

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

December 14, 1984

Audell Petroleum Corp.
549 Larkfield Road
East Northport, NY 11731

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Frank J. Sullivan
Jackson, Sullivan & Beckert
312 Oxford Valley Rd.
Fairless Hills, PA 19030
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Audell Petroleum Corp. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/78 - 9/15/81. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of December, 1984, he served the within notice of Decision by certified mail upon Audell Petroleum Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Audell Petroleum Corp.
549 Larkfield Road
East Northport, NY 11731

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of December, 1984.

David Parchuck

James A. DeLong
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Audell Petroleum Corp.

:

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the
Period 12/1/78 - 9/15/81.

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State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of December, 1984, he served the within notice of Decision by certified mail upon Frank J. Sullivan, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank J. Sullivan
Jackson, Sullivan & Beckert
312 Oxford Valley Rd.
Fairless Hills, PA 19030

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of December, 1984.

David Parchuck

James A. [Signature]

Authorized to administer oaths
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
AUDELL PETROLEUM 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 December 1, 1978	:	
through September 15, 1981.	:	

Petitioner, Audell Petroleum Corp., 549 Larkfield Road, East Northport, New York 11731, 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 December 1, 1978 through September 15, 1981 (File No. 36178).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1983 at 2:45 P.M., with all briefs to be submitted by October 1, 1983. Petitioner appeared by Jackson, Sullivan & Beckert (Francis J. Sullivan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether the receipts from the sale of a customer account list in connection with the purchase of the assets of a home heating oil company were subject to tax as the sale of tangible personal property.

II. Whether the receipts from such sale were subject to tax as the sale of an information service.

FINDINGS OF FACT

1. On December 18, 1981, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Audell Petroleum Corp., in the amount of \$50,833.74, plus interest of \$2,426.31, for a total due of \$53,260.05 for the period December 1, 1978 through September 15, 1981.

2. On December 16, 1981, petitioner, by its president, John O'Loughlin, had executed a Consent to Fixing of Tax Not Previously Determined and Assessed partially consenting to the assessment to the extent of \$6,472.20. Petitioner made payment of the \$6,472.20 and timely filed a petition for a hearing with respect to the remainder of the assessment.

3. Petitioner was engaged in the business of home distribution of fuel oil and oil burner servicing for approximately 12,000 residents of Suffolk County, New York. According to testimony offered by petitioner, the home heating oil business is of a personal nature such that, to remain competitive, vendors must offer customers good service and good credit terms. Since petitioner had no contracts with customers to deliver oil for set periods of time, customers could transfer their business to any one of a number of competing companies; therefore, petitioner's good name was an important asset.

4. On September 15, 1981, Meenan Oil Co., Inc. ("Meenan") purchased all the assets, both tangible and intangible, of petitioner. The total purchase price was \$811,932.00 which was allocated as follows:

Furniture & Fixtures	\$ 5,000.00
Motor Vehicles	94,350.00
Merchandise - Inventory	95,227.00
Goodwill & Other Assets (Customer List)	617,466.00
	<u>\$811,932.00</u>

The customer list referred to was actually a set of cards containing customer names and addresses and other information such as past oil usage and types of service contracts used. These cards were never actually transferred from petitioner to Meenan; rather, the information they contained was to be entered in Meenan's computer after the transaction had been consummated. The computer transfer process took approximately one month to complete.

5. The parties to the sale agreed to treat the customer list as a trade secret to insure that Meenan had the opportunity to retain as many of petitioner's customers as possible. One of Meenan's managers testified that, typically, a purchaser of a home heating oil business will lose 20 percent of the former owner's customers and this figure is taken into consideration in determining the purchase price of the customer list. In Meenan's case, two of petitioner's employees left to join a rival oil company and were able to solicit some of petitioner's customers whose names and addresses they knew from the time spent working for petitioner. As a result, Meenan lost 27 percent of petitioner's former customers in its first year of operation, thus demonstrating the necessity of maintaining the strictest confidentiality with respect to the customer list.

6. The purchase price of the customer list was determined based on guarantees from petitioner that it sold a certain number of gallons of oil the previous year. The agreed price of the list was "\$617,335.00 plus the product of 18¢ times the number of degree day adjusted gallons sold by [Meenan] in excess of 3,429,750 gallons during the one year period from the date of closing...", but not on any gallonage sold in excess of 4,035,000 gallons. The final value of the list was thus based on the expectation of future profits as measured by petitioner's past performance.

7. On audit, the Audit Division determined that the sale of the customer list was a sale of tangible personal property and an information service and, as such, taxable under sections 1105(a) and 1105(c)(1) of the Tax Law. Of the \$50,833.74 assessed, petitioner consented to the tax due of \$5,713.00 and submitted a check in payment of that amount plus interest. The remaining \$45,120.74 represented the bulk sales tax due on the sale of the customer list and furniture and fixtures.¹

8. Petitioner argues that the sale of the customer list was not a sale of tangible personal property because the subject of the transfer was not a physical piece of paper or card, but rather a transfer of the knowledge and information contained on the cards, which information was intangible and confidential. Moreover, petitioner maintains that the sale of the list was not the sale of an information service because Meenan was, in fact, purchasing access to the customers of petitioner, not information. Petitioner argues that even if the sale was to be deemed a sale of an information service, the list was of such a personal and confidential nature as to fall within the exclusion for such information provided for in section 1105(c)(1) of the Tax Law.

9. The Audit Division argues that the sale of the list was a sale of tangible personal property because Meenan bought the set of cards containing customer information and, since the cards could be used in any manner Meenan wanted, they were tangible personal property. Alternatively, the Audit Division maintains that the sale of the list was the sale of information within the meaning and intent of section 1105(c)(1) of the Tax Law.

¹ The tax due on the sale of the furniture and fixtures was \$362.50 which has not been paid and was not contested by petitioner.

CONCLUSIONS OF LAW

A. That section 1105(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(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 section 1105 [subd. (c)] of the Tax Law (citation omitted)" (Long Island Reliable Corp. v. Tax Commission, 72 A.D.2d 826). Therefore, the Audit Division properly determined that the sale of the customer list to Meenan was subject to tax.

C. That the petition of Audell Petroleum Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 18, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 14 1984

Roderick W. Clun
PRESIDENT

Francis R. Koony
COMMISSIONER

[Signature]
COMMISSIONER

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

December 14, 1984

Audell Petroleum Corp.
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cc: Petitioner's Representative
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STATE OF NEW YORK

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In the Matter of the Petition	:	
of	:	
AUDELL PETROLEUM CORP.	:	DECISION
for Revision of a Determination or for Refund	:	
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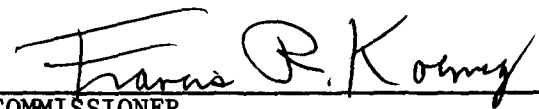
C. That the petition of Audell Petroleum Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 18, 1981 is sustained.

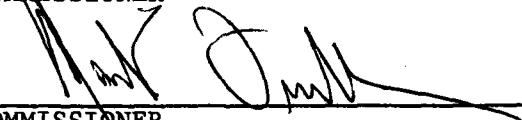
DATED: Albany, New York

STATE TAX COMMISSION

DEC 14 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 308

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Cludell Petroleum Corp</i>	
Street and No. <i>349 Grandview Rd.</i>	
P.O., State and ZIP Code <i>East Haverhill 01831</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 316 309

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Frank J. Sullivan</i>	
Street and No. <i>1000 Sullivan & Baker</i>	
P.O., State and ZIP Code <i>3rd Oxford Valley Rd</i>	
Postage <i>Franklin Hills PA 17030</i>	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>1/3/84</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition <i>Mar. - Dec. - 12/14/84</i>
Name <i>Andell Petroleum Corp.</i>	
Address <i>549 Larkfield Road</i> <i>East Northport, N.Y. 11731</i>	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	<i>Moved Not Forwardable</i>

Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ANY, N. Y. 12227

9978

Encls

NOTICE

NOTICE

NOTICE

NOTICE

CERTIFIED

P 470 316 308

MAIL

Audell Petroleum Corp.

549 Larkfield Road

East Northport, NY 11731

