

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
G. Ausanio & Sons, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 9/1/73-8/31/76. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of June, 1980, he served the within notice of Determination by mail upon G. Ausanio & Sons, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

G. Ausanio & Sons, Inc.
235 Downs St.
Kingston, NY 12401

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of June, 1980.

Joanne Krapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
G. Ausanio & Sons, Inc. :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 9/1/73-8/31/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of June, 1980, he served the within notice of Determination by mail upon Gennaro Ausanio the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Gennaro Ausanio
235 Downs St.
Kingston, NY 12401

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

June 18, 1980

G. Ausanio & Sons, Inc.
235 Downs St.
Kingston, NY 12401

Gentlemen:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gennaro Ausanio
235 Downs St.
Kingston, NY 12401
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
G. AUSANIO & SONS, INC.	:	DETERMINATION
	:	
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, 1973 through	:	
August 31, 1976.	:	

Applicant, G. Ausanio & Sons, Inc., 235 Downs Street, Kingston, New York 12401, filed an application of 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, 1973 through August 31, 1976 (File No. 17673).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on February 9, 1979, at 2:45 P.M. Applicant appeared by Gennaro Ausanio, President. The Audit Division appeared by Peter Crotty, Esq. (Barry Bressler, Esq., of counsel).

ISSUES

I. Whether applicant's contract with the Kingston City School District was for the rental of school buses or was for providing transportation services.

II. Whether an agreement between the applicant and City of Kingston constituted a lease of a bus or was it to provide a transportation service.

FINDINGS OF FACT

1. On December 30, 1976, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the applicant for the period September 1, 1973 through August 31, 1976. The notice was issued for \$3,780.35, plus penalty and interest of

\$1,660.18, for a total of \$5,440.53. The Audit Division's determination was based on the position that applicant was performing transportation services, and as such, was liable for sales tax on purchases of equipment, repairs, and parts used in the performance of said services.

2. During the period at issue, applicant successfully bid seven transportation contracts, annually, with the Kingston City School District. Each contract was for a specific route within the school district. Applicant ceased business operations in October, 1976, when applicant was unable to update equipment to the school district specifications.

3. The aforesaid contracts were drawn on a State Education Department form entitled "Transportation Contract." Said contract stated as follows:

"This agreement made this...by and between City School District City of Kingston, party of the first part, and G. Ausanio & Sons Inc. party of the second part.

That whereas party of the first part is duly empowered to enter into a contract for the purpose of providing transportation for children of said district for the period....

That said party of the first part hereby agrees to pay to the said party of the second part the sum of...for conveying approximately ...pupils, residing along the route hereinafter designated...in a suitable conveyance....

That Transportation will be provided as set forth herein:"

Said contract goes on to provide for the particular route and mileage, the specific vehicle that will be used on such route, and insurance requirements.

4. The school district transportation specifications, which are part of the contracts with successful bidders, contains provisions relating to the operation of the buses. These provisions included the extent of insurance coverage, the school district was to be named as co-insured, passenger capacity, color and maintenance requirements, designated pick-up and discharge points, established route, year and make of vehicle, and approval of drivers.

5. Applicant contended that the transportation specifications described above, gives the school district complete and entire control over its buses.

6. Applicant employs the bus drivers, subject to approval by the school district. It is also responsible for the registration fees, license fees, insurance, and maintenance of the school buses.

7. On September 6, 1972, applicant executed an agreement with the City of Kingston in which the parties agreed to the leasing of equipment and operator for the operation of Municipal Bus System along certain designated streets and routes for a period of five years at a total compensation of \$365.00 per week. On August 28, 1974, said contract was amended to increase the weekly compensation to \$415.00.

Applicant operated one bus exclusively in the performance of said contract.

8. During December, 1973, applicant purchased a 1974 Ford bus for \$10,864.00 to replace the bus under contract to the City of Kingston. Applicant did not pay a sales tax on said purchase and the tax was included as part of the Audit Division's audit findings.

9. Applicant owned seven school buses and one city transit bus. Applicant also owned two carry-alls or mini buses and two automobiles which were used as back-up vehicles for the school district, in case of a breakdown.

CONCLUSIONS OF LAW

A. That applicant's contract with the Kingston City School District expressly sets forth that the applicant will provide "transportation services"; that the contract specification did give the school district a certain degree of control over the operation of the buses while in the school district's hire; however, it is not sufficient to constitute a "rental or lease" within the meaning and intent of section 1101(b)(5) of the Tax Law.

B. That applicant, pursuant to its contract with the Kingston City School District, was engaged in providing transportation services which are

excluded from the imposition of sales tax and therefore, all purchases of tangible personal property used in performing such services are purchases at retail, within the meaning and intent of section 1101(b)(1) of the Tax Law and are subject to the imposition of sales tax within the meaning and intent of section 1105 of the Tax Law.

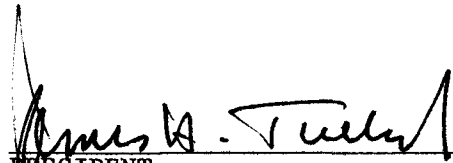
C. That applicant's agreement with the City of Kingston constituted a lease within the meaning and intent of section 1101(b)(5) of the Tax Law; that applicant's purchase of parts and repairs relating to the operation thereof, are purchases for resale within the meaning and intent of section 1101(b)(4) of the Tax Law and therefore, the additional tax determined by the Audit Division with respect to said purchases in the amount of \$951.93 is cancelled.

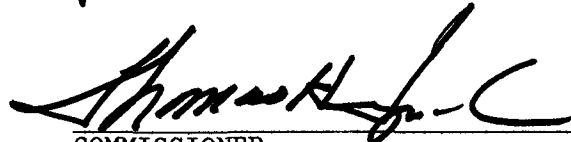
D. That the application of G. Ausanio and Sons, Inc. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 30, 1976 together with interest computed at the minimum statutory rate; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

JUN 18 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER