

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SWOFFORD & SCHARFF, 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 April 4, 1983. :

DECISION

In the Matter of the Petition :
of :
INGALLS ASSOCIATES, 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 April 4, 1983. :

Petitioner, Swofford & Scharff, Inc., 59 East 54th Street, New York, New York 10022, 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 April 4, 1983 (File No. 50484).

Petitioner, Ingalls Associates, Inc., Two Copley Place, Boston, Massachusetts 02116, 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 April 4, 1983 (File No. 46811).

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 June 4, 1985 at 1:15 P.M., with all briefs to be submitted by July 5, 1985. Petitioners appeared by Gaston Snow & Ely Bartlett, Esqs. (Jay Freedman,

Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

Pursuant to a Stipulation of Facts executed by the attorney for the petitioners on May 30, 1985 and by the representative for the Audit Division on June 4, 1985, the parties agreed to certain facts and exhibits which have been incorporated in the findings of fact to the extent that they are relevant to these proceedings.

ISSUE

Whether New York State and local sales tax is due on the sale of an asset specifically identified as "Client Accounts" by Swofford & Scharff, Inc. to Ingalls Associates, Inc.

FINDINGS OF FACT

1. Petitioner Swofford & Scharff, Inc. ("Swofford") is a New York corporation engaged in the advertising business, with offices at 59 East 54th Street, New York, New York.

2. Petitioner Ingalls Associates, Inc. ("Ingalls") is a Massachusetts corporation that is engaged in the advertising business, with offices at Two Copley Place, Boston, Massachusetts.

3. On June 17, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Swofford for taxes due of \$12,870.00 for the period April 4, 1983.

Also on June 17, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Ingalls for taxes due of \$12,870.00 for the period April 4, 1983.

The aforementioned notices were based on the sale of assets by Swofford to Ingalls for \$156,000.00.

4. It is the position of the Audit Division that Ingalls purchased a customer list from Swofford which transaction is subject to tax as the sale of tangible personal property or an information service under sections 1105(a) and 1105(c)(1) of the Tax Law, respectively.

5. Petitioners claims that Ingalls purchased the name (Swofford) from an existing corporation and that no other tangible asset which would ordinarily be subject to the sales tax or bulk sales tax was made. Petitioners further contend that the Audit Division has the burden of proof to show that the sale of an information service was made.

6. On March 28, 1983, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk signed by the attorney for the purchaser informing it of the sale of assets, specifically "Client Accounts," from Swofford to Ingalls for \$156,000.00. The notification also provided the terms and conditions of sale and indicated a scheduled date of sale of April 4, 1983.

7. On March 29, 1983, the Audit Division issued a Notice of Claim to Purchaser advising Ingalls of a possible claim for New York State and local sales and use taxes due under section 1141(c) of the Tax Law. On April 7, 1983, the Audit Division issued a Notice to the Seller alerting Swofford to the possibility of a claim for sales and use taxes due in accordance with the provisions of Articles 28 and 29 of the Tax Law.

8. Pursuant to a Purchase Agreement executed on April 13, 1983, Ingalls purchased certain assets of Swofford listed in Exhibit A thereto as follows:

<u>Asset</u>	<u>"Amount of Purchase Price Allocated to Assets"</u>
(i) All existing business relationships, including accounts receivables, with the following clients of the Seller and all rights of the Seller under any contracts between the Seller and any such client of the Seller:	

American-Maize	\$30,000
General Defense	\$25,000
Gestetner Corp.	\$20,000
Zayre Corp. (50% of this account)	\$15,000
Handleman Corp.	\$20,000
Gleason Works	\$20,000

- (ii) All trade names, including the right to the name "Swofford & Scharff" and any other names incorporating the name "Swofford & Scharff", logos relating to the Seller's financial and investor business and good will: \$ 1,000
- (iii) Covenant not to compete as provided in Article 8 of the Agreement \$25,000

* If the aggregate purchase price is reduced below \$156,000 pursuant to the provisions of Article 2 of the attached Agreement, the amount of the purchase price allocated to each asset shall be reduced in the same proportion."

9. On November 21, 1983, the Audit Division issued notices of assessment review to Ingalls and Swofford wherein it reduced the amount of tax due pursuant to the notices of determination (see Finding of Fact "3") to \$10,725.00. The adjustment was made on the ground that tax was due only on the value of client accounts (\$130,000.00) and that the values of the trade names and covenant not to compete were not subject to tax.

10. Petitioner Ingalls' negotiations with petitioner Swofford for the purchase of the assets commenced in January, 1981. The names and identity of the six "public relations" clients of Swofford which were the subject of the Purchase Agreement became known to Ingalls at the outset of the negotiations in January, 1981.

The six client accounts specified in the Purchase Agreement conveyed no information to Ingalls as it already knew the names of the six clients. The specification of six client accounts in the Purchase Agreement was there to

ensure that Swofford would not sue Ingalls for interference with contractual relations.

11. The Law Bureau in its answer to the petitions affirmatively stated that a customer list is a business asset the sale of which constitutes the sale of information and is, therefore, taxable under section 1105(c) of the Tax Law. Petitioners contended that this is an affirmative defense which must be proven by the Law Bureau.

12. With its brief, petitioners submitted proposed findings of fact for the Commission's consideration. Proposed findings one through five are substantially duplicates of findings in the Stipulation of Facts. Proposed findings six, seven, the first part of eight, and nine have been adopted by the Commission. The latter part of proposed finding eight is conclusory in nature rather than factual. Petitioners also submitted proposed conclusions of law. However, under the State Administrative Procedure Act §307, the State Tax Commission is not required to rule upon them.

CONCLUSIONS OF LAW

A. That section 1105(c)(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 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 A.D.2d 826; Dairymens League Co-op Association, Inc. et al., State Tax Commission, December 14, 1984).

C. That the list of clients in the Purchase Agreement constituted a customer list the sale of which was subject to tax under section 1105(c) of the Tax Law, notwithstanding the facts that Ingalls Associates, Inc. had previously known the six names and that the customers were specified to ensure that Swofford & Scharff, Inc. would not sue Ingalls Associates, Inc. for interference with contractual relations.

D. That the State Tax Commission's Rules of Practice and Procedure provide that the Law Bureau shall serve an answer on the petitioner within 60 days from the date the Secretary acknowledged receipt of an acceptable perfected petition. 20 NYCRR 601.6(a) provides, in pertinent part, as follows:

"(2) The answer as drawn shall contain numbered paragraphs corresponding to the perfected petition and shall fully and completely advise the petitioner and the Commission of the defense. It shall contain:

* * *

(B) a statement of any additional facts to be proven by the Law Bureau either as a defense, or for affirmative relief, or to sustain any issue raised in the petition upon which the Department has the burden of proof."

E. That the Law Bureau's statement in its answer to the effect that a customer list is a business asset the sale of which constitutes the sale of information and is taxable under section 1105(c) of the Tax Law, is not an affirmative defense but more in the nature of a conclusion of law and, therefore, does not have to be proven by the Law Bureau. See McKinney's Cons. Laws of N.Y., Book 7B, CPLR §3018(b) Affirmative defenses.

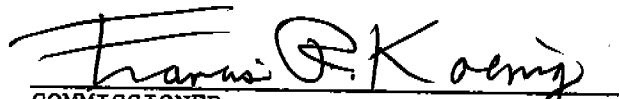
F. That the petitions of Swofford & Scharff, Inc. and Ingalls Associates, Inc. are denied and the notices of determination and demand for payment of sales and use taxes due issued on June 17, 1983 and adjusted on November 21, 1983 (see Finding of Fact "9") are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER