STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MAXIMILIAN FUR CO., INC.	:	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 Period December 1, 1979 through November 30, 1982.	:	

Petitioner, Maximilian Fur Co., Inc., 20 West 57th Street, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on August 10, 1989 with respect to its 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 December 1, 1979 through November 30, 1982 (File No. 801479)

Petitioner appeared by McGuire & Tiernan (Terri E. Simon, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel). Petitioner filed a brief in support of its exception. The Division filed a brief in response to the exception. Oral argument, at petitioner's request, was heard on March 14, 1990.

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

ISSUES

I. Whether petitioner's sales of furs to persons leaving the United States were taxable under Articles 28 and 29 of the New York Tax Law.

II. Whether the Division of Taxation is equitably estopped from imposing sales tax on the aforementioned sales of furs to persons leaving the United States since the Division exempted similar sales in a prior audit.

III. Whether the imposition of sales tax on said sales of furs to persons leaving the United States is unconstitutional as violative of either the Import-Export Clause or the Commerce Clause of the United States Constitution.

FINDINGS OF FACTS

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner, Maximilian Fur Co., Inc. ("Maximilian"), is a manufacturer and retailer of luxury fur garments, serving an international clientele from its showroom located at 20 West 57th Street in New York City.

On September 23, 1982, the Division of Taxation ("Division") began a field audit of Maximilian which involved a thorough review of the books and records of the business. Said review indicated that the records available for audit were both adequate and sufficient to warrant an audit method that would utilize all the records within the audit period using a statistical sampling of records. On October 19, 1982, the Division and Maximilian agreed to such a statistical sampling in auditing the sales, recurring expense purchases and fixed asset acquisitions of Maximilian. Petitioner's controller, J.D. Perera, signed the agreement.

The test period selected for the statistical sampling was the quarter ending February 29, 1980. The test performed resulted in additional tax on disallowed nontaxable out-of-state sales reported of $207,048.12.

A detailed review was made of sales allegedly delivered to airlines but without what the Division deemed acceptable proof of shipment. These sales were denied exemption and yielded an additional $492,000.00 in taxable sales.

An audit of expense purchases tested for the quarter ended November 30, 1981 and fixed assets for the entire audit period indicated that proper taxes had been paid thereon and no

additional taxes were assessed. Therefore, total additional taxable sales were $699,048.12, which yielded an additional tax due of $56,416.98.

Consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law were executed by the parties, permitting the Division to assess additional sales and use taxes for the period December 1, 1979 through February 28, 1981, at anytime on or before June 20, 1984.

On June 20, 1984, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Maximilian Fur Co., Inc. for the period December 1, 1979 through November 30, 1982, setting forth a total tax due of $56,416.98 and interest of $20,202.80, for a total amount due of $76,619.78.

At a conference held on July 15, 1985, it was determined that the tax assessed on disallowed out-of-state sales was incorrect in that there was proper substantiation for most of said sales. As a result, the tax due on out-of-state sales was decreased from $16,810.48 to $316.41, which amount was agreed to by Maximilian. A partial withdrawal of petition was executed by Maximilian with regard to this amount. Therefore, the only issue before this forum is that of disallowed exempt sales of furs to persons leaving the United States. The amount of tax remaining in issue on these disallowed sales is $39,606.50 plus interest.

The sales in issue, also referred to as "export" or "airline" sales, were sales of fur garments to customers who were about to depart from the United States and who wished to avoid paying New York State sales tax.[1]

In order to achieve this end, Maximilian devised a procedure for packaging and sending its furs to Kennedy International Airport or LaGuardia Airport in the Borough of Queens, State of New York.

Maximilian packaged the fur garment in a carton which was then wrapped and sealed. An envelope was attached to the sealed carton containing what is referred to as an "export

[1]There are three sales included which do not fall into this category and they are addressed below.

certificate" in addition to a return envelope, with the return address being that of Maximilian Fur Co., Inc. in New York City. The "export certificate" was prepared on a form of unknown origin which had been used by petitioner at least since 1975.

