

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
HUNTINGTON UTILITIES FUEL CORPORATION :
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, 1980 :
through May 31, 1982. :

DECISION

Petitioner, Huntington Utilities Fuel Corporation, 155 West Shore Road, Huntington, New York 11743, 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, 1980 through May 31, 1982 (File No. 46779).

On April 25, 1986, petitioner waived a hearing and agreed to submit the matter to the State Tax Commission for decision based on the Department of Taxation and Finance file. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioner is liable for sales and/or use tax on the inventory of parts purchased in a bulk sale.

FINDINGS OF FACT

1. On May 27, 1982, petitioner, Huntington Utilities Fuel Corporation, and Nick Brothers Fuel Corporation ("Nick Brothers"), both of which were engaged in the retail fuel oil business in the Town of Huntington, Suffolk County, entered into an agreement whereby petitioner was to acquire Nick Brothers' business.

2. The agreement provided that petitioner would purchase the following from Nick Brothers:

"1. SALE OF BUSINESS. The seller shall sell to the purchaser and the purchaser shall purchase from the seller, free from all liabilities and encumbrances, subject to the terms and conditions set forth in this agreement, the following:

a) Rolling Stock - Four fuel oil delivery trucks and two service vehicles in an 'as is' condition.

b) Customers - All retail heating oil accounts in Nassau and Suffolk Counties at the date of the closing.

c) Burner and Water Heater Service Contracts - Seller will assign to the purchaser at the closing and purchaser agrees to accept the assignment of and perform all service and provide all parts required by all burner and water heater service contracts commencing with the date of the closing for all customers in Nassau and Suffolk County areas existing at the date of the closing.

d) Parts Inventory - All functional burner and water heater service parts on hand at the date of the closing in an 'as is' condition.

e) Name - Right to use the name Nick Brothers and the telephone number 423-0300."

3. The purchase price as set forth in the contract was as follows:

"a) Rolling Stock - \$85,000.00

b) Goodwill, Customers and Their Gallonage - The purchase price to be paid for goodwill and the customers and their gallonage shall be 16¢ per gallon based on the gallonage sold by the seller during the year ending on the 31st day of May, 1982. It is estimated that the gallonage of the accounts to be sold to the purchaser is approximately 1,850,000 gallons. Seller makes no commitment as to the actual life of the retail home heating oil accounts being sold nor does seller warrant the past life of any accounts to be transferred hereby. Purchaser shall have the right to verify actual gallonage for the period by checking seller's business records.

c) Parts Inventory - Actual wholesale value of the functional parts on the date of the closing."

4. The closing was held on June 1, 1982. The closing statement showed the following valuations:

"Purchase Price - Rolling Stock	\$ 85,000.00	
Goodwill	296,000.00	
Parts Inventory	<u>41,236.02</u>	\$422,236.02
Paid - Cash	\$222,236.02	
Notes	<u>200,000.00</u>	\$422,236.02"

5. On August 8, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Huntington Utilities Fuel Corporation, in the amount of \$150,061.92 in tax, plus penalty and interest. The explanation for the assessment was that the taxes were "determined to be due from Nick Brothers Fuel Corporation and represent your liability as purchaser in accordance with section 1141(c) of the New York State Sales/Use Tax Law." It was also stated that the tax had "been estimated or determined to be due in accordance with the provisions of section 1138 of the Tax Law...". (Assessments were also issued to Nick Brothers and its officers, Sam Albicocco and Dominic Nicoletto; however, these assessments are not at issue herein.)

6. On April 26, 1984, a Notice of Assessment Review was issued to petitioner reducing the adjusted tax due to \$149,311.36, plus penalty and interest. The explanation given was that a "recent adjustment of Nick Brothers Fuel Corp. sales tax liability has resulted in the above reduction in your liability as purchaser, in accordance with section 1141(c) of the Tax Law." (Notices of assessment review were also sent to Nick Brothers and its officers.)

7. Information produced at a pre-hearing conference held on December 18, 1984 with respect to Nick Brothers resulted in the further reduction of seller's tax liability to \$27,775.52. Accordingly, the assessment against petitioner was also reduced to said amount, less \$3,325.91 paid by Nick Brothers, resulting in a net of \$24,449.61.

8. The disagreed portion of the assessment consists of \$21,460.00, representing tax on customer list purchases paid by petitioner, and \$2,989.61 in tax on parts. Petitioner paid \$21,460.00 with respect to the customer list, under protest, and counsel for petitioner and the Audit Division entered into a stipulation dated May 6, 1986, wherein they agreed to be bound by the final judicial decision in the Matter of Audell Petroleum Corp. v. New York State Tax Commission, with respect to the customer list issue. The only remaining issue is the tax assessed on the parts inventory.

9. The parts at issue consisted of oil burner parts and accessories used in servicing, repairing and replacing oil burner systems and did not include truck or auto parts or office equipment. The value of the parts inventory at the time of sale was \$41,236.02.

10. The 73 sample customer sales agreements submitted by petitioner show no tax collected, in most cases by virtue of a certificate of capital improvement. Some indicate "no tax" but the reason is not ascertainable.

CONCLUSIONS OF LAW

A. That purchases of tangible personal property by a contractor, subcontractor or repairman for use or consumption in performing a capital improvement contract are deemed to be purchases at retail and subject to tax (20 NYCRR 526.6[b][1]).

B. That 20 NYCRR 541.1(b) provides as follows:

"(b) The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract (except interior cleaning and maintenance contracts of 30 days or more) subject to the

sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer."

C. That the parts inventory was subject to tax upon purchase and petitioner has not sustained its burden of proof to show that it was entitled to a refund or credit on the basis that any of the parts were used in a repair or maintenance contract subject to sales tax. In fact, the customer agreements submitted by petitioner indicate that petitioner performed a substantial amount of work under certificates of capital improvement. The fact that the parts inventory did not include vehicle parts is irrelevant.


D. That the petition of Huntington Utilities Fuel Corporation is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as modified by the Notice of Assessment Review and at the pre-hearing conference (Finding of Fact "7"), is sustained. As noted in Finding of Fact "8", the parties have agreed to be bound by the final decision of the courts in the Matter of Audell Petroleum Corp. v. New York State Tax Commission with respect to the customer list issue.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER