

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CERTIFIED TRANSPORT, 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 March 1, 1979
through February 28, 1981.

In the Matter of the Petition
of
CERTIFIED HEATING OILS, 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 March 1, 1979
through February 28, 1981.

DECISION

In the Matter of the Petition
of
JOSEPH J. MARINO, SR.,
OFFICER OF CERTIFIED TRANSPORT, 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 March 1, 1979
through February 28, 1981.

Petitioners, Certified Transport, Inc., Certified Heating Oils, Inc. and Joseph J. Marino, Sr., officer of Certified Transport, Inc., 328 Front Street, Staten Island, New York 10304, 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 February 28, 1981 (File Nos. 41186, 41187 and 41188).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 7, 1985 at 1:30 P.M., with all briefs to be submitted by November 13, 1985. Petitioners appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey (James H. Tully, Jr., Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Joseph Pinto, Esq., of counsel).

ISSUES

I. Whether the transfer of assets from petitioner Certified Transport, Inc. to petitioner Certified Heating Oils, Inc., both wholly owned by the same individual, constituted a sale subject to sales tax.

II. Whether the Audit Division properly determined petitioners' sales and use tax liability.

FINDINGS OF FACT

1. On December 20, 1982, as the result of a field audit, the Audit Division issued three notices of determination and demand for payment of sales and use taxes due for the period March 1, 1979 through February 28, 1981 against petitioners as follows:

<u>Petitioner</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
Certified Transport, Inc.	\$109,611.84	\$27,402.96	\$34,302.66	\$171,317.46
Certified Heating Oils, Inc.	\$109,611.84	\$27,402.96	\$34,302.66	\$171,317.46
Joseph J. Marino, Sr.	\$100,487.44	\$25,121.86	\$31,517.55	\$157,126.85

On April 9, 1984, as the result of additional information provided by petitioners, the Audit Division issued revised assessments against petitioners as follows:

<u>Petitioner</u>	<u>Tax Due</u>	<u>Penalty & Interest</u>	<u>Total</u>
Certified Transport, Inc.	\$59,723.46	\$45,154.04	\$104,877.50
Certified Heating Oils, Inc.	\$59,723.46	\$45,154.04	\$104,872.50
Joseph Marino, Sr.	\$56,098.64	\$44,552.03	\$100,650.67

2. Petitioner Certified Transport, Inc. ("Transport") was a fuel oil distributor which transported gasoline for major distributors and sold gasoline in addition to selling home heating oil and performing oil burner repairs. At some time in 1980, petitioner Joseph Marino, Sr., the president and sole stockholder of Transport, decided to close the business. Mr. Marino's son, Joseph Marino, Jr., asked his father to continue the business and Mr. Marino, Jr. would operate it. Rather than continue Transport in business, Mr. Marino, Sr. decided to create Certified Heating Oils, Inc. ("Heating Oils") and terminated Transport. Heating Oils discontinued the gasoline transportation aspect of the business. Transport transferred all of its assets to Heating Oils which began doing business with Joseph Marino, Sr. as president and sole stockholder, but with Joseph Marino, Jr. in charge of running the operation. The transfer of the assets was reported by Heating Oils for accounting and income tax purposes as a debit to buildings and other depreciable assets totalling \$120,021.00 and an offsetting credit to paid-in or capital surplus with corresponding reverse entries for Transport's reporting purposes. An agreement entered into between Transport and Heating Oils on May 15, 1980 stated that the "transfer is for no monetary or other consideration."

3. On audit, the auditor found that Transport's books and records were inadequate for conducting a complete audit. Petitioners admit that there were less than adequate records but question the accuracy of the audit procedures employed. The only records which petitioners provided to the auditor were Federal tax returns, cancelled checks, bank statements and delivery tickets for No. 2 heating oil deliveries, along with a spiral notebook summarizing the No. 2 oil deliveries. The records of No. 2 oil sales appeared to the auditor to be

accurate and she therefore assumed that all such sales had been properly reported and that all unreported sales were of diesel and kerosene fuel.

4. The auditor used a test year of 1980 and compared purchases per invoices for that year to the cost of sales as reported to determine unreported purchases. Purchases of kerosene and diesel were marked up 19.83 percent resulting in unreported sales of \$158,665.00 in 1980. Purchases of parts for oil burner repairs were marked up 150 percent resulting in unreported parts sales of \$64,703.00. The auditor also disallowed \$70,564.00 in sales which had been claimed as nontaxable sales. The unreported taxable sales were divided by reported taxable sales to arrive at an error rate of 139.22 percent for 1980. The error rate was applied to reported taxable sales for the entire audit period to arrive at unreported taxable sales of \$581,216.00 at a sales tax rate of 8 percent resulting in additional sales tax due of \$46,497.28.

5. The auditor also determined that the transfer of assets from Transport to Heating Oils was a bulk sale subject to tax. The tax was assessed against the \$120,021.00 in depreciable assets transferred resulting in tax due of \$9,601.36 on the transfer. The assessments against Transport and Heating Oils also included use tax on fixed asset purchases and truck repair and maintenance expense totalling \$3,624.82. No use tax was assessed against Joseph Marino, Sr.

6. Petitioners maintain that the transfer of assets between Transport and Heating Oils did not constitute a bulk sale inasmuch as there was no consideration. The record is not clear with respect to whether the stock of Heating Oils was transferred to Mr. Marino, Sr. or Transport in connection with the transfer. Presumably, however, stock of Heating Oils was issued and transferred to one of the two. There is no evidence indicating that Heating Oils assumed the liabilities of Transport and certain purchase invoices submitted by the Audit

Division indicate that Transport continued paying off its own debts after the cessation of business.

7. Petitioners also maintain that allowances should have been made for the difference in tax rates applicable to No. 2 heating oil, taxable at four percent, and kerosene and diesel fuel, taxable at eight percent. The Audit Division's position is that all sales of No. 2 heating oil at four percent were properly reported and that the additional fuel sales determined on audit were comprised of kerosene and diesel sales at eight percent. Petitioners also argue that an allowance should have been made for shrinkage and spillage. In support of their argument, petitioners submitted evidence indicating that the volume of oil expands and contracts as its temperature rises and falls. Petitioners also submitted delivery reports indicating that less fuel was delivered by the trucks than was unloaded each day. The average spillage for the reports submitted amounted to .2 percent. Applying this percentage to unreported purchases of \$132,408.00 results in a reduction of purchases by \$265.00 with a concomitant reduction in unreported fuel sales to \$158,347.00.

8. Petitioners also objected to the 150 percent markup computed on sales of parts for oil burner repairs; however, no evidence was produced to refute this markup. During part of the audit period, Transport performed burner repairs with no charge for labor, but it was never suggested that parts were given away with no charge.

9. Petitioners also submitted into evidence a resale certificate from one of its major customers. The resale certificate could not be obtained during the audit and accounted for \$23,993.00 in nontaxable sales, reducing the amount of such sales disallowed on audit to \$46,571.00. Such reduction, taken together with the adjustment for spillage, results in a new error factor of 127.54 percent computed as follows:

Unreported fuel sales	\$158,347.00
Other sales	64,703.00
	<u>\$223,050.00</u>
Disallowed nontaxable sales	+ 46,571.00
	<u>\$269,621.00</u>
Less ECAP/HEAP allowance	- 4,100.00
Total unreported taxable sales	<u>\$265,521.00</u>

Ratio of unreported to reported taxable sales

$$\frac{265,521}{208,179} = 1.2754 = 127.54\% \text{ error rate}$$

Applying the revised error rate to taxable sales reported of \$417,480.00 results in unreported taxable sales of \$532,454.00 at an 8 percent rate for additional sales tax due of \$42,596.32.

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines sale, in part, as a "transfer of title or possession or both...by any means whatsoever for a consideration." Section 1101(b)(4)(ii)(D), in effect during the period in issue, excludes from the definition of retail sale "[t]he transfer of property to a corporation upon its organization in consideration for the issuance of its stock."

B. That presumably the transfer of the assets of Transport to Heating Oils was made in consideration for the issuance of the stock of Heating Oils. Therefore, there was a bulk transfer which would be a sale subject to tax under section 1101(b)(5) of the Tax Law. However, since the transfer of the assets was in exchange for Heating Oils stock upon its organization, such a sale was not a retail sale. Therefore, although there was a bulk sale, the assets transferred were not subject to tax, and the \$9,601.36 assessed on the transfer is cancelled.

C. That petitioners have not met their burden of proving that part of the unreported fuel sales were of No. 2 heating oil, taxable at a lower rate. Given the inadequate condition of petitioners' records generally and the

completeness of the No. 2 heating oil sales records, it was reasonable for the auditor to assume that all sales of No. 2 oil had been reported and that any additional sales determined on audit were of other types of fuel, taxable at eight percent. Petitioners offered no documentation to refute the auditor's findings.

D. That petitioners have not met their burden of proving that the 150 percent markup on parts for oil burner repairs was incorrect or that an allowance should have been made for shrinkage. As discussed in Finding of Fact "8", no evidence was produced to show that the 150 percent markup on parts was erroneous and it is therefore sustained. With respect to shrinkage, all that petitioners have proven is that oil expands and contracts with changes in temperature. Any shrinkage on a cool day would be nullified by expansion on a warmer day. Petitioners have not shown that such volume changes would have an overall negative effect on their gallons available for sale.

E. That petitioners have proven that there was spillage to the extent of .2 percent of their fuel purchases and that \$23,993.00 in disallowed nontaxable sales were, in fact, sales for resale and, in accordance with the computations in Finding of Fact "9", the additional sales tax due is reduced to \$42,596.32 plus penalty and interest. The use tax due of \$3,624.82 was not contested and is sustained as assessed against Transport and Heating Oils.

F. That the petitions of Certified Transport, Inc., Certified Heating Oils, Inc. and Joseph J. Marino, Sr., officer of Certified Transport, Inc., are granted to the extent indicated in Conclusions of Law "B" and "E"; that the Audit Division is directed to modify the notices of determination and demands

for payment of sales and use taxes due issued December 20, 1982 accordingly;
and that, except as so granted, the petitions are in all other respects denied.

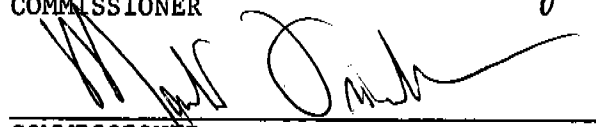
DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER