

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
BUCHERER, 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 December 1, 1979 :
through February 28, 1983. :

DECISION

In the Matter of the Petition :
of :
WILLIAM SERGIO CORTI :
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 December 1, 1979 :
through February 28, 1983. :

Petitioners, Bucherer, Inc. and William Sergio Corti, as an officer of Bucherer, Inc., c/o Graubard, Mollen, Horowitz, Pomeranz & Shapiro, 600 Third Avenue, New York, New York 10016, filed exceptions to the Administrative Law Judge's determination issued on September 22, 1988 which denied their petitions 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 December 1, 1979 through February 28, 1983 (File Nos. 800759 and 800758). Petitioners appeared by Graubard, Mollen, Horowitz, Pomeranz & Shapiro (Allen Greenberg, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioners filed a brief on exception. The Division filed a letter in lieu of a brief in opposition to the exceptions. At the request of petitioners, oral argument was heard on January 31, 1990.

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

ISSUE

Whether it is a violation of the equal protection clauses of the New York State and United States constitutions to impose the sales tax on jewelry sold to a nonresident who takes possession of the merchandise in New York, but not on a motor vehicle sold to a nonresident who takes possession of the vehicle in New York.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below except we modify finding of fact "8" as indicated below.

Petitioner Bucherer, Inc. ("Bucherer") is a retail jeweler located at 730 Fifth Avenue, New York, New York. Bucherer went out of business on January 31, 1983.

Mr. "W.S. Corti" was named as Bucherer's sole officer on its 1979, 1980 and 1981 Federal corporation income tax returns.

Mr. William S. Corti signed the audit method election for Bucherer, designating himself managing director and vice president. Mr. Corti's signature also appears on Bucherer's sales tax returns. Mr. Corti now resides in Switzerland.

The books and records of Bucherer were found to be adequate for conducting a detailed audit. However, in lieu of an audit utilizing all books and records, Bucherer and the Department of Taxation and Finance signed an "audit method election" (form AU 377.12) by which Bucherer elected "utilization of a representative test period audit method to determine any sales or use tax liability." This election extended to sales and recurring expense purchases but not to fixed asset acquisitions. This election states explicitly that it does not preclude the protest of the audit results.

Bucherer's gross sales for 1980 and 1981 as reported on its sales tax returns were less (by \$114,799.20) than the sales reported on its Federal corporation tax returns for both years. No explanation for this discrepancy was forthcoming. The difference resulted in an additional tax due of \$9,380.51.

Bucherer's reported nontaxable sales were tested for a one-month test period of November 1980. A schedule was prepared showing each sale, its billing address, its shipping address, its amount and the finding of the auditor. About 46% of the reported nontaxable sales were disallowed. Reasons for disallowance assigned by the auditor were that the merchandise was hand carried from the store by the customer allegedly for later export, or the sale was to a foreign diplomat from whom Bucherer failed to obtain a sales tax diplomatic exemption certificate (ST 126). The 46% figure was applied to reported nontaxable sales for the entire audit period to arrive at additional taxable sales of \$2,490,667.62 and tax due thereon of \$201,772.05.

A test was made of taxable expense purchases for the months of September and October 1980. Items representing advertising and display materials were found to be taxable and were itemized in worksheets. An error factor of .311648 was computed and was applied to total expense purchases for the audit period. This resulted in additional tax of \$22,624.55.

The auditor found purchases of fixed assets subject to tax in two of the quarters. These purchases were for leasehold improvements such as carpets and cabinets and were listed in a schedule. The tax due on these purchases amounted to \$4,209.14.

The auditor disallowed certain credits taken by petitioner on its sales tax returns. These credits were for refunds of tax to foreign customers who had paid sales tax when taking delivery in New York City, traveled to a foreign country and from there mailed to Bucherer a form letter requesting a refund. The amount of credits disallowed was \$16,165.85.

The refund form was on the letterhead of Bucherer and was captioned with the name of the customer and date. It designated a portion to be signed by an airline employee. This portion certified that the identified passenger on the identified flight showed the employee one sealed package which the passenger had carried aboard the aircraft, marked as follows: "BUCHERER INCORPORATED 730 Fifth Avenue, New York, NY 10019"; that the wrapping of said package was undisturbed and sealed; that said passenger opened the package in the employee's presence and outside the territorial limits of the United States of America; and that said package

contained a certain sales slip number purporting to be from Bucherer and describing the contents of the package. The bottom part of the form contained a passage to be signed by the passenger. This stated: "I hereby certify that I am the passenger named above; that I have purchased the above described article(s) from Bucherer Inc. who packed the above mentioned articles in the above described manner and I opened the package for the first time in the afore said [sic], outside the territorial limits of the United States of America, and that said article has not been used within the United State of America. I am not a citizen of the United States of America."

The corporation, by Mr. Corti, executed a consent extending the period of limitations for assessment of sales and use taxes for the period December 1, 1979 through May 31, 1980 to September 20, 1983.

On June 20, 1983,¹ the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Bucherer, Inc. in the amount of \$254,152.10, (\$227,318.41 in sales tax and \$26,833.69 in use tax), plus interest of \$54,591.25, for a total due of \$308,743.35 for the period December 1, 1979 through February 28, 1983.

On the same date, the Division issued a Notice and Demand for Payment of Sales and Use Taxes Due² against petitioner William Sergio Corti, vice president, for personal liability as an officer, in the amount of \$227,318.41, plus interest of \$48,889.91, for a total due of \$276,208.32 for the identical periods covered by the notice to the corporation. Mr. Corti's notice did not include the use taxes assessed against the corporation.

¹The Administrative Law Judge's finding contained the date of September 20, 1983. The finding has been modified to reflect the date on the notices submitted into evidence (Exhibits B-1 and B-2).

²Although a notice of determination under Tax Law § 1138(a) should have been issued against Mr. Corti, all of the notice requirements of § 1138(a) were complied with on the notice and demand issued.

OPINION

The Administrative Law Judge found that: (1) the Division of Taxation had properly assessed petitioner Bucherer for tax due on sales that petitioner Bucherer had claimed were nontaxable; (2) the Division had properly disallowed credits taken by petitioner Bucherer for refunds made by it to certain of its nonresident customers; (3) the documentation presented by petitioner Bucherer was inadequate to show that the merchandise was not subject to tax in light of actual delivery of the merchandise to the customer at the time of purchase; (4) claimed sales to diplomatic personnel were taxable in the absence of proper documentary evidence of exemption; and (5) the other additions to tax in the notice of determination issued to petitioner Bucherer were upheld since no evidence contesting these additions was produced by petitioner. The Administrative Law Judge upheld the assessment issued to petitioner William S. Corti since no evidence was presented at the hearing to refute the evidence presented by the Division that he was an officer under a duty to act for petitioner Bucherer with respect to Article 28.

On exception, petitioners contest only the portion of the determination relating to sales of their merchandise to nonresident customers who subsequently took the merchandise out of New York. Petitioners' sole claim is that Tax Law section 1105, which subjects these purchases to sales tax, violates equal protection under the law in light of Tax Law section 1117, which provides an exemption from tax under section 1105 for certain purchases of motor vehicles. Petitioners cite the equal protection clauses of the United States and New York State constitutions (US Const, 14th Amendment, § 1; NY Const, art I, § 11). Petitioners argue that to subject its sales to sales tax because its purchasers took possession of the merchandise in New York is an arbitrary distinction which violates the constitutional guarantee that all persons within the same classification (in this case, nonresidents) be similarly treated because sales under section 1117 are not subject to tax even though physical possession of the vehicle also takes place in New York.

The Division argues that the existence of an alternative method of collecting sales tax on motor vehicles is irrelevant to the facts here

since the purchaser of a motor vehicle and the purchaser of an item of jewelry are not "similarly situated." Differing tax treatments are therefore not a violation of equal protection. As petitioners do not dispute that their customers took possession of the merchandise in the store located in the City and State of New York, the Division asserts that the sales tax was properly assessed and the Administrative Law Judge's determination should be upheld.

We affirm the determination of the Administrative Law Judge.

The only argument made by petitioners in opposition to the Administrative Law Judge's determination is their challenge to the constitutionality of Tax Law section 1105 which imposes sales tax at the point at which possession is transferred by the vendor to the purchaser (Tax Law § 1105[a], 20 NYCRR 525.2[a][3]). Petitioners argue that Tax Law section 1117 unconstitutionally distinguishes between similarly situated nonresidents by allowing nonresidents to take possession of motor vehicles purchased in this State without payment of the sales tax but not jewelry. The jurisdiction of this Tribunal does not encompass such constitutional challenges. We presume at this level of review that statutes are constitutional (Matter of Phelps, et al., Tax Appeals Tribunal, November 2, 1989; Matter of Wizard Corporation d/b/a Wizard Petroleum, Tax Appeals Tribunal, January 12, 1989; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

The Tribunal notes that the Court of Appeals has upheld the application of the sales tax to the purchase of merchandise subsequently removed from the State in a case where the petitioners used methods and documentation similar to those employed by petitioners here (Matter of David Hazan, Inc. v. Tax Appeals Tribunal, 152 AD2d 765, 543 NYS2d 545, affd ___ NY2d ___, ___ NYS2d ___ [May 3, 1990]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners, Bucherer, Inc. and William Sergio Corti, as officer of Bucherer, Inc., are in all respect denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Bucherer, Inc. and William Sergio Corti, as officer of Bucherer, Inc. are denied; and

4. The notice of determination dated June 20, 1983 to Bucherer, Inc. and the notice and demand dated June 20, 1983 to William Sergio Corti, as officer of Bucherer, Inc. are sustained.

DATED: Troy, New York
June 28, 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