

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

NOAR TRUCKING 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 December 1, 1979
through August 31, 1982. :

Petitioner, Noar Trucking Co., Inc., 86-26 103rd Avenue, Ozone Park, New York 11417, 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, 1979 through August 31, 1982 (File No. 45681).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1985 at 10:30 A.M. Petitioner appeared by Stanley S. Getzhoff, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

I. Whether the transfer of tangible personal property to petitioner approximately one year after its incorporation was a taxable retail sale or whether it was non-taxable as a transfer of property to a corporation upon its organization.

II. Whether the Audit Division correctly assessed use taxes on expense purchases and fixed asset acquisitions.

FINDINGS OF FACT

1. On April 27, 1983, the Audit Division issued to Noar Trucking Co., Inc. ("Noar") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting a tax of \$8,518.35 plus minimum interest for the period December 1, 1979 through August 31, 1982.

2. On audit of Noar's books and records, the Audit Division determined additional taxes due as follows:

(a) In fiscal year 1980, Arnmart Wholesale Beer, Inc. ("Arnmart") transferred to Noar transportation equipment with a cost basis of \$14,000.00. This transfer was deemed by the Audit Division to be a transfer of property to a corporation upon its organization in consideration for the issuance of its stock and, consequently, non-taxable. In 1981, Arnmart transferred to Noar trucks, trailers and other equipment valued on the depreciation schedule accompanying Noar's federal tax return at \$119,592.10. Noar's federal tax return also revealed an increase in the book value of Noar's capital stock from \$10,000.00 at the end of 1980 to \$130,000.00 at the end of 1981. This second transfer was deemed to be a retail sale of tangible personal property subject to tax. The equipment was valued by the Audit Division at \$120,091.00, the net book value of Arnmart's transportation equipment at the close of the fiscal year ending November 1980. Equipment valued at \$96,428.00 was garaged in a county subject to 4 percent tax; the balance was garaged in a county subject to 8 percent tax. Total tax due was calculated accordingly and determined to be \$5,750.16.

(b) Upon review of a sample of invoices from Noar's suppliers, the Audit Division discovered that two suppliers failed to separately state the sales tax charged. One supplier, Best Trucks, noted on its invoices

that sales tax was included in the total sales price; the other, Ganin Tire, simply noted the total sales price without mention of sales tax. The Audit Division concluded that Noar failed to pay sales tax on purchases made from these suppliers. From Noar's disbursements journal, the Division accumulated total purchases from these suppliers of \$29,576.00, on which a use tax of \$2,382.39 was assessed.

(c) Noar's books showed fixed asset acquisitions totalling \$4,762.00. Because petitioner could not substantiate that sales tax was paid, a use tax of \$385.80 was assessed on these purchases.

3. Noar is a New York corporation formed by Arnmart and incorporated on or about February 1, 1980. Noar is a transportation and delivery company which provides services to Arnmart, its sole customer. It was created by Arnmart to insulate the beer wholesaler from liability arising out of the transportation and delivery end of the business. The principals of the two corporations are the same.

4. In 1981, over a period of approximately twelve months, Arnmart transferred to Noar ownership of various trucks and trailers as the motor vehicle registrations and insurance coverage expired. This was done because immediate registration of the vehicles in Noar's name would have resulted in a forfeiture of whatever time remained on Arnmart's registration. The motor vehicle law would have allowed no rebate to Arnmart for the unused portion of the registration periods. Noar began doing business on or about the date of its incorporation, February 1, 1980.

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." Title and possession of the property in issue were transferred by Arnmart to Noar during the fiscal year which ended November 30, 1981. Moreover, the assets of Noar increased after the transfers occurred and the book value of the stock held by Arnmart or its principals increased accordingly. This increase in value of the capital stock constituted consideration for the transaction. Therefore, there was a transfer of possession for consideration and, unless the transfers fall within a specified exclusion, the transaction was a taxable sale under section 1105(a) of the Tax Law [see Matter of Seymour Morris d/b/a Sunny Vending Co., State Tax Commission, February 4, 1983, confirmed 101 A.D.2d 666 (3rd App. Div.)].

B. That certain transactions are excluded from the definition of a sale by section 1101(b)(4)(iii)(D) of the Tax Law. Among these exclusions are transfers of tangible personal property to a corporation upon its organization in return for the issuance of its stock. "Only transactions made at the time of the commencement of corporate business, or within a reasonable time thereafter, while the corporation is still in the process of organizing its business, are eligible for the exclusion" [20 NYCRR 526.6(d)(5)(ii)]. Arnmart did not transfer the tangible personal property to Noar upon Noar's organization. Noar came into existence and began doing business on February 1, 1980, while the transfers occurred between December 1, 1980 and November 30, 1981, from ten to twenty-one months later. The mere fact that the transactions in issue might have come within the operation of the statute had they occurred earlier in time is irrelevant. Arnmart and Noar "chose not to follow procedures which would have exempted the transaction from the sales tax" and their decision not to do so precludes them from claiming the benefits of the exclusion (Prospect Dairy, Inc. v. Tully, 53 A.D.2d 755; see also, Matter of Seymour Morris, supra). Therefore,

the transfer of tangible personal property to Noar in 1981 was a taxable retail sale not falling within the exclusion provided by section 1101(b)(4)(iii)(D).

C. That Tax Law section 1132 provides, in pertinent part, that whenever a customer is given a sales slip or invoice, a tax shall be charged and shown separately on the first of such documents given to him. By regulation, the Tax Commission has provided that the words "tax included" or similar words on an invoice do not constitute a separate statement of the tax, and where such words are used, the entire amount charged is deemed the sales price of the property sold [20 NYCRR 531.2(b)(3)]. Where a customer has failed to pay a tax to a person required to collect it, Tax Law section 1132 requires the customer to pay the tax directly to the Tax Commission. Since Noar did not pay sales tax on expense purchases or capital asset acquisitions, the Audit Division properly imposed a compensating use tax, deeming the entire amount paid by Noar to be the sales price of the property sold.

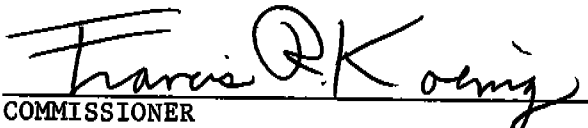
D. That the petition of Noar Trucking Co., Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on April 27, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

