

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ANTIQUE WORLD, 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, 1988 :
through August 31, 1991. :

In the Matter of the Petition :
of :
DONALD A. ALESSI :
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 March 1, 1989 :
through August 31, 1991. :

DECISION
DTA NOS. 811565,
811566 AND 811567

In the Matter of the Petition :
of :
LOUIS A. BERRAFATO :
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 March 1, 1989 :
through August 31, 1991. :

Petitioners Antique World, Inc., c/o 370 Franklin Street, Buffalo, New York 14202, Donald A. Alessi, 4940 Hillcrest, Clarence, New York 14031-1602, and Louis A. Berrafato, 8981 Cliffside Drive, Clarence, New York 14031-1406 and the Division of Taxation filed exceptions to the determination of the Administrative Law Judge issued on April 13, 1995. Petitioners appeared by Donald A. Alessi, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation's brief in support of its exception and in opposition to petitioners' exception was not timely filed and was returned to the Division. Petitioners' brief in opposition to the Division's exception would have been due on September 13, 1995, which date began the six-month period for the issuance of this decision.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUES

I. Whether admission fees collected by petitioners for attendance at special events were subject to sales tax.

II. Whether petitioners have established that the results of the audit were erroneous.

III. Whether petitioners have established that any failure to comply with the sales tax law was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "9" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation (the "Division") issued to petitioner Antique World, Inc. a Notice of Determination dated March 12, 1992 assessing sales taxes in the amount of \$52,552.37 for the period December 1, 1988 through August 31, 1991, plus penalty and interest. Notices of determination dated March 23, 1992 were issued to petitioners Donald A. Alessi and Louis A. Berrafato assessing tax in the amount of \$52,527.76, for the period March 1, 1989 through August 31, 1991, plus penalty and interest, against them individually, as officers of Antique World, Inc.

The notices of determination were issued as a result of a field audit of the business operations of Antique World which operates a flea market. The grounds where the flea market

is held have open fields which are used for parking, an outdoor area where vendors display items for sale and buildings which are also used for sales and displays. It generates revenues from several areas. According to the Field Audit Report prepared by the auditor, the principal product or service of Antique World is the rental of real property. This is the space it rents to vendors on the grounds of the flea market. It also rents tables to vendors and receives income from this activity. During most of the audit period, Antique World rented facilities to vendors who operated food concessions on the premises; however, in 1991 Antique World operated the concession sales itself. Finally, Antique World operated special events several times per year and collected admission fees for these events.

The auditor testified that she contacted "the taxpayer" (tr., p. 12) and made a request for books and records and set up an audit appointment. There is little evidence about this first contact in either the audit report or the auditor's testimony, so it is not known whether the first request for books and records was made orally or in writing. Apparently, the auditor's only personal contact was with Katy Toth, the office manager of Antique World. There is some confusion in the record concerning the books and records made available. The auditor testified that the following books and records were provided:

"The sales journals, sales invoices, cash register tapes, New York sales tax returns, federal and state income tax returns, general ledgers, attendance records, which would include admissions revenues, depreciation schedules." (Tr., p. 12.)

After consulting the audit report, she testified that the 1988 and 1989 Federal and State income tax returns, attendance records, sales invoices and general ledgers were not made available (tr., p. 13). The audit report indicates that cash register tapes pertaining to concession sales, purchase invoices and a list of vendors with sales tax identification numbers for each vendor were made available. The auditor also testified that sales journals were provided (tr., p. 18).

According to the audit report, petitioners' purchase records were adequate and a detailed audit was conducted of those records. This resulted in an assessment of \$1,187.57 for recurring

purchases on which no sales tax was collected or paid. The auditor reviewed cash register tapes for the period in which Antique World operated its own concession stands. She determined that sales tax was properly collected and remitted on these sales, with the exception of a few days when Antique World first took charge of these operations. Sales tax due in this area was determined to be \$164.80. Petitioners did not challenge these audit results.

The auditor noted in her report that petitioners rented tables to vendors for \$2.00 each and collected and remitted sales tax on these charges. Her worksheets indicate that she transcribed sales receipts on table rentals from petitioners' records. No tax was assessed on these charges.

The major area of contention between petitioners and the Division is an assessment of \$51,200.00 on admission charges. The auditor testified, and the audit report states, that she made numerous requests for records of admission fees collected during the audit period and was not provided with them. Apparently, those requests were made to Katy Toth who was not an officer of the corporation and did not have a power of attorney to represent Antique World on audit. Regarding a power of attorney, the Field Audit Report states: "A properly completed Power of Attorney has not been filed because: . . . Contact with the taxpayer's representative was not necessary."

The auditor characterized Antique World as an "exhibit ground", and she considered entrance fees collected for the special events sponsored by Antique World to be subject to the sales tax imposed on admission charges to or for places of amusement. Because records of admission charges were not provided, the auditor estimated these charges using Antique World advertising brochures. Two brochures were available to the auditor. The first is for Antique World Expo, an event held on May 18 and May 19. The auditor identified this as a 1990 brochure. As pertinent, it contains the following statements:

"ANTIQUE WORLD & MARKETPLACE!

Open Every Sunday Year Round

Hundreds of Dealers set up both Indoor and Outdoors. Offering Antiques & Collectibles including Furniture, Jewelry, Clothing, Toys, etc., New Merchandise and much more.

Hours: 9 a.m. to 5 p.m.

No Admission / Free Parking

ANTIQUE WORLD AUTO!

June 22 & 23

Antique World AUTO is a swapmeet, Fleamarket and Car Show held annually. Over 200 cars are exhibited along with participating car part Dealers from most regions of the U.S. The Show is highlighted by the 50' [sic] & 60's Cruise-N-Dance held Friday at 8 p.m. June 22. Hours: Fri. 12 p.m. to 8 p.m. and Sat. 7 a.m. to 6 p.m.

Admission \$3.00 per person

* * *

ANTIQUE WORLD EXPO!

August 24 & 25

Antique World EXPO has earned the reputation for being one of the finest Antique & Collectible Shows in the Northeast. Featuring 600 Dealers from 22 U.S. States and Canada. The Show attracts over 20,000 people, and is held twice annually.

Hours: Fri. 9 a.m. to 7 p.m. and Sat. 9 a.m. to 5 p.m.

Admission: \$3.00 per person"

A second brochure used by the auditor is for Antique World & Marketplace, described as an indoor/outdoor market. The auditor identified this as a 1991 brochure. It contains two paragraphs describing activities and events as follows:

"Antique World & Marketplace is WNY's Largest Market. Just a pleasant country drive 15 miles east of Buffalo and 40 miles west of Rochester on Main St. (Rt. 5) in Clarence (Erie County's oldest Est. Town). Once you arrive you will be pleased to find hundreds of indoor/outdoor Dealers featuring Antiques, Collectibles, Jewelry, New Merchandise, Entertainment, Produce & more. Food Concessions and Restrooms and [sic] conveniently located. This is a must stop for bargain hunters and Antique Enthusiasts.

* * *

-SPECIAL EVENTS

"Antique World Expo has earned the reputation for being one of the premier Antique & Collectible Shows in the Northeast. Featuring 600 Dealers from 22 U.S. States & Canada. The Show attracts over 20,000 people, twice annually, every May and August.

"Antique World's Arts & Crafts Shows -- Antique World sponsors three shows annually. The Shows include hundreds of the areas finest Artisans & Craftsmen. Live entertainment as well as many interesting demonstrations are offered to people of all ages."

Based on these brochures, the auditor assumed that there were 20,000 attendees at each special event held by Antique World. According to the brochure, the Antique World Expo was held twice per year and charged an admission fee of \$3.00. Thus, the auditor estimated that

40,000 persons attended this event each year from which petitioners received admissions revenue of \$120,000.00 per year or \$360,000.00 for the audit period.

Antique World Auto show was held annually. Assuming attendance of 20,000 persons per event, the auditor calculated admission charges of \$60,000.00 from the auto show in 1989 and 1990. She did not include the auto show in her calculations for 1991. Total revenues from Antique World Auto for the audit period were determined to be \$120,000.00.

The 1991 brochure states that the Arts & Crafts Fair was held three times per year. Petitioners charged an admission fee of \$2.00 for this event. The auditor estimated revenues from this event of \$40,000.00 for the sales tax quarter ending August 31, 1989; \$40,000 for the quarter ending August 31, 1990; \$40,000.00 for the quarter ending May 31, 1991; and \$40,000.00 for the quarter ending August 31, 1991. Thus, the auditor calculated total revenues from this event of \$160,000.00.

In her workpapers, the auditor stated: "1 [arts and crafts show] was assumed to have occurred in Q/E 11/91 which is outside the audit period." It is not known why the auditor assumed that only one arts and craft show was held in 1989 and one in 1990, when the 1991 brochure indicates that three shows were held annually.

The auditor determined that admission charges for the audit period totalled \$640,000.00 with a tax due on that amount of \$51,200.00.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

Petitioner presented the testimony of Frank Berrafato, general manager of Antique World. He described the operation as a flea market where buyers and sellers come to transact business. The Antique Expo and the arts and craft fair were operated in much the same manner as the Sunday flea market except that an admission fee was charged. Mr. Berrafato testified that there were no bands or music, no entertainment and no demonstrations at the Antique Expo. Mr. Berrafato testified that the auto show was held for two years running and then discontinued because the response to it was poor.¹

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We modified finding of fact "9" of the Administrative Law Judge's determination by adding the second to last sentence to more fully reflect the record.

Mr. Berrafato estimated that an average of between 3,000 and 4,000 persons attended the Antique Expo and the arts and craft fair each time one was held. He thought that no more than 1,000 persons attended the auto shows.

Mr. Berrafato testified that Antique World's accountant advised that admission charges to the special events were not subject to sales tax. For this reason, Antique World did not maintain a separate record of admission charges. He asserted that approximately 80 percent of Antique World's income was from the rental of space to vendors. Receipts from space rental and admission charges were recorded together as nontaxable revenues.

Mr. Berrafato and Katy Toth prepared a breakdown of revenues received for the special events for each year in the audit period. Apparently rent and other income was subtracted from total income to determine admission charges. The schedule prepared by Mr. Berrafato shows admission charges as follows:

	<u>1989</u>	<u>1990</u>	<u>1991</u>
Expo (spring)	\$ 8,943.64	\$12,099.75	\$11,033.57
Expo (fall)	19,237.00	13,484.50	18,255.60
Craft show	5,605.97	4,194.36	3,780.00
Car show	<u>3,578.11</u>	<u>2,201.00</u>	<u> </u>
Totals:	\$37,364.72	\$31,979.61	\$33,069.17

Petitioners did not report income from real property rentals or from admissions as gross sales on its sales tax returns. Income from concession sales and table rentals was reported as taxable sales.

OPINION

Tax Law § 1105(f)(1) imposes sales tax on "[a]ny admission charge where such admission charge is . . . to or for the use of any place of amusement in the state" Tax Law § 1101(d)(2) defines "admission charge" as used in section 1105(f)(1) as an "amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor." A "place of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10]). In its

regulations, the Division includes within the definition of a place of amusement a "fairground or exhibition hall or grounds" (20 NYCRR 527.10[b][3]).

In her determination, the Administrative Law Judge concluded that:

"The statutory definition [Tax Law § 1101(d)(10)] plainly includes within its ambit the admission receipts derived from fees charged to attend the Antique World special events. The critical words in the statute are 'place of amusement' and this term is expansively defined by the statute and the regulations (see, Matter of 1605 Bookstore v. Tax Appeals Tribunal, 83 NY2d 240, 609 NYS2d 144, cert denied ___ US ___, 130 L Ed 2d 19). A privately operated museum has been found to be a place of amusement (Matter of Fort William Henry Corp. v. State Tax Commn., 52 AD2d 664, 381 NYS2d 907) as well as an observatory located in a tall building (Matter of Wien v. Murphy, 28 AD2d 222, 284 NYS2d 303, lv denied 22 NY2d 646, 295 NYS2d 1027). Although the evidence presented by both parties was sparse, it is clear that people attended the special events to view the wares exhibited by vendors, perhaps to purchase an item and perhaps not, in effect, to shop. Surely, shopping, browsing and scrutinizing a vendor's goods are forms of amusement and entertainment. Musical bands or other forms of live entertainment were not required" (Determination, conclusion of law "A," emphasis added).

Petitioners argue that the Administrative Law Judge's conclusion as to what constitutes entertainment and amusement is erroneous. In their brief, they state:

"[t]o call shopping a form of amusement and entertainment is at best an outrage to most men, and at worst, an impermissible transformation of an act of commerce into an act of entertainment" (Petitioners' brief, p. 6).

The question to be decided, therefore, is whether the activities offered at the special events held by petitioners constituted forms of amusement or entertainment.

In Matter of Wien v. Murphy (*supra*), the Court held that the Empire State Building Observatory was a "place of amusement" as that term was defined in Tax Law § 1101(d)(10).

The Court stated:

"[i]n explaining the words 'amusement' and 'entertainment' in various ways, Webster's New Twentieth Century Dictionary (Second Edition), also defines 'amusement' as '(2) the act of amusing; diversion, recreation; the state of being amused', while Black's Law Dictionary

(4th Edition) defines 'AMUSEMENT. Pastime; diversion; enjoyment. A pleasurable occupation of the senses, or that which furnishes it'

"While we recognize that tax statutes are to be strictly construed in favor of the taxpayer [citations omitted], the application of this doctrine cannot serve to defeat the purpose of the statute where there exists clear and unmistakable meaning and intent in the act itself. Here, nothing is left to conjecture nor can any claim of vagueness or indefiniteness be sustained. As a complement to the rule of strict construction, the principle that a tax statute should be interpreted as the ordinary person reading it would interpret it, should prevail [citation omitted], and since the words used in the statutory definition of a 'Place of amusement' are common words, they are to be given their commonly understood meanings unless another meaning is obviously intended" (Matter of Wien v. Murphy, *supra*, 284 NYS2d 303, 307).