The "export certificate" was prepared by a storage and shipping employee of Maximilian, setting forth the passenger's name, airline, flight number, departure date and time and a description of the merchandise. The form called for the signature of both an airline employee and the Maximilian customer. The airline employee, as stated on the certificate, certified that, on the specified date and indicated aircraft, the named passenger:

> "showed me a sealed package which had been carried aboard the aircraft by common carrier and/or other delivery service.
> (Description of package) CARTON
> marked as follows: (Retailer's name and other markings, if any)
>
> From: Maximilian Fur Co., Inc. 20 West 57th Street New York, New York 10019
>
> For: [Name of Passenger, airline, date and time of departure]
>
> and that the wrappings of said package were undisturbed and sealed in was the imprint MAXIM:
> that said passenger broke the seal(s) and opened the said package in my presence and outside the territorial limits of the United States of America: that said package contained a Sales slip (invoice number, if any)
> purporting to be from Maximilian Fur Company, Inc. and describing the contents of said package as
>
> [Description of contents]
>
> and that said package contained an article(s) which appeared to be that (those) described on said sales slip(s).
>
> NAME [of airline employee]
>
> SIGNATURE
>
> TITLE"

After the airline employee signed this certification, the passenger signed his name or her name below the following certification:

> "I hereby certify that I am the passenger named above, that I purchased the above described article(s) from Maximilian Fur Company, Inc., which article(s) was (were) wrapped and sealed in the above described package by vendor before delivery to me; that I opened said package for the first time as aforesaid outside the territorial limits of the United States of America, and that said article(s) has (have) not been used within the United States of America."

Maximilian instructed its customers to mail this form back to it from their foreign destinations in the envelope provided for that purpose. Petitioner retained all "export certificates" returned to it.

During the audit period, there were 42 purported out-of-state sales which were disallowed by the Division. For eight of those sales, no "export certificates" were provided either to the auditor, conferee, or at hearing. Those sales, were as follows:

Date	Customer	Petitioner's Exhibit No.
11/6/80	Mrs. Szporn	14
2/16/81	Mrs. M. Ulloa	24
2/27/81	Mrs. S. Cohn	25
12/19/81	Mrs. Schmidheiny	34
10/17/82	Mrs. Mary Nathaniel	37
12/17/82	Mrs. Edith Rosenkrantz	38
11/6/82	Mr. Alberto Benhayon	39
11/30/82	Mrs. G. Sherover	42

Other significant evidentiary material submitted in support of the 42 out-of-state "export" sales were delivery receipts from AM Delivery, which at some time during the audit period became known as Fleet Messenger Service. Each of these delivery receipts indicated from whom the package was picked up, in all instances Maximilian, and to whom the package was to be delivered, which in each case was the customer at his or her respective airline at John F. Kennedy International Airport or LaGuardia Airport. No delivery receipts were entered into evidence for 17 of the 42 purported out-of-state sales. Those sales were as follows:

Date	Customer	Delivery to	Petitioner's Exhibit No.
12/20/79	Mrs. Nelia DeBarletta	British Airways Flight No. 170 (J.F.K. to London)	1
12/23/79	Mrs. Susan Lloyd	American Airlines Flight No. 45 (J.F.K. to Nassau)	2

4/30/80	Mrs. R.D. Wasserman	British Airways Flight No. 170 (J.F.K. to London)	3
1/5/80	Mrs. Marilyn Cohen	South African Airways Flight No. 208 (J.F.K. to Johannesberg)	4
2/2/80	Veronica Neuding	Swiss Air Flight No. 101 (J.F.K. to Zurich)	5
3/25/80	Dr. Carnelutti	Swiss Air Flight No. 101 (J.F.K. to London)	7
3/28/80	Teresa Degens	Export	8
7/3/80	Mrs. M. D'Onofrio	National Flight No. 421 (LaGuardia to Miami)	11
2/16/87	Mrs. M. Ulloa	Peruvian Consul General New York	24
2/27/81	Mrs. S. Cohn	Pan Am Flight No. 201 (J.F.K. to Rio de Janero)	25
11/16/81	Mrs. Carmen Garcia	Eastern Flight No. 901 (J.F.K. to Mexico City)	32
11/27/81	Mrs. M. Quinton	Pan Am Flight No. 104 (J.F.K. to London)	33
11/24/81	Mrs. L. Goulandris	BOAC Flight No. 194 (J.F.K. to London)	35
3/20/82	Mrs. A.G. Kaufman	Swiss Air Flight No. 111 (J.F.K. to Geneva)	36
11/4/82	Mrs. Astrid Carrizosa	Pan Am Flight No. 115 (J.F.K. to Miami)	40
11/24/82	Mrs. G. Caminer	Pan Am Flight No. 2	41

Most of the 25 delivery receipts entered into evidence were unsigned.

The customer receipts issued to Maximilian by the delivery service, which indicated receipt of the package by the delivery service and also the person and place to whom and to which the package was to be delivered, sometimes contained personal notations of the messenger. For instance, in the case of Mrs. Szporn of Sao Paulo, Brazil, the delivery receipt, F98397 (petitioner's Exhibit 14 in evidence), indicates that the messenger waited two hours at John F. Kennedy Airport between the hours of 6:00 P.M. and 8:00 P.M. on November 6, 1980.

With regard to the sale to Mrs. Edith Resenkrantz (petitioner's Exhibit 38 in evidence), the delivery receipt indicated that the delivery person waited between 11:45 A.M. and 12:11 P.M.

In the case of Mr. Alberto Benhayon (petitioner's Exhibit 39 in evidence), the delivery person waited an hour and a half to find the passenger and Mr. Benhayon signed for the package himself.

In the case of Mrs. M. Ulloa of Lima, Peru, there is no evidence that delivery was even intended to take place at the airport, for the Peruvian Consul General in New York is indicated as the shipping destination on the purchase agreement. Sales tax was not paid because Mrs. Ulloa submitted to Maximilian a note from the Consul General of the Peruvian Consulate, Carlos Vizquerra, stating that one Dr. Manuel Ulloa-Elias was the Prime Minister and Minister of Economy, Finance and Commerce of Peru and the holder of a diplomatic passport, and was visiting New York City in transit to Lima, Peru at the time of the sale of the coat to Mrs. Ulloa. This sale is denoted in the record as petitioner's Exhibit 24.

Additionally, there were two other sales which were admittedly not airport delivery sales and which were presumably sales for export. However, the first one of these, made on March 28, 1980, to one Teresa Degens denoted in the record as petitioner's Exhibit 8, shows no evidence of mailing or other delivery.

The other sale, made on November 30, 1982 to one Mrs. G. Sherover, denoted in the record as petitioner's Exhibit 42, is also without evidence of mailing or other delivery except for a credit slip which has the phrase "shipped out of state" written on its face.

A prior audit for the period December 1, 1975 through November 30, 1978, found this same petitioner liable for sales and use tax in the sum of $29,472.59. A conference with regard to this audit period was held on October 7, 1980 before a Tax Department conferee, Robert Pilatzke. The taxpayer, petitioner herein, was represented by its attorney, Philip Maley, and its accountant, Robert Bronsteen.

At the hearing held in the instant action, Mr. Bronsteen appeared and testified that the same issue with regard to deliveries to airlines occurred in the prior case. In the prior audit, five of nine airport sales were found to be nontaxable due to the fact that the taxpayer was able to produce satisfactory proof of out-of-state shipment. The conferee indicated that he reviewed additional export documentation with regard to said sales and reduced the additional tax due accordingly. In his report, conferee Robert Pilatzke stated:

> "(2) The export documentation were [sic] reviewed and the additional tax due on sales was reduced to $5,418.82."

On the same day as the conference, Mr. Bronsteen sent a letter to Mr. Lewis Wheeler of Maximilian Fur Co., Inc. stating the following:

> "Please review the enclosed as a guide to our future responsibilities as far as sales tax is concerned.
>
> Signed receipts by airline personnel on Maximilian's current airport delivery forms will be required to exempt the sales from tax." (Emphasis in original.)

Mr. Bronsteen's memorandum with regard to the conferee's preliminary finding on the sales tax audit for the period December 1, 1975 through November 30, 1978 stated, in part, as follows:

> "Auditor had disallowed 9 sales in test period totalling $54,950. Of these sales, six represented deliveries at JFK Airport; two were picked up by a Ford company plane; one was delivered by Maximilian truck to Pennsylvania. Of the 6 deliveries at JFK Airport, two were signed for by pursers of the airline; one was signed for by an airline hostess; one was signed for by an airline

stewardess; two were not signed by airline personnel. Maximilian's standard form for airport delivery was used in all cases. There was a signed receipt for the delivery to Pennsylvania.

PRELIMINARY FINDING BY CONFEREE

The four sales delivered to JFK and signed for by airline personnel are not subject to sales tax. The sale delivered by company truck to Pennsylvania and signed for is not subject to sales tax. The two deliveries at JFK which were not signed for and the two sales picked up by the Ford plane are taxable."

Mr. Bronsteen testified at hearing that the same export documentation presented to Mr. Pilatzke was presented herein.

OPINION

The Administrative Law Judge determined that petitioner had not carried its burden of establishing that the property sold to Maximilian's customers was delivered anywhere but in the State of New York. Therefore, he concluded that possession was taken within the State of New York and that such sales were properly held subject to sales tax. Further, the Administrative Law Judge stated that because it was uncertain on what grounds the "exempt sales" were allowed by the conferee in a prior audit and because the conferee's report did not state that the "exempt certificates" constituted satisfactory proof of the exempt sales, the Division may not be equitably estopped from imposing sales tax on the purported "export" sales. Finally, the Administrative Law Judge ruled that the imposition of a sales tax on receipts from petitioner's in-state sales of furs to customers leaving the State was not a duty or impost being levied on exports and, thus, was not unconstitutional.

On exception, petitioner argues that the Administrative Law Judge erred in deeming the delivery of the furs in question to be made within the State of New York. Petitioner also contends that it was manifestly unjust for the Division to impose sales tax on these transactions when petitioner directly relied on the Division's previous approval of its out-of-state delivery procedures and "export certificates." Petitioner also argues that it accepted proof of the diplomatic exemption of Dr. Ulloa-Elias in good faith and it would be unfair to tax the

transaction. Lastly, petitioner maintains that the taxation by New York State of merchandise delivered onto an aircraft which is leaving the United States would be unconstitutional.

The Division, in response, claims that the Administrative Law Judge correctly concluded that the delivery of the furs occurred in New York State and, therefore, the receipts from the sales of those items are subject to the sales tax imposed by § 1105(a) of the Tax Law. Notwithstanding that a pre-hearing conferee accepted allegedly similar documentary evidence as adequate proof of "export" delivery for a prior audit period, the Division argues that it was not manifestly unjust to impose a sales tax on receipts from sales of goods delivered in New York and so it may not be estopped from assessing the tax. Finally, the Division asserts that the imposition of sales tax on receipts from petitioner's sales of tangible personal property delivered in New York is constitutional as applied.

We agree with the determination of the Administrative Law Judge.

Tax Law § 1105(a) imposes a tax on the receipts from every retail sale of tangible personal property. Tax Law § 1132(c) creates a presumption that all receipts from the sale of such property are subject to tax until the contrary is established and places the burden of proving that any receipt is not taxable upon the taxpayer. In addition, the sales tax regulations at 20 NYCRR 525.2(a)(3) provide that:

> "The sales tax is a 'destination tax,' that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

In this case, petitioner contends that the Administrative Law Judge erred in holding that petitioner did not carry its burden of proof that the delivery of the furs in question occurred outside of New York State. Specifically, petitioner claims that the Administrative Law Judge ignored the oral and documentary evidence presented at the hearing and, in effect, applied a presumption of in-state delivery that was practically irrebuttable. We disagree.

First, petitioner furnished "export certificates" for 33 out of the 42 "export" sales at issue. No "export certificates" or other documentation was made available for eight of these transactions

so these sales are clearly taxable. With regard to the certificates which were signed by airline personnel, the signature of the airline employee on the certificate could only establish that the airline employee saw the passenger open the sealed package on board the aircraft. The certificate does not disclose how the airline employee knew how the package got on board the aircraft. No other evidence of the delivery was introduced. These certificates simply failed to establish that delivery of the furs occurred outside the State of New York (see, Matter of David Hazan, Inc. v. Tax Appeals Tribunal, 152 AD2d 765, 543 NYS2d 545, affd 75 NY2d 989, ___ NYS2d ___).

Second, petitioner submitted delivery receipts from its common carrier as additional evidence of the 42 "export" sales. Of the 21 delivery receipts produced, only three appeared to be signed and it is unclear whether these signatures were executed by airline personnel. We think under these facts, the delivery receipts are insufficient to demonstrate that petitioner's common carrier did not physically transfer the merchandise to the customers in the airport.

Third, petitioner maintains that the testimony of Mr. Walter Lucas, its former head of shipping, showed that it had always followed a uniform procedure for effectuating delivery of "export" merchandise so as to be exempt from sales tax. At the hearing, Mr. Lucas declared that petitioner's common carrier had been instructed to deliver the furs to a representative of the airline on which the customer was leaving the country, and not to the customer in the airport. His testimony, however, did not prove that delivery of the items at issue actually occurred outside of New York State.

