by petitioner to Ryder in the amount of \$10,217.34 are not subject to tax since said payments constitute purchases for resale in accordance with section 1101(b)(4).




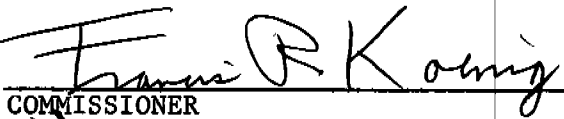
H. That the petition of Brighton Sound, Inc. is granted to the extent indicated in Conclusion of Law "G", supra; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER