

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ALASCON, 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 September 1, 1977
through August 31, 1980.

Petitioner, Alascon, Inc., Port of Albany, Albany, New York 12202, 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 September 1, 1977 through August 31, 1980 (File No. 48889).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on August 22, 1985 at 1:15 P.M., with all briefs to be submitted by October 28, 1985. Petitioner appeared by Michael F. Daly, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether transactions between petitioner and related corporations constituted a rental of tangible personal property subject to sales tax or whether such transactions constituted the furnishing of a transportation service not subject to sales tax.

FINDINGS OF FACT

1. On September 20, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Alascon, Inc. (hereinafter "petitioner") for the period

September 1, 1977 through August 31, 1980 for taxes due of \$19,944.87, plus interest of \$9,060.08, for a total amount due of \$29,004.95. Petitioner executed consents extending the period of limitation of assessment of sales and use taxes for the period at issue to December 20, 1983.

2. Petitioner concedes that sales of \$5,319.00 for the period ending February 28, 1978, \$412.50 for the period ending February 28, 1979 and \$5,000.00 for the period ending May 31, 1980 were properly determined to be taxable sales and does not contest tax due thereon. However, the balance of sales determined, on audit, to be taxable remains at issue.

3. Petitioner is an affiliated corporation of Hudson River Construction Co., Inc. (hereinafter "Hudson River") which is in the highway construction business. Hudson River has one division named Port Concrete and one subsidiary named Albany Asphalt & Aggregates Corp. (hereinafter "Albany Asphalt"). Petitioner hauls equipment, cement, sand and stone for its affiliated corporations. Petitioner **owns** trucks, tractors, flat bed trailers, a box trailer and a cement trailer. Petitioner **owns** and registers the vehicles and pays for insurance, gas, oil and repairs. **No** one corporation has exclusive hauling rights to any of the trucks. In fact, the trucks frequently haul loads for more than one corporation on the same day. When the trucks are idle, petitioner receives no income. The equipment is hauled on a per move basis while the cement, sand and stone are hauled on a per ton basis. The rates which petitioner charges for hauling are comparable to the rates which are charged by independent truckers.

4. Petitioner employs four seasonal employees whose only duties are to drive petitioner's vehicles. These employees work solely for petitioner. They do not load or unload the equipment, cement, sand **or** stone, but merely pick up and deliver the same at petitioner's direction. Eugene Hallock, Jr. who

is the President, a Director and a 50 percent shareholder of petitioner directs petitioner's employees and gives them instructions each day as to where they are to drive their vehicles, what they are to pick up and where they are to drop off their vehicles' loads. At no time is there a transfer of possession, control or use of petitioner's vehicles to any of the affiliated corporations for which petitioner hauls loads.

5. Petitioner, at all times, maintains the right to hire and fire its drivers. Although these drivers are paid by check from Hudson River, petitioner is billed, on a monthly basis, for the drivers' gross pay plus an insurance charge which includes the fringe benefits paid to the drivers.¹ Petitioner bills Hudson River and its affiliates on a monthly basis, for transportation charges. All of said bills are paid by means of the issuance of checks from one corporation to the other.

6. Petitioner, Hudson River and Albany Asphalt share common offices. The sign on the building which houses the corporation specifically lists thereon the three corporations.

7. On July 20, 1983, the Audit Division, Central Corporation Tax Section, determined that, as of April 1, 1980, petitioner was subject to tax under sections 183 and 184 of Article 9 of the Tax Law as a transportation corporation. Petitioner consented to this determination and paid the tax due for the applicable periods.

¹ Petitioner and its affiliated corporations, pursuant to the provisions of section 3121(s) of the Internal Revenue Code, utilize Hudson River as a common paymaster. The propriety of the use of a common paymaster has not been challenged by the Audit Division and said issue will not, therefore, be addressed herein.

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines "sale, selling or purchase" as follows:

"Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

B. That 20 NYCRR 526.7(c)(1) provides, in pertinent part, as follows:

"The terms 'rental, lease, license to use' refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property."

C. That 20 NYCRR 526.7(e)(4) provides as follows:

"Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property."

D. That 20 NYCRR 526.7(e)(6) provides, in pertinent part, as follows:

"When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment."

E. That petitioner did not transfer any of the attributes of property ownership as the same as set forth in 20 NYCRR 526.7(e)(4) and, at all times, petitioner's vehicles were operated by and under the custody and control of petitioner's drivers. The drivers were supervised and directed by petitioner. Although the drivers were paid by Hudson River pursuant to the common paymaster provisions of section 3121(s) of the Internal Revenue Code, petitioner reimbursed Hudson River each month for monies paid to petitioner's

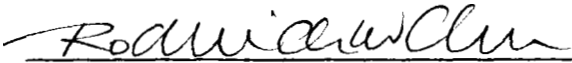
drivers and did, therefore, pay all expenses incurred in the operation of its vehicles. Accordingly, with the exception of that portion conceded by petitioner to be taxable sales to the extent indicated in Finding of Fact "2", supra, petitioner's hauling of equipment, cement, sand and stone for Hudson River, Albany Asphalt and Port Concrete did not constitute a rental of tangible personal property within the meaning and intent of section 1101(b)(5) of the Tax Law, but was instead the furnishing of a transportation service not subject to the imposition of sales and use taxes.

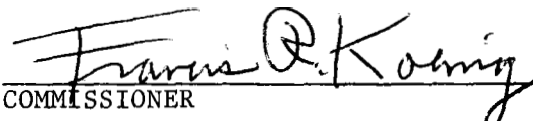
F. That the petition of Alascon, Inc. is granted to the extent indicated in Conclusion of Law "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1983; and that, except **as so** granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 27 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 373 578

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <i>Michael F. Daly</i>	
Street and No. <i>123 State Street</i>	
P.O., State and ZIP Code <i>Albany, N.Y. 12207</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 319 373 577

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <i>Alascon, Inc.</i>	
Street and No. <i>Port of Albany</i>	
P.O., State and ZIP Code <i>Albany, N.Y. 12202</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	