"Shopping," "browsing" or "scrutinizing a vendor's goods" are activities that the Administrative Law Judge found common to each of the special events held by petitioners. However, we do not find any evidence in the record to support the Administrative Law Judge's conclusions that "shopping," "browsing" or "scrutinizing a vendor's goods" are forms of "amusement and entertainment" as those terms are commonly understood. While engaging in such activities may be pleasurable to some and burdensome to others (see, Petitioners' brief, p. 6), we cannot conclude that these activities, in and of themselves, constitute "amusement" or "entertainment" as those terms are used in Tax Law § 1101(d)(10). Therefore, to determine whether the admission charges to these special events were properly subjected to sales tax, we must examine the activities conducted at each of them.

Petitioners conducted three types of special events. Each of these events were described in advertising brochures obtained by the auditor as follows:

(a) Antique World Expo, advertised as "one of the finest Antique & Collectible Shows in the Northeast. Featuring 600 Dealers from 22 U.S. States and Canada. The Show attracts over 20,000 people, and is held twice annually";

(b) Antique World Auto Show, advertised as a "swapmeet, Fleamarket and Car Show held annually. Over 200 cars are exhibited along with participating car part Dealers from most regions of the U.S. The Show is highlighted by the 50' [sic] & 60's Cruise-N-Dance held Friday

at 8 p.m. June 22. Hours: Fri. 12 p.m. to 8 p.m. and Sat. 7 a.m. to 6 p.m." (emphasis added); and

(c) Antique World's Arts & Crafts Shows, advertised to "include hundreds of the areas finest Artisans & Craftsmen. Live entertainment as well as many interesting demonstrations are offered to people of all ages" (emphasis added).

The brochures relied on by the auditor contain the only documentary evidence of the type of activities carried on at any of these events. Petitioners testified that no entertainment, bands, music or demonstrations were offered at the Antique World Expo events. In support of this, no entertainment or amusement of any kind is advertised in connection with the Antique World Expo. Absent the conduct of any activities beyond shopping and browsing at the Antique World Expos, there is no evidence to support the Administrative Law Judge's conclusion that the admission charged to attend the Antique World Expos was taxable pursuant to Tax Law § 1105(f)(1) as an admission charge to a "place of amusement."

While shopping and browsing may not be commonly understood to be forms of amusement and entertainment, we believe that live entertainment, interesting demonstrations, an antique car show or a dance are forms of amusement and entertainment and a place offering them meets the definition of a "place of amusement" pursuant to Tax Law § 1101(d)(10). It is reasonable to expect that the patrons who paid admittance to the arts and crafts shows did so in reliance on the advertising brochures stating that entertainment and demonstrations were to be provided. Further, it is reasonable to believe that the patrons who paid admittance to the Antique World Auto Show did so in reliance on the advertising brochures stating that over 200 cars were to be exhibited and that a dance was to be held. Therefore, we sustain the determination of the Administrative Law Judge insofar as she concluded that admission charges to the arts and crafts shows and the Antique World auto shows were subject to sales tax as admission charges to a "place of amusement."

The Division has taken exception to that portion of the determination of the Administrative Law Judge which found that the audit results were erroneous and which

accepted the calculations supplied by petitioners as proof of admissions revenues from the special events. The Administrative Law Judge concluded that the auditor's determination that records of admissions would not be provided was reasonable under all of the circumstances.

Further, she concluded that the audit method employed (use of advertising brochures to estimate admission revenues) was reasonably calculated to reflect the tax due and was not irrational or arbitrary. However, the Administrative Law Judge concluded that petitioners met their burden of proof to show that the audit results in this case greatly overstated the amount of admission fees collected during the audit period. We find that the Administrative Law Judge correctly and fully considered the evidence presented and correctly applied the law on this issue. Therefore, we affirm the conclusion of the Administrative Law Judge on this issue for the reasons set forth in her determination.

Finally, petitioners argue that their failure to comply with the sales tax law was due to reasonable cause and not to willful neglect because of their reliance on the advice of their accountant. We disagree with petitioners' position and affirm the determination of the Administrative Law Judge on this issue for the reasons set forth in her determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Antique World, Inc., Donald A. Alessi and Louis A. Berrafato is granted to the extent that the fees charged for admission to the Antique World Expos are not considered taxable as admission charges to a "place of amusement," and is in all other respects denied;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is modified in accordance with paragraph "1" above, but in all other respects is affirmed;

4. The petitions of Antique World, Inc., Donald A. Alessi and Louis A. Berrafato are granted to the extent indicated in paragraph "1" above and in conclusion of law "D" of the Administrative Law Judge's determination, but in all other respects are denied; and

5. The Division of Taxation is directed to modify the notices of determination dated March 12, 1992 and March 23, 1992 in accordance with paragraph "4" above, but such notices are otherwise sustained.

DATED: Troy, New York
February 22, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner