STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GERALD A. LOPER	:	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 Periods March 1, 1981 through February 28, 1982, December 1, 1982 through February 28, 1983, and September 1, 1983 through November 30, 1983.	:	

Petitioner, Gerald A. Loper, P.O. Box 64, Chemung, New York 14825, filed an exception to the determination of the Administrative Law Judge issued on January 4, 1990 with respect to his 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 periods March 1, 1981 through February 28, 1982, December 1, 1982 through February 28, 1983, and September 1, 1983 through November 30, 1983 (File No. 801627). Petitioner appeared by pro se. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly assessed sales tax on petitioner's in-state purchases of three trucks.

II. Whether the Division properly assessed compensating use tax on petitioner's out-of-state purchases of certain trucks and trailers.

III. Whether the Division properly assessed sales tax on petitioner's in-state purchases of tires installed on his trucks.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below except that we modify finding of fact "3" as indicated below.

On September 12, 1984, following an audit, the Division of Taxation issued to petitioner, Gerald A. Loper, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed a tax due of$8,649.63, plus interest, for the periods March 1, 1981 through February 28, 1982, December 1, 1982 through February 28, 1983, and September 1, 1983 through November 30, 1983.

Petitioner is in the trucking business, and during the period at issue, he owned several trucks and trailers. All of petitioner's vehicles were under contract to Elton M. Harvey Trucking, Inc. ("Harvey") of New Jersey. Under the terms of the contracts, each designated "Lease/Agreement", petitioner was obligated to haul commodities offered by Harvey. Harvey was authorized to transport commodities pursuant to authority granted by the Interstate Commerce Commission. Petitioner held no such authority. Neither Harvey nor petitioner held any intrastate trucking authorization. Harvey paid petitioner by a percentage of the net revenue earned on each haul.

We modify finding of fact "3" to read as follows:

> Pursuant to the terms of the contracts Harvey was furnished "the possession, control, and use of the equipment that (Harvey) may require to fulfill requirements placed on it by all applicable regulations." Petitioner retained ownership of his vehicles and was responsible for their maintenance. Petitioner was also responsible for hiring and paying drivers for his trucks, paying all operating expenses, and selecting all routes. Both petitioner and Harvey were required under the agreements to insure the vehicles, but petitioner was required to indemnify Harvey for any loss or damage to Harvey arising from petitioner's trucking operation.[1]

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[1] The original finding of fact "3" of the Administrative Law Judge's determination read as follows:

> "Pursuant to the terms of the contracts, petitioner retained ownership of his

During the periods in question, petitioner operated a terminal near Chemung, New York, where his vehicles were garaged between trips. Dispatching of the vehicles was handled from the Chemung terminal. In addition, the vehicles were sometimes serviced or repaired at the Chemung terminal.

On audit, the Division reviewed petitioner's Federal income tax returns, with particular attention paid to petitioner's depreciation schedules. Using the information contained on the depreciation schedules, the Division determined that petitioner had improperly failed to pay sales or use tax on the following vehicles:

Vehicle	Date of Acquisition	Cost
1975 International	3/81	$ 14,000.00
1974 International	1/83	8,500.00
1975 International	8/81	16,000.00
1978 Peterbilt	9/81	27,000.00
1974 Freuhauf	8/81	4,500.00
1969 Freuhauf	12/81	4,700.00
1972 Hercules	1/83	6,500.00
1980 Peterbilt	1/83	29,500.00
1978 Freuhauf	1/83	7,800.00
	Total	$118,500.00

At hearing, petitioner established that he paid sales tax on the 1974 Freuhauf at the time of purchase. The Division thus withdrew its assessment with respect to said vehicle.

On audit, the Division also reviewed petitioner's purchase invoices and determined that petitioner had improperly failed to pay sales tax on purchases of tires in New York totaling $5,066.16. Tax assessed in respect of such purchases was $354.64.

Petitioner filed no sales tax returns with respect to the periods at issue.

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vehicles and was responsible for their maintenance. Petitioner was also responsible to hire and pay drivers for his trucks, to pay all operating expenses, and to select all routes. Both petitioner and Harvey were required under the agreements to insure the vehicles, but petitioner was required to indemnify Harvey for any loss or damage to Harvey arising from petitioner's trucking operation."

This fact was changed to more fully reflect the record.

Of the vehicles remaining at issue herein, petitioner purchased the 1974 International in Binghamton, New York; the 1978 Peterbilt in Buffalo, New York; and the 1975 International in Rochester, New York. Petitioner purchased the remaining vehicles out of state.

Petitioner was registered as owner of all the vehicles. The 1978 Freuhauf was registered in New York. The remaining vehicles were registered in New Jersey.

All of the vehicles purchased out of state were driven directly to the Harvey terminal in New Jersey. At that time, the vehicles became subject to the contract between petitioner and Harvey, the terms of which are outlined above. The vehicles were then loaded up and sent out on the road. While hauling under contract with Harvey, the vehicles were always engaged in interstate commerce.

After the vehicles had delivered their loads, they were returned empty to petitioner's terminal near Chemung, New York. They remained in Chemung until Harvey contacted petitioner. The vehicles were then dispatched to Harvey's terminal in New Jersey to pick up their loads, and to be sent out on the road again.

The tire purchases component of the assessment results from petitioner's in-state purchases of tires from two entities, Twin Tier Tire Corporation ($2,049.18 in purchases) and Johnny Antonelli Tire ($3,016.98 in purchases). The Twin Tier tire purchases were mounted by Twin Tier and the Johnny Antonelli purchases were mounted by petitioner and his drivers.

OPINION

The Administrative Law Judge rejected each of petitioner's contentions, determining that the Division of Taxation a) properly assessed sales tax on petitioner's in-state purchase of three trucks, b) properly assessed compensating use tax on petitioner's out-of-state purchases of certain trucks and trailers, and c) properly assessed sales tax on petitioner's in-state purchases of tires installed on his trucks.

On exception, petitioner argues that the use of three of these vehicles after they were purchased in New York was for the sole benefit of Harvey under a contractual arrangement which constituted a lease. Based on this contention, he states that his purchases are not retail

sales, and thus, are not subject to sales tax. Petitioner further argues that because the trucks purchased outside New York were brought into the state solely for service and repair, the purchases at issue should be exempt from tax. Finally, he contends that because his truck and trailer combinations exceeded twenty-six thousand pounds, his purchases of all trucks and tires are exempt from tax. In response, the Division relies upon the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

We will first address petitioner's contention that the trucks purchased within the state were purchased for resale, so that the imposition of sales tax under Tax Law § 1105(a) does not apply. This statute imposes a sales tax upon the receipts of every retail sale of tangible personal property. Petitioner relies on Tax Law § 1101(b)(5), which defines sale as:

> "any transfer of title or possession or both, exchange or barter, rental, lease, or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration . . ." (emphasis added).

Petitioner contends that the contractual arrangement between himself and Harvey constituted a lease. Based on this premise, he argues that the definition of a retail sale at Tax Law § 1101(b)(4)(a) would exclude his purchases from sales tax as they would be categorized as purchases "for resale" and not as purchases at retail. The determinative issue, therefore, is whether this contract between petitioner and Harvey constituted a lease. The Division has adopted regulations at 20 NYCRR 526.7(c), which characterize a lease as:

> "[T]he terms rental, lease, license to use refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a 'sale', 'rental, lease, or license to use' shall be determined in accordance with the provisions of the agreement" (emphasis added).

A transfer of possession is defined at 20 NYCRR 526.7(e)(6), in pertinent part, as follows:

> "[W]hen a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment" (emphasis added).

This issue has arisen previously in Matter of Concrete Delivery Co. v. State Tax Commn. (71 AD2d 330, 423 NYS2d 293). There, the petitioner obtained for a stated period the

exclusive right to services of independently owned trucks by entering into written agreements with the owners thereof. The petitioner, in an attempt to avoid the imposition of sales tax on the contract under a lease classification, argued that the contract in question was not a true lease. The contract term which was the basis of the dispute provided:

> "The leased equipment under this agreement is in the exclusive possession, control, and use of the *** LESSEE and that *** LESSEE assumes full responsibility in respect to the equipment it is operating, to the public, the shippers, and the INTERSTATE COMMERCE COMMISSION."

In Concrete Delivery, the supporting terms of the agreement conferred upon the "LESSEE" the duty to regularly inspect the tractors owned by the owner-operators, as well as the licenses and medical certificates of drivers, to ensure compliance with the Interstate Commerce Commission and Department of Transportation safety regulations (Matter of Concrete Delivery, State Tax Commn., May 31, 1978). The Appellate Division affirmed the determination of the former State Tax Commission, holding that this contractual relationship constituted a taxable lease. The Court found that the contract terms provided substantial evidence and a reasonable basis for the Commission's conclusion.

In the case at hand, the written agreement confers upon the carrier "the possession, control, and use of the equipment that the carrier may require to fulfill requirements placed on it by all applicable regulations" (Exhibit 1). However, unlike the contractual language in Concrete Delivery, this qualified possession is vague on its face as these "applicable regulations" are not defined in the contract. The Court of Appeals has provided guidance on the proper construction of contractual terms, stating in an oft-cited opinion that "a written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose. The meaning of a writing may be distorted where undue force is given to single words or phrases" (Empire Props. Corp. v. Manufacturer's Trust Co., 288 NY 242, 248-49, 43 NE2d 25, 28). Thus, the legal significance of this term granting possession to Harvey must necessarily be derived from related terms in a manner consistent with the essence of the agreement as a whole.

The contract offered by petitioner as typical provides that the trucks involved in this arrangement were at all times to be under the direction and control of persons employed by petitioner. Petitioner retained the responsibility for determining the means and methods of service, including the payment and supervision of the drivers, the payment of all operating expenses, and the right to select all routes of travel. Petitioner also assumed the responsibility for satisfying the requirements of all State and Federal regulatory bodies and authorities. In addition, the agreement is otherwise barren of any terms to support an intention to confer possessory rights in Harvey. Therefore, we find that upon an examination of this term in light of the entire agreement, it imparts no legal right upon Harvey to direct and control the vehicles. Accordingly, we agree with the Administrative Law Judge's determination that petitioner's purchases of trucks within New York before November 11, 1981[2] were properly classified by the Division as taxable retail sales.

For those purchases after November 11, 1981, we also agree with the Administrative Law Judge that petitioner's purchases were taxable retail purchases pursuant to § 1101(b)(4)(i) regardless of the nature of the transaction between petitioner and Harvey (sections 38 and 69 of ch 1043, L 1981).

We will next address the issue of whether trucks purchased by petitioner outside New York and later brought in are subject to use tax. The Administrative Law Judge held that the garaging of the vehicles in question at petitioner's terminal near Chemung, New York constituted a "use" of the vehicles within the plain meaning of Tax Law § 1101(b)(7). Tax Law § 1110 imposes a compensating use tax on the use within New York of property which would have been subject to sales tax if purchased in New York. As all of the vehicle purchases in the case at hand have been determined to be at retail, we will now address the question of whether they are subject to use tax for the period the vehicles were in New York. Tax Law § 1101(b)(7) defines the term "use" as follows:

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[2]The Administrative Law Judge's opinion stated November 11, 1983 instead of November 11, 1981. This was apparently a typographical error.

> "Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage, or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property" (emphasis added).

To have been subject to the use tax, a taxable event must have occurred within this State (Seaboard World Airlines v. State Tax Commn., 118 AD2d 947, 499 NYS2d 513, appeal dismissed, 68 NY2d 752, 506 NYS2d 1034). Petitioner testified that his trucks often returned empty to his terminal in Chemung, New York upon completion of a delivery. The trucks would remain there until petitioner was contacted by Harvey's terminal in New Jersey, at which time they would dispatch a truck to pick up a new load. This testimony establishes that a use occurred within the plain meaning of Tax Law § 1101(b)(7). Garaging the trucks in Chemung for indefinite periods between trips represents "storage, or any keeping or retention for any length of time", and thus constitutes a taxable event within New York (see, Sunshine Developers v. State Tax Commn. 132 AD2d 752, 517 NYS2d 317; Matter of Thomas Pauly, Sr., Tax Appeals Tribunal, April 5, 1990).

On exception petitioner seeks to alter the facts established at hearing by contending that these trucks were brought into the State and garaged in his Chemung terminal solely for service and repairs. He relies on Division policy statement TSB-M-83(23)S, which states that such activity within the State is exempt from tax. This allegation, however, is inconsistent with petitioner's own testimony at hearing that the trucks remained in Chemung during periods of inactivity (tr, p. 20). Our prior decisions have firmly established that new or additional evidence which was not part of the record before the Administrative Law Judge may not subsequently be submitted for consideration upon review of the case by the Tax Appeals Tribunal (Matter of Cougar International, Inc., Tax Appeals Tribunal, February 8, 1990, citing Ronnie's Suburban Inn, Inc., Tax Appeals Tribunal, May 11, 1989). Petitioner had an opportunity at hearing to establish facts necessary to support his argument. His failure to submit such testimony during the evidentiary stage of the proceeding prohibits us from considering this modification of fact upon exception (20 NYCRR 3000.10[d][5]).

Alternatively, petitioner argues in his exception that even if his purchases were otherwise taxable under the sales and use tax provisions, they would be exempted by Tax Law § 1115(a)(26), which exempts from tax sales of "tractors, trailers, and semi-trailers and property installed on such vehicles for their equipping, maintenance, or repair, provided such vehicle is used in combination and exceeds twenty-six thousand pounds." Petitioner contends that this would exempt from tax all purchases of trucks and tires at issue. Reliance on this statute, however, is misplaced as it became effective on January 1, 1988, which is subsequent to the period at issue. This exemption, therefore, does not apply to petitioner's purchases.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Gerald Loper is in all respects denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Gerald Loper is denied; and

4. The Notice of Determination and Demand for Payment dated September 12, 1984, as adjusted per finding of fact "6" and conclusion of law "I" of the determination of the Administrative Law Judge, is hereby sustained.

DATED: Troy, New York
September 7, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner