

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ACE PROVISION & LUNCHEONETTE SUPPLY, 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 June 1, 1979
through May 31, 1982.

In the Matter of the Petition

of

MAX BANNER,
Individually and as Officer of
ACE PROVISION & LUNCHEONETTE SUPPLY, 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 June 1, 1979
through May 31, 1982.

In the Matter of the Petition

of

IRVING FLUXGOLD,
Individually and as Officer of
ACE PROVISION & LUNCHEONETTE SUPPLY, 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 June 1, 1979
through May 31, 1982.

Petitioners, Ace Provision & Luncheonette Supply, Inc., c/o Irving Fluxgold,
355 Bronx River Road, Yonkers, New York 10704, Max Banner, 727 Bronx River
Road, Yonkers, New York 10704, and Irving Fluxgold, 355 Bronx River Road,
Yonkers, New York 10704, each 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 June 1, 1979 through May 31, 1982 (File Nos. 40575, 40088 and 40089).

A hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 6, 1986 at 9:45 A.M. Petitioners appeared by Irving Laster, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that petitioner Ace Provision & Luncheonette Supply, Inc. was liable for sales tax on a portion of its over-the-counter cash sales.

11. Whether receipts from the sale of a customer list are subject to tax.

FINDINGS OF FACT

1. On August 12, 1982, the Audit Division, as the result of a field audit of the books and records of petitioner Ace Provision & Luncheonette Supply, Inc. ("Ace"), issued to Ace a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing additional taxes of \$15,272.95, plus penalty of \$2,585.44 and interest of \$2,555.24, for a total amount due of \$20,413.63 for the period June 1, 1979 through May 31, 1982. On the same date, the Audit Division issued to petitioner Max Banner and petitioner Irving Fluxgold similar notices for the same amount of tax, penalty and interest.

2. Each of the petitioners timely filed a petition for revision of the notices.

3. During the period at issue, Ace's gross sales, totalling \$3,770,800.00, consisted primarily of meats, cheeses and canned goods to small restaurants. Ace also sold paper products such as coffee containers, for use in providing

take-out service. Finally, Ace sold a small amount (less than 1% of gross sales) of cleaning and maintenance supplies such as soap powder and mops. The business was located at 9 North Bond Street, Mt. Vernon, New York and was operated by petitioners Max Banner and Irving Fluxgold until May 1982 when it was sold to Ace Endico Corp.

4. On July 19, 1982, the examiner visited the business premises and found no books or records available. On a subsequent visit, the examiner reviewed the limited records which were made available and determined additional taxable sales of \$162,433.63 with a tax due thereon of \$12,191.70. The examiner also determined a bulk sales tax due of \$3,081.25 on the sale of a customer list for \$42,500.00.

5. On a subsequent visit, additional books and records were made available by Ace. The examiner first tested sales invoices for which no resale certificates were available for a three-day period and found that sales tax should have been collected on \$379.37. This amount was compared to gross sales per the sales journal to compute a margin of error of .9025 percent. The margin of error was applied to total audited sales to compute unsubstantiated exempt sales for the audit period of \$33,959.32 and a tax due thereon of \$2,543.98. The examiner next compared sales per sales invoices to sales per sales journal for a six-day period and found that sales per sales journal were higher by \$10,607.18, which represented over-the-counter cash sales. This amount was compared to sales per the sales journal to compute a cash sales percentage of 25.23%. This percentage was applied to total audit sales to compute cash sales for the audit period of \$949,355.70. In a separate computation the examiner determined that sales of taxable items (including those supported by resale certificates) represented 14.29 percent of gross sales. This percentage was applied to cash sales to compute additional taxable sales of \$135,662.93. Instead of taxing this

amount, the examiner determined that 50 percent of these cash sales were purchased for resale, and therefore, she imposed a tax on the remaining 50 percent or \$67,831.47. Additional tax as a result of this taxable ratio test was computed to be \$5,081.50. Lastly the examiner determined that taxes of \$3,081.25 were due on the sale of a customer list for \$42,500.00.

6. As a result of the aforementioned procedure, additional taxes were determined to be \$10,706.73. At some point in time prior to the pre-hearing conference, the Audit Division stipulated that the notices should be reduced accordingly. Also, as the result of a pre-hearing conference, the additional taxes due on unsubstantiated exempt sales (\$2,543.98) were cancelled. The amount at issue herein is \$8,162.75 (\$5,081.50 + \$3,081.25).

7. At the hearing held herein, the examiner testified that the contract of sale between Ace and Ace Endico Corp. listed as a single item "customer list and goodwill" with a price of \$85,001.00. When asked by the examiner, the petitioners placed a value on the customer list of \$1.00. The examiner viewed this as inadequate and estimated the value of the customer list at one-half of the amount indicated or \$42,500.00.

8. Petitioners contend that the over-the-counter cash sales (other than food provisions) consisted primarily of paper products for use in providing take-out service, such as coffee containers in 1,000 or 2,500 count cartons. Petitioners maintain that such items are not purchased by individuals for personal use because of the quantity, but rather are purchased by local restaurants for resale purposes. Petitioners further claim that the contract of sale wherein "customer list and goodwill" were listed as one item was done so at the insistence of the purchaser. Presumably the purchaser was concerned about amortizing the goodwill. According to petitioners, the goodwill was sold for \$85,000.00 and the customer list for \$1.00. Lastly, the petitioners propose

that if additional taxes are due, the Audit Division should collect said taxes from the purchaser, Ace Endico Corp.

9. Petitioners Banner and Fluxgold presented no evidence regarding their personal liability for any taxes found due from Ace, and it is thus presumed that they do not contest such derivative liability.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i) of the Tax Law defines retail sale as "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property...".

B. That section 1132(c) of the Tax Law provides, in pertinent part, that:

"...it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) of this section, unless (1) a vendor... shall have taken from the purchaser a certificate in such form as the tax commission may prescribe,... to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax... the sale shall be deemed a taxable sale at retail."

C. That the petitioners have failed to sustain the burden of proof required to show that the additional taxable sales as determined by the Audit Division were actually sales for resale within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law.

D. 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 or 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...".

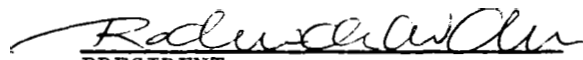
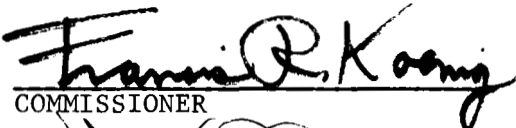
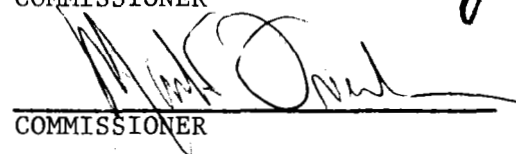
E. That a customer list is a business asset the sale of which constitutes "the sale of information and is, therefore, taxable under section 1105 [subd. (c)] of the Tax Law (citation omitted)" (Long Island Reliable Corp. v. Tax Commission, 72 A.D.2d 826; Matter of Dairymens League Co-op Association, Inc. 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. Further, the petitioners have failed to demonstrate that the Audit Division's determination of the value of the customer list was not proper.

F. That the petitions of Ace Provision & Luncheonette Supply, Inc., Max Banner and Irving Fluxgold, Individually and as Officers of Ace Provision & Luncheonette Supply, Inc., are denied and the notices of determination and demands for payment of sales and use taxes due issued August 12, 1982 and as revised by the Audit Division (see Finding of Fact "6") are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT

COMMISSIONER

COMMISSIONER