

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ORTEP FUEL OIL CORP., formerly  
known as EFFRON FUEL OIL CORP.  
and ERIK SEVIN OFFICER OF EFFRON FUEL OIL 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 Ending 8/31/79.

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 10th day of May, 1985, he served the within notice of Decision by certified mail upon Ortep Fuel Oil Corp. formerly known as, Effron Fuel Oil Corp. and Erik Seven Officer of Effron Fuel Oil Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ortep Fuel Oil Corp. formerly known as  
Effron Fuel Oil Corp. and Erik Seven  
Officer of Effron Fuel Oil Corp.  
c/o Petroleum Heat & Power Co., Inc.  
Davenport St.  
Stamford, CT 06904

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  
10th day of May, 1985.

David Parchuck

William A. DeGard  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

May 10, 1985

Ortep Fuel Oil Corp. formerly known as  
Effron Fuel Oil Corp. and Irik Seven  
Officer of Effron Fuel Oil Corp.  
c/o Petroleum Heat & Power Co., Inc.  
Davenport St.  
Stamford, CT 06904

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  
Barry W. Silverstein  
Otterbourg, Steindler, Houston & Rosen  
230 Park Ave.  
New York, NY 10169  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petitions                  | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| ORTEP FUEL OIL CORP., formerly                  | : |          |
| known as EFFRON FUEL OIL CORP.                  | : | DECISION |
| and IRIK SEVIN OFFICER OF EFFRON FUEL OIL CORP. | : |          |
|   | : |          |
| for Revision of Determinations or for Refunds   | : |          |
| of Sales and Use Taxes under Articles 28 and    | : |          |
| 29 of the Tax Law for the period ended          | : |          |
| August 31, 1979.                                | : |          |

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Petitioners, Ortep Fuel Oil Corp., formerly Effron Fuel Oil Corp. and Irik Sevin as an Officer of Effron Fuel Oil Corp., c/o Petroleum Heat & Power Co., Inc., Davenport Street, Stamford, Connecticut 06904, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period ended August 31, 1979 (File Nos. 36974 and 37042).

On May 4, 1984, petitioners advised the State Tax Commission, in writing, that petitioners desired to waive a formal hearing and to submit the case to the State Tax Commission, with all briefs and documents to be submitted by August 15, 1984. After due consideration of the entire file, the State Tax Commission renders the following decision.

ISSUE

Whether the sale of a customer list is subject to New York State sales and use tax.

FINDINGS OF FACT

1. Effron Fuel Oil Corp. ("Effron") is a wholly owned subsidiary of Petroleum Heat & Power Co., Inc. ("Petro"). Effron is engaged in the business

of distributing fuel oil to residential and commercial users, primarily in Westchester, Dutchess, and Ulster counties.

2. On January 7, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Effron Fuel Oil Corp. covering the period ended August 31, 1979. The Notice was issued as a result of an audit and asserted additional sales and use tax due of \$76,702.21 plus interest of \$16,696.54 for a total due of \$93,398.75.

3. A similar Notice was issued at the same time against Irik Sevin, as Officer of Effron Fuel Oil Corp.

4. A purchase agreement was entered into on June 18, 1979 by and among Petro, Effron and Kingston Oil Supply Corp. ("Kosco"). Pursuant to this agreement Kosco agreed to purchase certain assets of Effron in connection with the fuel oil business. Effron changed its name from Effron Fuel Oil Corp. to Ortep Fuel Oil Corp. so that Kosco could form a subsidiary and conduct business under a name that Effron's customers were accustomed to.<sup>1</sup>

5. The purchase agreement entered into states:

"Effron agrees to sell, assign, transfer and deliver to Kosco and Kosco agrees to purchase from Effron at the Closing, the following assets...

- a. 15 straight tank trucks, two tractor trailers and 18 service vans as described on Exhibit A (the 'Equipment').
- b. the fuel oil inventory of Effron as of the Closing ('Inventory');
- c. Effron's customer list ('Customer List').

2.1 The purchase price ('Purchase Price') for the Acquired Assets shall be the sum of:

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<sup>1</sup> Kosco's newly formed subsidiary was "Effron Fuel Oil Co., Inc.". However, all references to Effron in this decision include only the former Effron Fuel Oil Corp. and its current name of Ortep Fuel Oil Corp., not Kosco's newly formed subsidiary, Effron Fuel Oil Co., Inc. In some correspondence Effron had been misidentified as Effron Fuel Oil Co., Inc.

- (a) for the Equipment the Equipment Purchase Price.
- (b) for the Inventory the Inventory Purchase Price, plus
- (c) for the Customer List - \$1,000,103".

6. The terms of the purchase agreement itself provide: "The parties agree that the foregoing allocation of the Purchase Price has been arrived at in arms-length negotiation and each of them agrees not to take any position, either in the Federal income tax returns or otherwise, inconsistent therewith."

7. A Bulk Sale Questionnaire, executed July 29, 1980, indicating that the business had been sold by Effron on June 30, 1979 for \$1,553,913.00 contained the following:

Selling Price of Assets Sold

|                              |                       |
|------------------------------|-----------------------|
| Furniture, fixtures, etc.    | \$ 4,700.00           |
| Motor Vehicles               | 275,700.00            |
| Merchandise Inventory        | 273,410.00            |
| Real Estate and Other Assets | 1,000,103.00          |
| Total Selling Price          | <u>\$1,553,913.00</u> |

8. On February 8, 1980 petitioners made a payment of \$235.00 which represented bulk sales tax due on the sale of furniture, fixtures and garage equipment valued at \$4,700.00.

9. A field audit completed on November 2, 1981 resulted in the following determination of additional bulk sales tax liability:

| <u>Category</u>        | <u>Amount Subject to Additional Tax</u> | <u>Additional Tax</u> |
|------------------------|---|-----------------------|
| Furniture and Fixtures | \$ 1,343.00                             | \$ 94.00              |
| Motor Vehicles         | 94,300.00                               | 6,601.00              |
| Customer List          | 1,000,103.00                            | 70,007.21             |
| Totals                 | <u>\$ 1,095,746.00</u>                  | <u>\$76,702.21</u>    |

10. The auditor determined that the amount of \$1,000,103.00 listed as real estate and other assets was actually for the sale of the customer list. The Audit Division contends that the sale of this customer list constitutes a

taxable sale of information with regard to Effron's individual customers and is within the purview of section 1105(c)(1) of the Tax Law.

11. Upon submission, petitioners maintain that the customer list purchased by Kosco was an intangible asset in the nature of goodwill and thus outside the purview of the sales and use tax. It is the petitioners position that the sale of the customer list is not subject to tax under section 1105(c)(1) of the Tax Law based upon the following criteria:

(1) the transaction was personal or individual in nature and involved material which is not or may not be substantially incorporated in reports furnished to other persons;

(2) the tax does not apply to reports that may not be furnished to other persons by the person who compiled the information;

(3) the furnishing of information is taxable only when the seller is in the business of collecting and disseminating information;

(4) the list at issue had little or no value<sup>2</sup> and what was paid for was not a list but a business opportunity, the chance to gain the patronage of Effron's customers based upon the existing relationship between Effron and its customers.

#### CONCLUSION 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

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2 Petitioners claim that Kosco could at anytime purchase lists of owners of real estate from commercial services such as Standard Abstract Co. for less than \$1,000.00, a price which amounts to less than pennies per name.

which is personal or individual in nature and which is not or may not be substantially incorporated into 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.'" Matter of Dairylea Cooperative, Inc. - Metro Branch, State Tax Commission, December 14, 1984 citing Long Island Reliable Corp. v. Tax Commission, 72 A.D.2d 826. In Dairylea, despite the petitioner's contentions that a customer list is an intangible asset akin to goodwill and thus not subject to sales or use tax and that the sale of a customer list is not taxable under 1105(c)(1) when sold by a vendor not in the business of furnishing information services, a customer list was deemed taxable within the purview of section 1105(c)(1) of the Tax Law.

C. That the purchase agreement clearly allocated the Purchase Price into three specific subcategories composed of the Equipment Purchase Price, the Inventory Purchase Price and the Customer List (\$1,000,103). Petitioners have failed to maintain their burden of proof to show that the Customer List did not enter into the computation of the Purchase Price and that the Purchase Price was dependent solely on the gallons of fuel oil that Effron sold to its former customers as contended in Finding of Fact "11".

D. That in accordance with Conclusion of Law "B", the \$1,000,103.00 received by Effron when it sold its customer list to Kosco was taxable under section 1105(c)(1) of the Tax Law.



E. That the petitions of Ortep Oil Corp., formerly Effron Oil Corp., and Irik Sevin are hereby denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 10 1985

*Roderica W. Clark*  
PRESIDENT

\_\_\_\_\_  
COMMISSIONER

*[Signature]*  
COMMISSIONER

4/16/85  
I abstain!!  
Francis R. Koenig

P 693 169 817

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

|   |                        |
|---|------------------------|
| Sent to <i>Outip Fuel Oil Corp.</i>                           |                        |
| Street and No. <i>Exton Fuel Corp.</i>                        |                        |
| P.O., State and ZIP Code <i>Swind</i>                         |                        |
| Postage   | \$                     |
| Certified Fee   | <i>Stampd Ct 06904</i> |
| 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  |                        |

P 693 169 818

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

|   |                           |
|---|---------------------------|
| Sent to <i>Bary W. Surinintee</i>                             |                           |
| Street and No. <i>William Swaller</i>                         |                           |
| P.O., State and ZIP Code <i>230 Park Ave.</i>                 |                           |
| Postage   | <i>New York, NY 10017</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  |                           |