

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
INTERNATIONAL VENDING CORP. : 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 Ended May 31, :
1983.

Petitioner, International Vending Corp., 4875 White Plains Road, Bronx, New York 10470, 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 ended May 31, 1983 (File No. 49008).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 22, 1985 at 10:45 A.M., with all briefs to be submitted by January 31, 1986. Petitioners appeared by Fischer and Burstein, P.C. (Lyle A. Bakst, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Esq., of counsel).

ISSUES

I. Whether the receipts from the sale of a vending machine route were subject to tax as the sale of an information service.

II. Whether, if such receipts were taxable, the Audit Division correctly valued the asset sold.

III. Whether, if tax is due, the amount of tax should be decreased because the sale was cancelled, the property was returned or the debt was uncollectible.

FINDINGS OF FACT

1. On November 29, 1983, the Audit Division issued against petitioner, International Vending Corp., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$20,625.00 plus penalty and statutory interest for the period ended May 31, 1983. The notice explained that the tax was assessed upon petitioner's bulk sale of a "Truck Route" list valued at \$250,000.00.

2. On August 31, 1983, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from Robert A. Byrnes, the purchaser, stating that on August 5, 1983 petitioner sold to the purchaser a business consisting of vending machines and routes. At the Audit Division's request, a copy of the purchase contract was later provided. The purchaser stated that \$100,000.00 of the \$350,000.00 sale price was allocated to equipment consisting entirely of vending machines, and subsequently he paid a bulk sales tax of \$8,250.00. The Audit Division accepted the valuation of the vending machines, but took the position that the entire balance of the purchase price was applicable to the sale of what has variously been referred to as a customer list, a vending route, a truck route and location rights. This asset was deemed taxable as the sale of an information service.

3. By contract dated July 20, 1983, petitioner sold a portion of its assets to Robert A. Byrnes. The purchase price was allocated to three assets: equipment, good will and location rights; however, the contract attached no dollar amount to any asset. The equipment consisted of 117 vending machines; fifteen of which were located in petitioner's warehouse. The remainder were located in various sites, primarily in Pathmark supermarkets throughout the

metropolitan New York area. The contract provides as follows: "The Seller hereby sells to the Buyer the physical assets listed in the Schedule marked Schedule "A" annexed hereto as well as the vending routes as listed in Schedule "A" hereto." A segment of Schedule "A" is reproduced below for illustrative purposes.

<u>Location</u>	<u>Type</u>	<u>Make</u>	<u>Serial #</u>
Correctional	Snack	Nat. E.C.M.	13076586
Mobi	Snack	Nat. Showcase	14157339
	Soda	Cav. 360	44057
Bay 1	Soda	Vendo 348	8FF020282

The Audit Division determined that Schedule "A" was, in fact, a customer list subject to taxation. Petitioner alleges that Schedule "A" is nothing more than a list identifying the locations of the vending machines sold.

4. Although petitioner purportedly sold location rights or a vending route, it had no assignable leases at any of the locations, but relied entirely on oral agreements revocable at will. Commissions were paid to the location owners, but the record contains no information concerning the nature of the agreements under which such commissions were payable. Because no contractual right existed in any of the vending machine locations, petitioner placed a minimal value on this asset of approximately 0 to \$5,000.00.

5. Petitioner valued the good will of the business sold at approximately \$250,000.00. In the purchase contract, petitioner agreed to provide the purchaser with a letter of introduction for distribution to location owners at the various vending machine locations. He also agreed to assist the purchaser in its personal relationships with the accounts transferred. In another provision, petitioner guaranteed to the purchaser a minimum in gross sales of \$400,000.00 per year and obligated itself to find replacements if vending

machine locations were lost for as long as the purchaser bought its soda from petitioner. These provisions were necessary because without written leases the earning capacity of the business was dependent upon the owner's personal relationships with the owners and managers of the stores and other places where the machines were located.

6. In addition to the contractual obligations previously mentioned, petitioner agreed, among other things: to supply the purchaser with soda at the rate of \$6.50 per case; to provide the purchaser with the use of petitioner's premises without incurring any rent or other charges for use of the premises for a period of six months; and not to sell or compete with the purchaser at any locations transferred under the contract or any new locations established by the purchaser.

7. Although the purchaser formed a corporation to operate the vending machine business, a sticker bearing petitioner's name and phone number remained on the machines. Petitioner retained ownership of its cigarette machines; some of which were located in the same places as the vending machines sold. In order to protect his own business interests, petitioner responded to complaints concerning the purchaser's machines as well as his own.

8. The contract price of the assets sold was \$350,000.00. However, prior to closing, the purchaser negotiated a \$50,000.00 reduction in the price. The purchaser paid \$30,000.00 when he made the purchase offer, paid another \$70,000.00 at closing, and executed a promissory note for \$200,000.00 plus interest payable to petitioner in equal monthly installments over sixty months. An acceleration clause was included.

9. The purchaser defaulted on its obligations to petitioner after making seventeen monthly payments totalling \$71,893.95 including principal of \$43,333.00 plus interest of \$28,560.00. The petitioner instituted foreclosure proceedings, whereby it repossessed the vending machine business through the formality of an auction. Although the documentation of the auction sale stated consideration was valued at \$150,000.00, no money was exchanged and the stated sum was applied to the purchaser's remaining obligation. When the purchaser filed for bankruptcy, petitioner decided the remainder of the debt was uncollectible.

CONCLUSIONS OF LAW

A. That section 1105[subd.(a)] of the Tax Law imposes a tax upon the "receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28]". Section 1105[subd.(c), par.(1)] of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the service of "furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons...".

B. That petitioner's contract provided an appendix of customer names, locations and identification numbers of vending machines which clearly served as a customer list from which the purchaser could build his business. A customer list is a business asset the sale of which constitutes "the sale of

information and is, therefore, taxable under subdivision (c) of section 1105 of the Tax Law (citation omitted)." (Long Island Reliable Corp. v. Tax Commission, 72 AD2d 826 at 827, lv denied 49 NY2d 707; Matter of Skaggs-Walsh, Inc.v. State Tax Commission, 50 NYS2d 520).

C. That petitioner's position that the vending route was goodwill because the customers and location rights listed were not assignable leases is without merit. The State Tax Commission has held the sale of a customer list, which consists of customers without service contracts and no assignable rights, to be a taxable information service. (Wowkowych Enterprise Disposal Services, Inc. State Tax Commission, January 3, 1986.)

D. That petitioner's contract did not allocate the purchase price among the assets sold. Further, petitioner failed to sustain its assertion that the vending route had a value of \$5,000.00 or less. Therefore, in accordance with Finding of Fact "2", the Audit Division properly valued the customer list.

E. That section 1132(e) of the Tax Law provides, in pertinent part, as follows:

"The Tax Commission may provide, by regulation, for the exclusion from taxable receipts, amusement charges or rents of amounts representing sales where the contract of sale has been cancelled, the property returned or the receipt, charge or rent has been ascertained to be uncollectible or, in case the tax has been paid upon such receipt, charge or rent, for refund of or credit for the tax so paid."

F. That petitioner's repossession of the vending machine business did not serve to cancel the contract of sale. Repossession of assets by a secured party constitutes a sale within the meaning and intent of section 1101(b)(5) of the Tax Law. (Denos Vourderis d/b/a Stephen's Coffee Shop, State Tax Commission, December 11, 1978.) Furthermore, petitioner failed to prove that

the purchaser's debt was uncollectible in that petitioner may still recover the outstanding balance of the promissory note through the bankruptcy proceedings.

G. That the petition of International Vending Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated November 29, 1983, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986

Roderick A. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER