

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BEST BUS COMPANY, INC.	:	DECISION
and BESTWAY, 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, 1966	:	
through August 31, 1983.	:	

Petitioners, Best Bus Company, Inc. and Bestway, Inc., P.O. Box 514, Wheatley Heights, New York 11798, 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, 1966 through August 31, 1983 (File No. 47771).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1986 at 1:15 P.M. Petitioners appeared by Arthur Riber, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether petitioners are liable for use tax on purchases of gasoline and other expenses used in the operation of school buses.

II. If so, whether penalty and interest in excess of the statutory minimum should be waived.

FINDINGS OF FACT

1. On October 17, 1983, the Audit Division, as the result of an audit, issued to petitioner Best Bus Company, Inc. ("Best Bus") three notices of determination and demand for payment of sales and use taxes due as follows:

notice number S831017000F asserted a tax due of \$31,232.36, plus penalty and interest, for the period June 1, 1966 through February 28, 1978; notice number S831017001F asserted a tax due of \$41,834.24, plus penalty and interest, for the period March 1, 1978 through August 31, 1981; notice number S831017002F asserted a tax due of \$24,759.04, plus penalty and interest, for the period September 1, 1981 through August 31, 1983. The total tax determined to be due from Best Bus is \$97,825.64 for the period June 1, 1966 through August 31, 1983.

2. In or about July, 1982, an examiner for the Audit Division initiated an audit of the books and records of Best Bus. After repeated attempts to conduct the audit had failed, the examiner, based on the Audit Division's experience in auditing bus companies, issued the aforementioned assessments. Best Bus was not registered for sales tax purposes with the Audit Division; thus, the audit period was extended to June 1, 1966. In or about December, 1983, subsequent to the issuance of the notices, the case was assigned to David Fitzgerald for further audit. Mr. Fitzgerald reviewed the limited records which were made available and, as a result thereof, reduced the tax liability of Best Bus to \$56,133.43 and the audit period was revised to include June 1, 1966 through June 30, 1982. The amount at issue represents use tax due on purchases of gasoline and other expenses.

3. On October 24, 1983, Best Bus timely filed an application for a hearing to review the notices. The petitioners do not protest the audit methodology or the amount of taxes determined to be due, instead they maintain they are not liable for the tax.

4. Best Bus operated school buses until June, 1980 when it was dissolved and succeeded by Bestway, Inc. ("Bestway"). Thomas Fogarty was the principal

of both Best Bus and Bestway. At the hearing held herein, petitioners' representative described the current business of Bestway. Bestway operates school buses, primarily the minibus type of school bus, and specializes in transporting handicapped children. Almost all of its business is awarded annually by various school districts based on normal bidding procedures. Bestway services about twenty-five different school districts and transports about four hundred children per day while operating about thirty buses. Petitioners have been in business for over twenty-five years and employ forty to forty-five part-time employees. The school districts with which they have been doing business are all located on Long Island, New York and petitioners have been doing business with these districts on a recurring basis. Presumably, petitioners' activities were similar during the audit period.

5. Mr. Fogarty believed that since school districts were exempt from tax under section 1116(a) of the Tax Law, that sales tax should not be included in the corporations' bids. Because of this, petitioners did not pay sales or use taxes on gasoline and expense purchases and passed these savings on to the school districts. During the last three years, approximately, Bestway has paid all sales taxes on these purchases based on information supplied to Mr. Fogarty by Mr. Fitzgerald during the audit.

6. Petitioners maintain that the school districts, as exempt organizations, are exempt from payment of sales tax on their purchases. Accordingly, petitioners conclude, they should not pay sales tax on purchases made to fulfill a contract with a school district. Petitioners further contend that since they were doing contract work for the school districts, they could be deemed for these purposes to be an agent of the school district. Petitioner drew an analogy between the tax benefit on purchases made directly by school districts and that on purchases

made by an individual as agent of a school district and passed on to the school district.

7. At all times the petitioners acted in good faith and did not intentionally avoid paying the tax.

CONCLUSIONS OF LAW

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

B. That section 1116(a) of the Tax Law provides, in pertinent part, that any sale by or to certain enumerated entities shall not be subject to the sales and compensating use tax.

C. That the petitioners failed to sustain the burden of proof required to show that an agency relationship existed between them and the school districts, which are exempt from tax pursuant to section 1116(a) of the Tax Law.

D. That there is no provision in the Tax Law exempting petitioners' purchases of gasoline and expenses because they were used to fulfill a contract with an exempt organization. Purchases of these items were retail sales to petitioners pursuant to section 1101(b)(4)(i) of the Tax Law and, therefore, subject to tax.

E. That in accordance with Finding of Fact "7", the penalty is cancelled and interest is reduced to the minimum statutory rate. Tax Law §1145(a)(1)(iii).

F. That the petition of Best Bus Company, Inc. and Bestway, Inc. is granted to the extent indicated in Conclusion of Law "E". The Audit Division is hereby directed to modify the notices of determination and demand for

payment of sales and use tax due issued October 17, 1983; and that except as so granted, the petition is denied.

DATED: Albany, New York

APR 21 1986

STATE TAX COMMISSION

Rodriguez Allen
PRESIDENT

Francis R Koenig
COMMISSIONER

Mark A. [illegible]
COMMISSIONER