

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SOUTHTOWNS PETROLEUM CO., 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 November 30, 1979	:	
through August 31, 1981.	:	

Petitioner, Southtowns Petroleum Co., Inc., c/o Norman Klas, 43 C. Briarwood Lane, Marlboro, Massachusetts 01752, 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 November 30, 1979 through August 31, 1981 (File No. 41851).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on August 21, 1984 at 9:15 A.M., with all documents to be submitted by September 11, 1984. Petitioner appeared by Richard E. Schnell, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether certain sales of petroleum products by petitioner to an independent retail gasoline service station were properly subject to tax.

II. Whether petitioner was properly held subject to tax on its purchase of a customer route list.

FINDINGS OF FACT

1. Petitioner, Southtowns Petroleum Co., Inc. ("Southtowns"), was, during the period at issue, a wholesale and retail distributor of petroleum products.¹

2. On December 20, 1982, following a field audit, the Audit Division issued to Southtowns a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the quarterly periods ended November 30, 1979 through August 31, 1981, in the amount of \$66,517.22, plus penalty and interest.

3. The field audit report indicates that the aforementioned tax due consists of two separate items:

a) Tax in the amount of \$1,400.00, based on a customer route list purchased for \$20,000.00 by Southtowns as part of its acquisition of Day Petroleum Company, a small petroleum distributorship located in East Pembroke, New York, and

b) Tax in the amount of \$65,117.00, due on petroleum product sales by petitioner to Quick's Texaco.

The field audit report indicates that all other sales and use taxes due were properly collected and paid over by petitioner, and notes that resale certificates were on file for all customers except Quick's Texaco. The report reflects that efforts to secure a resale certificate from Quick's Texaco (apparently by the Audit Division's auditor) were unsuccessful, and that the tax due on petroleum products sold to Quick's Texaco by Southtowns has been assessed against both Quick's Texaco and Southtowns.

¹ Petitioner has since completed Chapter 7 bankruptcy proceedings (as of October 19, 1983) and been dissolved.

4. The dollar amount of the assessment is not in dispute, but Southtowns does dispute the taxability of the customer route list, and also asserts that all sales to Quick's Texaco were for resale and were thus were not subject to sales tax.

5. Southtowns' petroleum products were primarily (about 95%) Texaco products, with a small portion of its products (about 5%) consisting of products from other independent oil companies.

6. Quick's Texaco operated as an independent retail gasoline service station, selling gasoline and also repair parts and services during the period at issue. Quick's Texaco was registered as a vendor with the Department of Taxation and Finance.

7. Southtowns supplied gasoline to Quick's Texaco pursuant to an agreement negotiated between the two entities by one Norman Klas, Southtowns' secretary.² These two entities maintained this business relationship for a period of approximately twelve to fourteen years, until Southtowns ceased doing business with Quick's Texaco approximately one year before Southtowns entered into bankruptcy proceedings.

8. Southtowns distributed its products to retail service stations as follows:

a) in most cases, sales were made cash on delivery to the retail station operators on a per truckload basis, with the retail station operators responsible for collecting and paying all taxes on their own;

2 The record is silent as to whether the agreement was oral or written. No written agreement was offered in evidence. However, as noted in Finding of Fact "10", many of Southtowns' records are no longer available.

b) in four or five special cases, involving retail station operators who were good credit risks but lacked the financial knowledge necessary to run their stations, Southtowns sold the product on a consignment basis under which Southtowns handled the finances (i.e. sales receipts were turned over to Southtowns, which then either remitted taxes due thereon or returned tax monies to the retail station operators to be remitted by them).

9. Quick's Texaco was neither an agent nor an employee of Southtowns, but was operated independently by one Lloyd Quick at a facility located in Boston, New York and leased from a third party. Southtowns sold to Quick's Texaco only on the described cash on delivery per truckload basis, and not on a consignment basis, since Quick's Texaco was not considered a good credit risk by Southtowns.

10. Norman Klas testified and petitioner submitted affidavits from three persons (namely, its former office manager/in-house accountant, one Dorothy Jones; its former controller, one Ariane Klas [Norman Klas' wife]; and its former president, one Walter A. Burney), to the effect that Southtowns sold its product to Quick's Texaco as an independent purchaser, that Quick's Texaco thereafter sold such product at retail on its own, and that sales tax certificates (presumably resale certificates) from Quick's Texaco were on file with Southtowns and were periodically updated. Mr. Klas' testimony and each of the affidavits, except for Mr. Burney's, indicate that various documents from Southtowns' files pertaining to various accounts have disappeared. Finally, Mr. Klas testified that Southtowns had previously been audited by the Audit Division, which audit included an examination of resale certificates, and that an independent audit

was performed by a certified public accounting firm in conjunction with applications by Southtowns for bank financing, and in neither case was there any question that sales to Quick's Texaco were sales for resale.

11. Petitioner has made diligent efforts to secure further evidence from Quick's Texaco (subsequent to issuance of the instant assessment) but its requests in this regard have been refused.

CONCLUSIONS OF LAW

A. That a sale for resale is not considered a retail sale subject to tax [Tax Law §1101(b)(4); 20 NYCRR 526.6(c)].³ Here it is clear that the gasoline sales by petitioner to Quick's Texaco, an independent retail service station operator which was a registered vendor, were sales for resale and thus were not subject to tax when made by petitioner (cf. Matter of Ruemil Contract Interiors, Inc., State Tax Comm., September 9, 1983). Accordingly, that portion of the assessment relating to petitioner's sales to Quick's Texaco is cancelled.

B. That the sale of a customer list constitutes a taxable transaction, more specifically the sale of an information service (Long Island Reliable Corp. v. Tax Commission, 72 A.D.2d 826; Matter of Dairymens League Co-Op Association, Inc. et al., State Tax Comm., December 14, 1984). Accordingly, sales tax was due on petitioner's purchase of the customer list from Day Petroleum Company and the portion of the assessment relating thereto is sustained.

C. That the petition of Southtowns Petroleum Co., Inc. is granted to the extent indicated in Conclusion of Law "A", but is in all other respects denied

3 Tax Law section 1101(b)(4) was amended subsequent to the period at issue herein to provide, in essence, that sales such as those at issue by a distributor are treated as retail sales with the distributor thus responsible for collecting and remitting tax (see L. 1982, C. 469, §2, effective July 7, 1982).

and the Notice of Determination and Demand for Payment of Sales and Use Taxes
Due, as revised in accordance herewith, is sustained.

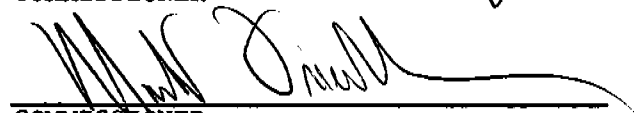
DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1985


PRESIDENT


COMMISSIONER


COMMISSIONER