Petitioner argues that a fair and common sense reading of the evidence would sustain the inference that the merchandise was delivered in-flight to the customer after the plane left the territorial limits of New York State. We note, however, that a reasonable inference in favor of petitioner per se is insufficient to carry petitioner's burden of proof. The threshold inquiry in this case requires a factual determination of whether the furs in question were physically delivered to the customers within the boundaries of this State. None of the evidence presented conclusively demonstrates that delivery of the merchandise did not take place in the airport or elsewhere in

New York. Petitioner failed to meet the burden of overcoming the presumption of delivery in New York. We hold that the Administrative Law Judge did not err in finding that the "export" sales of the fur merchandise at issue constitute taxable transactions under Tax Law § 1105(a).

In the alternative, petitioner argues that it relied to its detriment upon the conferee's determination in a prior audit which found certain "export certificates" to be satisfactory proof of delivery outside of New York State. Petitioner's claim is that it relied on the conferee's holding and continued to use the same certificate as evidence of out-of-state delivery. Consequently, it is maintained, the Division is estopped from changing its position and asserting in the instant case that the export certificate is not sufficient proof that delivery of merchandise took place beyond the boundaries of New York. We reject this argument.

As a general rule, the doctrine of estoppel cannot be invoked against the State or its governmental units unless such exceptional facts exist as would require its application in order to avoid "manifest injustice" (see, Matter of Wolfram v. Abbey, 55 AD2d 700, 388 NYS2d 952, 954; Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 409 NYS2d 847, 848). This rule is particularly applicable with respect to a taxing authority since sound public policy favors full and uninhibited enforcement of the tax laws (Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78, 80). Thus, the application of the estoppel doctrine against a taxing authority must be rare and limited to the truly unusual fact situations (Schuster v. Commr., 312 F2d 311, 62-2 USTC ¶ 12,121 at 86,585).

The elements of the estoppel issue in this case are whether petitioner could reasonably rely on the conferee's determination with respect to a prior audit, whether petitioner, in fact, relied on it, and whether petitioner so detrimentally relied on it such that the absence of equitable relief would be manifestly unjust. We hold petitioner did not show it was entitled to rely on the conferee's determination in a prior audit.

Section 601.0 of the State Tax Commission's Rules of Practice and Procedure, which governed all proceedings before the Commission, including pre-hearing conferences prior to

1987, stated that the intent of the rules was "to afford the public both due process of law and the legal tools necessary to facilitate the rapid resolution of controversies while at the same time avoiding undue formality and complexity." The purpose of the pre-hearing conference was to provide the taxpayer and the Department of Taxation a means of settling their disputes expeditiously and inexpensively without the formality of the full hearing process. The conferee was empowered "to propose any resolution he deems fair and equitable, [emphasis added]" so long as it was grounded in fact and in law (State Tax Commission's Rules of Practice and Procedure § 601.4[c][2]). In the event the petitioner accepted the conferee's proposal, the whole case was disposed of without any written determinations.

Further, nowhere in the statute, regulations, or Rules of Practice and Procedure, as they were written in 1980, was there any suggestion that a conferee's determination would be binding on the Department of Taxation for all subsequent disputes involving the same parties and issues. To argue that the disposition of a prior conference is binding upon the Department, as petitioner does here, in light of the settlement nature of the conference proceeding and in the absence of any statutory or regulatory authority, strains logic and common sense. If the Legislature intended that the conferee's determination be given the binding force of law, it would state so clearly. Indeed, the current regulations make it patently clear that only specifically authorized rulings and opinions are binding on the Department.[2] Hence, we conclude that petitioner is not entitled to rely on a conferee's determination that certain documents submitted for a prior audit were found to be sufficient proof of out-of-state delivery.

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[2] A declaratory ruling binds the Commissioner of Taxation and Finance provided the facts are the same as stated in the taxpayer's petition; however, such ruling may be changed to take effect prospectively (20 NYCRR 900.1[c]). The Commissioner is not bound by Opinions of Counsel (20 NYCRR 900.2[c]). An advisory opinion is binding upon the Commissioner in any subsequent proceeding involving the person to whom the advisory opinion is rendered (20 NYCRR 901.4). By contrast, the regulation in 20 NYCRR 4000.5(c)(5) explicitly provides that a conferee's conciliation orders have no precedential value, and states:

> "(5) Conciliation orders are not required to be published. Such orders are not considered precedent, nor are they given any force or effect in any subsequent conciliation conference with respect to the requester or any other person."

Even assuming, arguendo, petitioner demonstrated that it was entitled to rely on the conferee's determination regarding the 1980 audit, petitioner did not carry its burden of showing that it, in fact, relied on that disposition. Other than Mr. Edward Bronsteen's bare assertion that certain "export certificates" were found to be satisfactory proof of delivery outside of New York, petitioner offered no evidence to show that the conferee, in fact, based his determination upon submission of these certificates.

Petitioner argues that Mr. Bronsteen testified that the conferee found the "export certificates" to be sufficient proof of out-of-state delivery for certain sales in the 1980 audit. Petitioner contends that because Mr. Bronsteen's testimony was unrebutted and uncrossexamined at the hearing, the Division, in effect, conceded to the contents of his testimony. We find this reasoning devoid of merit.

It is well settled that courts give great deference to an administrative law judge's assessment of the credibility of witnesses (see, Myers v. Secretary of Health and Human Services, 893 F2d 840, 846 [6th Cir 1990]; Fowler v. Bowen, 876 F2d 1451, 1455 [10 Cir 1989]). The Administrative Law Judge may reject Mr. Bronsteen's uncorroborated claim relating to the conferee's determination in the prior audit even when "there was no evidence in contradiction" (Matter of Bachman v. State Tax Commn., 89 AD2d 679, 453 NYS2d 774, 776; Matter of Dalenz v. State Tax Commn., 9 AD2d 599, 600, 189 NYS2d 348, 350).

Neither the conferee's one-page report on the prior conference nor Mr. Bronsteen's October 17, 1980 letter to petitioner substantiates Mr. Bronsteen's assertion that the conferee had accepted the "export certificates" as sufficient proof of out-of-state delivery. Petitioner failed to produce the original documents submitted to and purportedly approved by the conferee or any other witnesses who would be able to corroborate Mr. Bronsteen's testimony.

Therefore, we conclude that petitioner did not show it actually relied on the conferee's determination in the prior audit as the basis for its current delivery practices with respect to "export" sales.

Finally, petitioner argues that because it relied to its detriment on the conferee's decision, it would be a manifest injustice if it was barred from obtaining equitable relief on grounds of estoppel. Relying on Matter of Harry's Exxon Service Station (Tax Appeals Tribunal, December 6, 1988), petitioner would have us believe that in direct reliance upon what petitioner believed to be the conferee's decision that its "export certificates" constituted satisfactory evidence of out-of-state delivery, it did not obtain and keep supplementary records which the Division now requires. As a result, petitioner argues, it is unable to prove its case and the Division should be estopped from asserting sales tax liability. Even were we able to assume that petitioner was entitled to rely on the conferee's decision and that it actually relied on it, we do not find that a manifest injustice exists here that requires equitable relief.

Harry's Exxon is distinguishable from the instant case in that the taxpayer's accountant in that case destroyed the tax records for the period under audit in reliance on a letter issued specifically to the taxpayer by the Division stating that the Division's audit activity was completed and no tax was due. Unlike Harry's Exxon, where the taxpayer's business records were affirmatively destroyed and, thus, were unavailable, there is no allegation here that the necessary documentary evidence was similarly destroyed or unobtainable. In fact, delivery receipts from petitioner's common carrier, though most of them were unsigned and were found to be insufficient as credible proof, were offered into evidence for 24 of the 42 "export" sales. The fact that other supplementary evidence (delivery receipts) were kept and produced counters petitioner's argument that the necessary proofs were unavailable and that it relied to its detriment on the conferee's decision. Further, the Division's advice and the taxpayer's reliance in Harry's Exxon related to the same audit period. Here, petitioner seeks to apply the disposition of one audit to a subsequent period.

Therefore, we hold that petitioner did not meet its burden of proving that it was entitled to rely on the conferee's decision concerning the 1980 audit; that it actually relied on the decision;

and that it detrimentally relied such that the Division is now estopped from asserting sales tax liability.

