

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Whaleco Fuel Corp., 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 6/1/77-9/30/79. :

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 22nd day of January, 1985, he served the within notice of Decision by certified mail upon Whaleco Fuel Corp., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Whaleco Fuel Corp., Inc.
One Coffey St.
Brooklyn, NY 11231

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
22nd day of January, 1985.

David Parchuck

James P. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 22, 1985

Whaleco Fuel Corp., Inc.
One Coffey St.
Brooklyn, NY 11231

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
WHALECO FUEL CORP., INC.	:	DECISION
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1977	:	
through September 30, 1979.	:	

Petitioner, Whaleco Fuel Corp., Inc., One Coffey Street, Brooklyn, New York 11231, 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 June 1, 1977 through September 30, 1979 (File Nos. 38385 and 38386).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 15, 1983 at 2:45 P.M., with all evidence to be submitted by January 6, 1984. Petitioner appeared by Charles Edwards Ross, Treasurer. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the value placed by the Audit Division on customer lists purchased by Whaleco Fuel Corp., Inc. from Petro/Crystal Corp. and Petroleum Heat and Power Co., Inc. was proper.

II. Whether the tax determined due on certain fixed assets purchased by Whaleco Fuel Corp., Inc. from Petro/Crystal Corp. and Petroleum Heat and Power Co., Inc. was a duplication of a use tax paid by petitioner on an audit conducted by the Brooklyn District Office.

III. Whether the audit conducted by the Brooklyn District Office on petitioner's books and records and its findings negates any tax liability determined due from petitioner as a result of the purchase of business assets acquired from Petro/Crystal Corp. and Petroleum Heat and Power Co., Inc.

IV. Whether reasonable cause existed for the failure of Whaleco Fuel Corp., Inc. to timely pay the proper amount of tax due.

FINDINGS OF FACT

1. On March 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Whaleco Fuel Corp., Inc. ("Whaleco") covering the period June 1, 1977 through September 30, 1979. This notice was issued as a result of an audit conducted by the White Plains District Office on the books and records of Petro/Crystal Corp. ("Crystal") and assessed a tax due of \$6,767.13, plus penalty and interest of \$3,817.42, for a total of \$10,584.55 which allegedly represented petitioner's liability on the purchase of a customer list and fixed assets from Crystal.

2. On March 20, 1982, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Whaleco covering the period June 1, 1977 through September 30, 1979. This Notice was issued as a result of an audit conducted by the White Plains District Office on the books and records of Petroleum Heat and Power Co., Inc. ("Petroleum") and assessed a tax due of \$10,202.94, plus penalty and interest of \$5,755.59, for a total of \$15,958.53 which allegedly represented petitioner's liability on the purchase of a customer list and fixed assets from Petroleum.

3. On August 8, 1979, petitioner, Whaleco, entered into an agreement with Crystal to purchase certain assets and leaseholds used by Crystal in connection with Crystal's fuel oil business in Putnam and Westchester Counties. Said closing took place on September 19, 1979.

The assets purchased from Crystal included but were not limited to a customer list, supply contract and restrictive covenant. The purchase price for same was 2.333¢ per gallon of fuel received from Crystal under the existing supply contract and sold by Whaleco to Crystal customers during the three-year period commencing September 15, 1979 through September 15, 1982.¹ The purchase price and payments were allocated and applied in the following manner:

Customer List	70%
Supply Contract	20%
Covenant Not to Compete	10%

4. A similar agreement was entered into between Whaleco and Petroleum on August 8, 1979 to purchase certain assets and leaseholds used by Petroleum in connection with Petroleum's fuel oil business in Westchester County. The closing took place on September 19, 1979.

The assets purchased from Petroleum included but were not limited to a customer list, supply contract and restrictive covenant. The purchase price was computed the same as (for Crystal) in Finding of Fact "3" above, and allocated and applied in the same manner for the same period.

5. On audit of the books and records of both Crystal and Petroleum, the Audit Division's auditor deemed the sales of the customer lists as sales subject to sales and use tax. The auditor found that 12,003,922 gallons were supplied to Whaleco by both Crystal and Petroleum for the first 22 months of the contract period. The auditor estimated the number of gallons to be sold for the remaining 14 months in the contract period based on the average of the first 22 months and determined that a total of 19,642,781 gallons would be sold by the end of the three-year contract term. The auditor then made the following

¹ It is apparent from the closing date of the sale that these dates were later amended.

computations pursuant to the contract to determine the selling price of the customer lists:

Total Gallons (36 mos.)	19,642,781
Rate per Contract	2.333¢
Total Cost	<u>\$458,266.09</u>
% Attributable to Customer Lists	70%
Value of Customer Lists	<u>\$320,786.26</u>

	<u>Crystal</u>	<u>Petroleum</u>
Value of Customer List	\$127,512.54	\$193,273.72
Tax Rate	5%	5%
Sales Tax Due	<u>\$ 6,375.63</u>	<u>\$ 9,663.69</u>

In addition to the above, the auditor found fixed assets were sold to Whaleco and held them subject to sales tax as follows:

	<u>Crystal</u>	<u>Petroleum</u>
Office Furniture	\$ 850.00	\$ 1,650.00
Garage Equipment	4,380.00	6,885.00
Radios	2,600.00	2,250.00
Total	<u>\$7,830.00</u>	<u>\$10,785.00</u>
Tax Rate	5%	5%
Tax Due	<u>\$ 391.50</u>	<u>\$ 539.25</u>

The Audit Division thereby determined total sales and use tax due on the sale of business assets from Crystal to Whaleco of \$6,767.13 and from Petroleum to Whaleco of \$10,202.94.

6. Petitioner argued that the value placed on the customer lists purchased from Crystal and Petroleum was too high in that fewer gallons of fuel were purchased than those estimated by the Audit Division. This was due to milder weather and less need for heating fuel by petitioner's customers.

Petitioner submitted evidence to show that the actual gallons supplied from Crystal and Petroleum were 4,738,751 and 11,551,748.1 gallons, respectively. The Audit Division conceded that petitioner's tax liability resulting from the purchase of the customer list from Crystal should accordingly be reduced to \$3,869.42 and \$9,332.58 on the purchase from Petroleum.

7. The Brooklyn District Office audited Whaleco for the period March 1, 1978 through November 30, 1980. As a result of that audit, a use tax was paid by Whaleco on the purchases of office furniture from Crystal valued at \$850.00 and from Petroleum valued at \$1,650.00. The Audit Division issued the notice covering this tax liability on June 18, 1982.

8. Petitioner argued that since it had undergone an audit conducted by the Brooklyn District Office encompassing the period during which the purchases of business assets occurred, these transactions had been audited twice: once by the Brooklyn Office on the audit of their (the purchaser's) records and again on the audits conducted by the White Plains Office on the sellers' books and records.

Petitioner contended that since the Brooklyn Office did not assess the items at issue, that office was satisfied that there was no tax due on said items. Petitioner argued that the claims based on the White Plains audit should be dismissed.

9. Petitioner contended that interest and penalties should be waived. It offered no evidence of reasonable cause for not remitting sales tax on its purchases of assets. Petitioner was audited previously and made aware of such obligations. Petitioner did not notify the Tax Commission of its purchase of business assets as required by Tax Law §1141(c).

CONCLUSIONS OF LAW

A. That a customer list is a business asset the sale of which constitutes the sale of information and is, therefore, taxable under section 1105(c)(1) of

the Tax Law (Long Island Reliable Corp. v. Tax Commission, 72 A.D.2d 826; Matter of Dairymens League Co-op Association, Inc. et al, State Tax Commission, December 14, 1984).

B. That the actual purchase price of the customer lists which Whaleco Fuel Corp., Inc. purchased from Petro/Crystal Corp. and Petroleum Heat and Power Co., Inc. was less than that originally determined by the Audit Division. That the tax due is reduced to \$13,202.00 as conceded by the Audit Division [Finding of Fact "6"].

C. That the tax assessed in the March 20, 1982 notice on the purchase of fixed assets was a partial duplication of a tax assessed and paid by Whaleco on office furniture pursuant to Finding of Fact "7". Accordingly, the tax assessed on the office furniture in the amount of \$200.00 is hereby cancelled.

D. That the fact that the Brooklyn District Office audited petitioner and did not assess tax cannot be held as an acquiescence on the part of the Audit Division that no sales tax is due.

E. That the petitioner, Whaleco Fuel Corp., Inc. has failed to demonstrate a cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay in paying the taxes due and which clearly indicates an absence of gross negligence or willful intent to disobey the tax statutes, so as to warrant the cancellation of penalty and interest in excess of the minimum statutory rate. 20 NYCRR 536.1(b).


F. That the petitions of Whaleco Fuel Corp., Inc. are granted to the extent indicated in Conclusions of Law "B" and "C" above; that the Audit

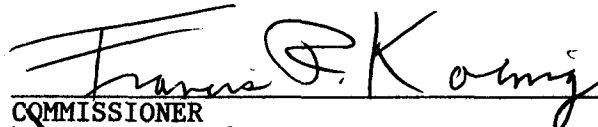
Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued March 20, 1982; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 22 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 464

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Whaleco Fuel Corp.	
Street and No.	
Old Coffey St	
P.O. State and ZIP Code	
Brooklyn NY 11231	
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