

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ROGER GAUTHIER, SR.

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 Periods Ended day 31,
1983 and February 28, 1985.

Petitioner, Roger Gauthier, Sr., RD #2, Granville, New York 12832, 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 periods ended May 31, 1983 and February 28, 1985 (File No. 65117).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building 9, W.A. Harriman Campus, Albany, New York, on April 7, 1987 at 2:30 P.M., with all briefs to be filed by June 8, 1987. Petitioner appeared by John R. Winn, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether petitioner **is** liable for use tax on the purchase of a tractor which he used in interstate commerce.

FINDINGS OF FACT

1. On October 10, 1985, the Audit Division issued to petitioner, Roger Gauthier, Sr., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales and use taxes due of \$6,850.00, plus interest of \$661.11, for a total amount due of \$7,511.11 for the periods ended May 31, 1983 and February 28, 1985. The aforementioned taxes were found to be due as the result of a field audit of petitioner's books and records. The auditor determined

that petitioner was liable for sales taxes of \$1,379.00 on the purchase of a tractor in 1983 and use taxes of \$5,471.00 on the purchase of a tractor in 1985.

2. On October 30, 1985, petitioner timely filed a petition for a hearing to review the notice. Petitioner claims that from the time of purchase the tractors were primarily used in interstate commerce and, therefore, are not subject to tax.

3. At all times relevant, petitioner was a resident of New York State residing at RD #2, Granville, New York.

4. On March 16, 1983, petitioner purchased a 1978 International tractor from Orange Motor Co., Inc. in Albany, New York for \$19,700.00. The tractor was delivered in New York State; however, petitioner avoided paying sales tax by registering the vehicle in New Jersey, utilizing the address of a relative of the salesman. The auditor determined the sales tax by multiplying the purchase price by the combined State and local sales tax rate ($\$19,700.00 \times 7\% = \$1,379.00$). At the hearing, petitioner conceded that he was liable for the sales tax on this transaction and this amount *is* no longer at issue.

5. On February 8, 1985, petitioner purchased a 1985 International tractor from J & B International in Burlington, Vermont for \$78,152.96. Petitioner traded his 1978 tractor in for the new vehicle and was given a credit of \$19,948.28 for a net purchase price of \$58,204.68. (It should be noted that the net purchase price includes Federal retailers' excise taxes in the amount of \$7,281.77.) Petitioner transferred his New Jersey license plates to the new vehicle. Petitioner took delivery of the vehicle in Vermont. The auditor determined the use tax by multiplying the sales price, before allowance for trade-in, by the combined State and local use tax rate ($\$78,152.96 \times 7\% = \$5,471.00$).

6. During 1985, petitioner, an independent contractor, was under contract to transport goods for Fort Ann Express of Fort Ann, New York. Petitioner's tractor was used primarily to transport placemats from Glens Falls, New York to Delta Airlines in Atlanta, Georgia and aluminum foil from General Electric Co. in Fort Edward, New York to Joliet, Illinois. After delivering the load, petitioner would return to Fort Ann, usually picking up and delivering additional loads at specific locations during the return trip. Only occasionally did petitioner use the tractor for intrastate transporting. Petitioner testified that on one such occasion he transported a load of paper from Glens Falls to New York City. Otherwise the tractor was used primarily for interstate transporting. When the tractor was not in use, it was garaged either at Fort Ann or at petitioner's residence in Granville.

7. Petitioner contends that it is the intent of the Tax Law to exempt vehicles primarily engaged in interstate commerce from sales and use taxes and that exemption is not lost because of incidental intrastate trips.

CONCLUSIONS OF LAW

A. That section 1110 of the Tax Law provides, in pertinent part, for the imposition of the compensating use tax as follows:

"Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail..."

B. That section 1101(b) of the Tax Law defines the term "use" as follows:

"(7) Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property."

C. That use tax is due pursuant to section 1110 of the Tax Law where (1) a vehicle enters the State while not engaged in interstate or foreign commerce, even though the vehicle is thereafter used in interstate or foreign commerce; or (2) the vehicle enters the State while engaged in interstate or foreign commerce, but is subsequently used to any degree in intrastate commerce or any localized use within New York State. Accordingly, since the petitioner used the tractor in intrastate commerce, the use tax was properly imposed by the Audit Division. Furthermore, petitioner has failed to show that the vehicle was garaged outside New York State or principally used outside New York State. (Xerox Corp. v. State Tax Commission, 71 AD2d 177.)

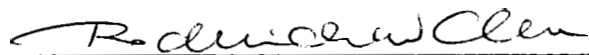
D. That pursuant to section 1110 of the Tax Law, the use tax is due on \$50,922.91 (\$58,204.68 - \$7,281.77) and not \$78,152.96 as determined by the Audit Division. (See Finding of Fact "5".)

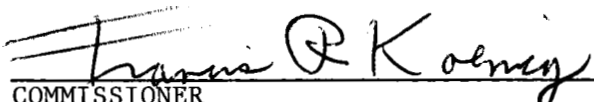
E. That the petition of Roger Gauthier, Sr. is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 10, 1985; and that, except as so granted, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 12 1987


PRESIDENT


COMMISSIONER


COMMISSIONER