

TAXABILITY OF A CUSTOMER LIST TRANSFERRED
IN CONJUNCTION WITH THE SALE OF A BUSINESS

As a result of the recent Court of Appeals decision in the Matter of Audell Petroleum Corporation v. New York State Tax Commission, 69 NY2d 818 (TSB-H-85(47.2)S), the taxable status of customer lists transferred in conjunction with the sale of a business has changed.

In 1979, the Appellate Division of the Supreme Court, in the Matter of Long Island Reliable v. New York State Tax Commission, 72 AD2d 826 lv denied 49 NY2d 707 (TSB-H-78(14.1)S), held that the sale of a customer list constituted a bulk sale of a business asset under Section 1141(c) of the Tax Law and that the sales price of the customer list was a basis for determining the liability of the purchaser for unpaid sales taxes of the seller. The court further ruled that the sale of a customer list is the sale of an information service and is, therefore, taxable under Section 1105(c)(1) of the Tax Law.

As a result of the Long Island Reliable decision, the Tax Department's policy was to hold customer lists transferred in conjunction with the sale of a business subject to sales tax. This position was also taken by the Appellate Division in the Matter of Skaggs-Walsh v. State Tax Commission, 120 AD2d 786, (TSB-H-85(105.1)S).

In 1987, the New York State Court of Appeals in the Matter of Audell Petroleum Corporation, overturned the Long Island Reliable decision and reversed the Appellate Division decision in Skaggs-Walsh. The Court of Appeals held that since the seller in each bulk sale was not engaged in the business of furnishing information and did not prepare the customer list at the purchaser's request, the transfer of the customer list as part of the sale of the business did not represent the sale of taxable information services under Section 1105(c)(t) of the Tax Law.

Thus, when there is a transfer of a customer list as part of the bulk sale of business assets, such transfer will not be treated as a sale of a taxable information service provided that customer lists were not previously sold or made available for sale in the ordinary course of business. If, however, customer lists are sold or made available for sale in the ordinary course of business, any transfer of a list, even in conjunction with the sale of a business, will be considered the sale of a taxable information service and will be taxed accordingly.

In addition, the sales price of a customer list, although not itself subject to tax as outlined above, will continue to be a basis for determining the liability of the purchaser for sales tax not remitted by the seller in the prior conduct of the business.

Example 1: Company A is engaged in the business of selling and servicing oil burning furnaces. Company B, whose business is the sale of fuel oil, purchases the business assets of Company A which consisted of its customer list, trucks and office equipment. The value assigned to the customer list was \$15,000 of the \$25,000 sales price. Under these circumstances, only \$10,000 of the sales price is subject to sales tax. However, Company B could be held liable for up to \$25,000 for any unpaid sales or use taxes due from Company A.

Example 2: Company A maintains two trash collection routes. It agrees to sell one of its customer routes to Company B for \$20,000. Since Company A is not in the business of selling customer route lists and the sale was part of a bulk sale of business assets, this transaction would not result in a taxable sale of an information service. However, Company B could be held liable for up to \$20,000 for any unpaid sales or use taxes due from Company A.

Example 3: Company A, a mail order company, regularly sells its customer list to other mail order businesses. It is selling its business to Company B, a mail order company, included in the sale is the sale of Company A's customer list. Even though a sale of a business is taking place, including the sale of a customer list, the fact that Company A regularly sells its customer list in the ordinary course of its business makes the sale of the customer list in this bulk sale transaction a sale of an information service subject to tax under Section 1105(c)(I) of the Tax Law.