

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DANIEL KAILBURN AND HEATHER KAILBURN
D/B/A EAST HILL CAR WASH

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 November 15, 1980 :
through May 31, 1985.

Petitioners, Daniel Kailburn and Heather Kailburn d/b/a East Hill Car Wash, 1731 Hanshaw Road, Ithaca, New York 14850, 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 November 15, 1980 through May 31, 1985 (File No. 63447).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York, on January 27, 1987 at 2:45 P.M., with all briefs to be submitted by February 27, 1987. Petitioners appeared ~~pro se~~. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether receipts from the sale of services performed by means of coin-operated, self-service car wash and vacuuming machines are subject to sales tax.

11. Whether, for sales tax purposes, the rinse cycle of a car wash can be isolated from the wash cycle, and if so, whether receipts from the rinsing of automobiles by coin-operated equipment **is** subject to sales tax.

III. Whether receipts from the sale of paper towels, sold through a vending machine at 25 cents apiece, were subject to sales tax.

IV. Whether petitioners miscalculated taxable sales by including sales tax therein, entitling them to a credit of \$190.02.

V. Whether the Tax Law unconstitutionally discriminates against petitioners by providing an exclusion from the sales tax for self-service laundries, but not for car washes.

FINDINGS OF FACT

1. Petitioners, Daniel Kailburn and Heather Kailburn d/b/a East Hill Car Wash, are the sole proprietors of a coin-operated, self-service car wash.

2. Petitioners timely filed State sales and use tax returns for the years under consideration. For the sales tax periods ended February 28, 1983, May 31, 1983 and May 31, 1984, petitioners claimed certain credits against sales tax due.

(a) Petitioners claimed a credit of \$2,848.11 for the sales tax quarter ended February 28, 1983. In a letter to the Audit Division, petitioners explained their belief that the rinse cycle of a car wash is exempt from sales tax because "customers don't drive away with a product". On the same basis, petitioners determined that sales receipts collected through a coin-operated vacuuming machine are exempt from sales tax. Accordingly, petitioners estimated, for the period November 15, 1980 through November 30, 1982, the amount of sales tax they had reported which related to the rinse cycle (approximately one-half of the total tax reported for the period) and the amount of tax which related to the vacuuming machine, and claimed the aggregate amount as a credit.

(b) For the sales tax quarter ended May 31, 1983, petitioners claimed a credit of \$190.02. This claim was based upon their realization that the total amount of all sales reported **on** their returns for the period September 1, 1980 through February 28, 1983 had erroneously included the amount of sales tax collected.

(c) The third credit claimed, in the amount of \$100.32, was for the period March 1, 1984 through May 31, 1984. This claim was based upon petitioners' belief that sales of tangible personal property sold through coin-operated vending machines at 25 cents or **less** were exempt from sales and use tax. Petitioners calculated the amount of sales tax they had paid over on receipts from the sale of paper towels through a vending machine at 25 cents per towel, and they claimed a credit in that amount. The total credit claimed also included sales tax of \$6.28 paid by petitioners **on** the purchase of salt used as water softener. The basis for that claim was not explained.

3. By letter dated May 8, 1985, all of petitioners' claims for credit were denied by the Audit Division,

4. At hearing, the Audit Division conceded that petitioners are entitled to a credit of \$190.02 which represents overpayments of sales tax due.

5. By their perfected petition to the State Tax Commission, petitioners claimed a refund of \$7,368.97 plus interest for all taxes paid during the period November 15, 1980 through May 31, 1985. Their claim for refund is premised upon several grounds.

(a) Petitioners take the position that a self-service car wash, such as theirs, neither sells tangible personal property nor provides a service, since the customer provides the labor and performs whatever cleaning services are necessary.

(b) Since car wash owners pay sales tax on their purchase of gas and electricity, soap, wax, etc., and these things are provided to the customer as part of the car wash service, a sales tax **on** the service constitutes double taxation.

(c) Because coin-operated car wash facilities can collect money only in multiples of twenty-five cents, it **is** physically impossible to collect a 7 cent or **8** cent tax from the customer; therefore, the imposition of tax on sales made through coin-operated machines wrongly places the burden of paying the tax on the vendor rather than the customer. Petitioners take the position that they have never collected sales tax from their customers, but have paid the tax themselves.

(d) Petitioners argue that the imposition of sales tax on services to tangible personal property performed by coin-operated machines unconstitutionally discriminates against self-service car wash owners because an exclusion is provided by statute for laundering services, but not ~~for~~ car washes.

CONCLUSIONS OF LAW

A. That Tax Law § 1105(c)(3) imposes a tax upon the receipts from every sale of the service of "maintaining, servicing or repairing tangible personal property... not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment". The State Tax Commission has held that the services provided by a coin-operated, self-service car wash are taxable under this section of the Tax Law (Matter of Douglas H. Casement Enterprises, State Tax Commission, November 27, 1981).

B. That section 1105(c)(3) imposes no tax on tangible personal property, rather it imposes a tax on services to tangible property. The rinse cycle of the car wash is a part of that taxable service, and petitioners have presented

no reason to support its exclusion from taxable services. Likewise, the services provided by a coin-operated vacuum machine are services taxable under Tax Law § 1105(c)(3). Petitioners' argument that they sell no services, since customers provide their own labor, *is* untenable. Petitioners' customers purchase services which are provided by petitioners' coin-operated machines. Moreover, all expenses incurred by a vendor in making a sale, regardless of their taxable status, are not deductible from the receipts (20 NYCRR 526.5(e)). Thus, purchases of utilities and supplies are expenses which may not be deducted from receipts.

C. That Tax Law § 1115(a)(13) provides an exemption from the sales tax for:

"Tangible personal property sold through coin operated vending machines at ten cents or less, provided the retailer *is* primarily engaged in making such sales and maintains records satisfactory to the state tax commission."

D. That Tax Law § 1115(a)(13-a), which became effective September 1, 1983, provides an exemption from the sales tax for:

"Tangible personal property sold through coin operated bulk vending machines at twenty-five cents or less, provided the retailer *is* primarily engaged in making such sales and maintains records satisfactory to the state tax commission. ~~As~~ used in this paragraph, 'bulk sale vending machine' means a vending machine, containing unsorted merchandise, which, upon insertion of a coin, dispenses the same in approximately equal portions, at random and without selection by the customer."

E. That petitioners' sales of paper towels through coin-operated vending machines were not exempt from sales tax under section 1115(a)(13) because each sale was at 25 cents. Such sales were not exempt under section 1115(a)(13-a) because the machines in question were not "bulk vending machines" as defined by the statute.

F. That "[e]very person required to collect the tax shall collect the tax from the customer when collecting the price...to which it applies" (Tax Law § 1132[a]) (emphasis supplied). Furthermore, every person who *is* required to collect any tax imposed by Article 28 of the Tax Law *is* personally liable for the tax imposed, whether or not it is collected from the customer (Tax Law § 1133[a]). Petitioners were not physically prevented from collecting sales tax by virtue of the fact that their sales prices were collected through a coin box. Under such circumstances, petitioners were authorized to use a unit price method of accounting for sales. The "unit price" is the price, including sales tax, at which the sale is recorded. Customers must be made aware of the inclusion of sales tax in the total sales price through the use of a placard stating that the prices of all taxable items include sales tax (20 NYCRR 532.1[4]; Matter of Douglas H. Casement Enterprises, State Tax Commission, November 27, 1981, supra).

G. That the Audit Division conceded that petitioners are entitled to a credit of \$190.02.

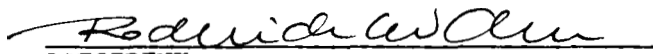
H. That the Tax Law is presumed to be constitutional at the administrative level.

I. That the petition of Daniel Kailburn and Heather Kailburn d/b/a East Hill Car Wash *is* granted to the extent indicated in Conclusion of Law "G", and that in all other respects the petition is denied.

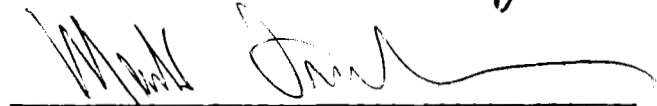
DATED: Albany, New York

STATE TAX COMMISSION

JUN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER