

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
W. W. Henderson & Son, Inc.

:

:

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 11/1/79 - 8/31/82

:

:

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon W. W. Henderson & Son, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

W. W. Henderson & Son, Inc.
5 W. Bridge St.
Catskill, NY 12414

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
23rd day of May, 1985.

David Parchuck

James A. O'Connell
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
W. W. Henderson & Son, Inc. :

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 11/1/79 - 8/31/82.

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Fred B. Wander, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred B. Wander
O'Connell & Aronowitz
100 State St.
Albany, NY 12207

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
23rd day of May, 1985.

David Parchuck

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

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

May 23, 1985

W. W. Henderson & Son, Inc.
5 W. Bridge St.
Catskill, NY 12414

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
Fred B. Wander
O'Connell & Aronowitz
100 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	DECISION
	:	
W. W. HENDERSON & SON, INC.	:	
	:	
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,	:	
1979 through August 31, 1982.	:	

Petitioner, W. W. Henderson & Son, Inc., 5 W. Bridge Street, Catskill, New York 12414, 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 September 1, 1979 through August 31, 1982 (File No. 42834).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on June 19, 1984 at 9:15 A.M. and was continued to conclusion before the same Hearing Officer, at the same location on July 2, 1984 at 11:00 A.M., with all briefs to be submitted by September 4, 1984. Petitioner appeared by O'Connell and Aronowitz, P.C. (Fred B. Wander, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether receipts from the sale of a customer list in connection with the sale of the assets of a fuel oil distribution business are subject to tax.

FINDINGS OF FACT

1. On December 20, 1982, the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, W. W. Henderson & Son, Inc., under Articles 28 and

29 of the Tax Law, for taxes due of \$9,100.00, plus interest of \$2,188.91, for a total due of \$11,288.91 for the period September 1, 1979 through August 31, 1982.

2. It is the Audit Division's position that a written customer list is an item of tangible personal property, the sale of which is subject to tax under section 1105(a) of the Tax Law; that the sale of a written customer list constitutes the service of furnishing information by printed matter and is therefore subject to tax under section 1105(c)(1) of the Tax Law; and that a customer list does not contain information which is personal or individual in nature.

3. On March 11, 1983 the petitioner, W. W. Henderson & Son, Inc. ("Henderson"), timely filed a petition for a hearing to review the Notice of Determination. The petitioner claims: (1) the customer list does not constitute tangible personal property; (2) the customer list contains information which is personal and/or confidential in nature which may not be substantially incorporated in reports furnished to other persons; (3) petitioner was not involved on a regular basis in providing services which included the furnishing of information concerning its customers to other persons; and (4) the sales tax provisions regarding petitioner's informational services do not include the value of the customer list but rather the value of the information service itself.

4. During the period at issue, Henderson, a New York corporation, was involved in the monument business as well as the retail distribution of fuel oil or home heating oil. Amos Post, Inc. ("Amos Post"), a New York corporation, was a retail and wholesale distributor of fuel oil. Pursuant to a contractual agreement entered on July 7, 1980 and a bill of sale delivered on September 1, 1980,

Henderson sold to Amos Post the assets of its fuel oil distribution business.

The total purchase price was \$150,000.00 which was allocated as follows:

Goodwill	\$ 5,000.00
Covenant Not to Compete	15,000.00
Customer List	<u>130,000.00</u>
	\$150,000.00

5. Both Henderson and Amos Post considered the customer list to be confidential information. Paragraph 8(h) of the agreement provides in pertinent part, that:

"8(h) That the seller has not and will not tender the 'customer list' or any contents thereof, or any of the names of the fuel oil accounts owned by the seller herein conveyed, or any contents or names on said 'customer list' to any other person, corporation or entity other than Amos Post, Inc."

6. The names and addresses of the approximate twelve hundred (1,200) customers of Henderson were maintained on ledger cards. The cards also contained confidential information relative to the delivery of fuel oil as well as credit information. The cards were transferred to Amos Post to be copied or reproduced and later returned to Henderson. Pursuant to the contract, this information was never divulged by Henderson to anyone except Amos Post.

7. The Audit Division determined that Henderson had failed to collect sales tax on receipts from the sale of the customer list to Amos Post and accordingly assessed Henderson for the taxes due.

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; Dairymens League Co-Op Association, Inc. et al., State Tax Commission, December 14, 1984). Therefore, the Audit Division properly determined that W. W. Henderson & Son, Inc. was liable for tax on the sale of the customer list.

C. That the petition of W. W. Henderson & Son, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1982 is sustained.

DATED: Albany, New York

MAY 23 1985

STATE TAX COMMISSISON

Richard W. Clun
PRESIDENT

COMMISSIONER

Mark J. Smith
COMMISSIONER

4/16/85
Abstain!!
Francis R. Koenig

P 693 169 864

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>W.W. Anderson & Son Inc.</i>	
Street and No. <i>5 W. Bridge St</i>	
P.O., State and ZIP Code <i>Carthage NY 12414</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	

P 693 169 865

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>Arvid Wender</i>	
Street and No. <i>O'Connell & Community</i>	
P.O., State and ZIP Code <i>100 State St</i>	
Postage	<i>Carthage NY 12414</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	