We also conclude that petitioner failed to prove that the sale to Mrs. M. Ulloa was an exempt sale to a diplomat. Even if we do accept the "To whom it may concern" note offered by petitioner as proof of the facts of the transaction, it is insufficient to claim the exemption. The right to diplomatic exemption is determined by the United States Department of State based on international treaties (see, 20 NYCRR 529.5). The facts put forward by petitioner that the purchaser was the holder of a diplomatic passport and was visiting the United States are not sufficient in themselves to show the right to the exemption.

As a final argument, petitioner maintains that the imposition of sales tax on the sales at issue in this case violates the Import-Export Clause of the United States Constitution. Relying on Richfield Oil Corp. v. State Bd. of Equalization (329 US 69), petitioner contends that once goods have entered the export stream, they enjoy constitutional protection from state taxation under the Import-Export Clause.

Petitioner's reliance on Richfield Oil is misplaced.

The Supreme Court, in subsequent cases, has made it abundantly clear that it has abandoned the inquiry on whether goods were imports or exports, and, instead, analyzes the nature of the tax in determining whether the state tax in issue is an "Impost or Duty" and, therefore, proscribed by the Constitution (Michelin Tire Corp. v. Wages, 423 US 276; Department of Revenue of the State of Washington v. Association of Washington Stevedoring Cos., 435 US 734). Specifically, the Court in Michelin balanced the state tax at issue against the three policy considerations which gave rise to the Clause, namely, (1) prohibiting the states from interfering with conduct of foreign affairs by placing local tariffs and duties on foreign nations' goods, (2) preventing diversion of import revenue from the United States government to the states, and (3) avoiding disharmony among the states by preventing states from levying taxes on

goods merely passing through their territory and destined for other states. A state tax does not violate the Import-Export Clause if it does not violate these principles.

The Court in Washington extended the Michelin approach to exports, stating:

> "[t]he Michelin approach should apply to taxation involving exports as well as imports. The prohibition on the taxation of exports is contained in the same Clause as that regarding imports. The export-tax ban vindicates two of the three policies identified in Michelin. It precludes state disruption of the United States foreign policy. [footnote deleted] It does not serve to protect federal revenues, however, because the Constitution forbids federal taxation of exports. U.S. Const, Art I, § 9, cl 5; [footnote deleted] see United States v. Hvoslef, 237 US 1, 59 L Ed 813, 35 S Ct 459 (1915). But it does avoid friction and trade barriers among the States. As a result, any tax relating to exports can be tested for its conformance with the first and third policies. If the constitutional interests are not disturbed, the tax should not be considered an 'Impost or Duty' any more than should a tax related to imports." (Dept. of Revenue of the State of Washington v. Assoc. of Washington Stevedoring Cos., supra, at 758).

Whether the application of the New York State sales tax under the facts of this case was an impost or duty and, thus, proscribed by the Import-Export Clause depends on whether the tax as imposed offends any of the principles set forth in Washington (Matter of David Hazan, Inc. v. Tax Appeals Tribunal, 152 AD2d 765, 543 NYS2d 545, affd 75 NY2d 989, ___ NYS2d ___). We hold it does not.

The imposition of sales tax on the furs in question does not create any special tariff or duty on foreign nations' goods. Hence, it poses no impediment upon the regulation of foreign trade by the United States. Nor does the application of this sales tax give rise to conflict, barriers, or disturb the harmony between New York and her sister states since the instant tax is a nondiscriminatory tax which attaches only because the transfer of possession takes place in New York State and not because the goods are passing through the State.

Accordingly, a straightforward inquiry into the policy considerations laid out in Michelin and Washington shows that the imposition of the instant tax does not offend any of the principles underlying the Import-Export Clause and, thus, its application is not prohibited herein.

Petitioner also alleges, without raising any arguments, that the imposition of sales tax upon the sales of furs involved is improper under the Commerce Clause of the United States Constitution. None of the cases cited in petitioner's brief, however, supports its assertion. We summarily reject petitioner's contention herein. Moreover, in Matter of David Hazan, Inc. v. Tax Appeals Tribunal (supra) the court plainly stated that the application of the instant tax to transactions identical to the ones in this case did not violate the Commerce Clause.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of the petitioner, Maximilian Fur Co., Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Maximilian Fur Co., Inc. is denied; and
4. The notice of deficiency dated June 20, 1984 is sustained.

DATED: Troy, New York
August 9, 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