

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| PETER SCHER | : | DECISION |
| | : | DTA NO. 819844 |
| 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 October 28, 2001. | : | |

Petitioner Peter Scher, 601 East 20th Street #6B, New York, New York 10010, filed an exception to the determination of the Administrative Law Judge issued on November 10, 2004. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation properly assessed use tax on tangible personal property that petitioner purchased in Brazil and brought into New York State upon his return from Brazil.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On October 28, 2001, while on American Airlines Flight 950 from Brazil, petitioner, Peter Scher, prepared a United States Customs Declaration (Customs Form 6059B [012799]) (“Customs Declaration”) providing information concerning various items that he had purchased in Brazil. On the back of the Customs Declaration, petitioner listed each item (as well as its value) that he acquired while abroad, as follows: refrigerator magnets - - value of \$1.25, glass bottles - - value of \$2.50, decorative pins - - value of \$1.25, earrings - - value of \$16.50, a wood carving - - value of \$3.50, a necklace with pendant (gold, silver, platinum [“GSP”]) - - value of \$32.50, a geode - - value of \$8.00, handbags - - value of \$11.00, a pair of pants - - value of \$35.00, a bracelet - - value of \$15.00, a pair of shoes - - value of \$40.00, 2 DVDs - - value of \$37.00, a bracelet (GSP) - - value of \$580.00, an emerald - - value of \$1,100.00, a bracelet (GSP) - - value of \$550.00 and a t-shirt - - value of \$3.50.¹ Petitioner declared \$2,424.25 as the total value for the items listed above. On the Customs Declaration, petitioner listed his United States address as 601 East 20th Street, Apartment 6B, New York, New York 10010.

Upon review of the Customs Declaration, the Customs Officer, after allowing the duty free purchase of an \$1,100.00 emerald and the \$400.00 duty free exemption, determined that duty in the amount of \$37.00 was due. Petitioner paid the duty.

¹ Petitioner listed a total of 16 items on two customs declarations. The sum total of the reported values for the 16 items is \$2,437.00. It is noted that lines have been drawn through the pair of pants, the pair of shoes and the t-shirt listed on the Customs Declaration. The significance of the drawn lines is not explained. The Customs Officer’s computation of the amount of duty due appears in the “Customs Use” section of one Customs Declaration.

Subsequently, on October 15, 2002, the Division of Taxation (the “Division”) sent a letter to petitioner which stated, in pertinent part, as follows:

A review of United States Customs Declarations² shows you bought tangible personal property outside of the United States and brought it into New York State. A New York State Use Tax may be due. The taxable value of the property that you brought into New York State on 10/28/01 was valued at \$2,346.75.

The New York State Tax Law imposes a use tax on New York resident purchases made outside of New York which would be subject to sales tax if the purchases were made in New York. The use tax provision was adopted in 1965 and is computed at the state and local rate in effect where the items are used.

Any use tax is IN ADDITION to the duty imposed and paid to U.S. Customs at the time of entry into the United States. The use tax is payable within (20) twenty days. . . .

If you have previously paid this tax, you are requested to furnish a copy of your cancelled check. The check should clearly indicate our deposit serial number which is stamped on the face of all checks we receive.

If you have not paid the use tax due, you should submit your payment. The computed use tax due based on the tax rate as determined from your customs declaration applied to the above shown purchases is \$193.60.³ The current interest amount due on your unpaid tax amount is \$12.08. This interest cannot be waived under the tax statute.

The penalties provided for by law for failure to remit sales and use tax timely will not be imposed provided you make full disclosure and payment of \$205.68 within (30) thirty days. . . .

To avoid imposition of penalties on any other unpaid use tax obligation you are advised to disclose these purchases now and to compute the applicable tax and interest amount due. The interest rate is one percent (1%) per month from the date due and payable. If you are unable to compute your exact tax and interest amount because of missing sales receipts you are requested to make a reasonable

² Apparently, the United States Customs Service has agreed to notify the Division of the import of goods into New York by New York residents. Information regarding the exact nature or content of the agreement has not been placed in the record.

³ The tax rate in this case is 8.25% ($\$193.60/\$2,346.75$).

estimate of your unpaid use tax for the past three years. (Capitalization in original.)

The Division issued to petitioner a Notice of Determination (assessment number L-022075454-5), dated March 6, 2003, assessing tax due in the amount of \$193.60 plus penalty in the amount of \$48.31 and interest in the amount of \$32.64 for a total amount due of \$274.55.

The tax due was estimated in accordance with Tax Law § 1138. The computation section of the notice contains the following explanation of the assessment:

Section 1101(b)(7) of the Tax Law, in part, defines ‘use’ as ‘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. . . .’

We have determined that you owe compensating use tax, interest, and any applicable penalties on the items you purchased outside of New York State and subsequently brought into the state through U.S. Customs, under section 1110, 1138 and 1145 of the Tax Law.

Petitioner requested that the Division obtain authorization to release to him a copy of the Customs Declaration that he submitted to Customs at the John F. Kennedy Airport on October 28, 2001 after departing from his flight from Brazil. On August 4, 2004, upon obtaining authorization, the Division sent petitioner a copy of his October 28, 2001 Customs Declaration.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that in order to obtain summary determination, the moving party must submit documents showing that there is no material issue of fact and that the facts mandate a determination in the moving party’s favor. She also observed that inasmuch as summary determination is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where a material issue of fact is arguable.

The Administrative Law Judge recited the provisions of Tax Law § 3003 concerning the content of a 30-day letter regarding a proposed determination. The Administrative Law Judge also set forth applicable provisions of the Tax Law and regulations regarding the imposition of a tax on the use within New York of tangible personal property purchased by a New York resident outside the State. The Administrative Law Judge found that a use tax was properly imposed on petitioner as he purchased tangible personal property in Brazil and brought it into New York.

The Administrative Law Judge rejected petitioner's argument that the Notice of Determination should be canceled because the Division failed to give him an accurate accounting of the computation of the use tax. The Administrative Law Judge found that the Division sent petitioner a letter adequately notifying him that use tax in the amount of \$193.60 was due on tangible personal property having a taxable value of \$2,346.75 which petitioner had brought into New York on October 28, 2001 and reported on his Customs Declaration. The Administrative Law Judge also found that the Notice of Determination issued by the Division stated the amount of tax due and also stated that use tax was being assessed under sections 1110, 1138 and 1145 of the Tax Law.

The Administrative Law Judge found petitioner's contention that the manner in which he was treated by Division personnel while trying to obtain a copy of his Customs Declaration justified cancellation of the Notice of Determination to be without merit.

The Administrative Law Judge found that there was a delay in petitioner's receipt of the Customs Declaration from the Division. However, the Administrative Law Judge held that the Division's October 15, 2002 letter to petitioner and the Notice of Determination adequately notified petitioner of the basis of the assessment and the amount of tax due. Further, the

Administrative Law Judge held that pursuant to Tax Law § 3003, such delay did not invalidate the Notice of Determination.

As a result, the Administrative Law Judge found that there was no material and triable issue of fact requiring a hearing and granted the Division of Taxation's motion for Summary Determination.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that since he had difficulty obtaining a copy of his Customs Declaration form from the Division, he was unable to verify whether or not the Division's calculation of use tax was correct. Petitioner also claims that he is the victim of selective enforcement of the provisions of the Tax Law. As a result, petitioner suggests that the tax, penalty and interest should be canceled. Notably, petitioner does not argue that he is not liable for the tax at issue.

The Division argues, in opposition to the exception, that the use tax was asserted based on the information petitioner supplied in his customs declaration. The Division notes that petitioner took no steps to obtain a copy of this declaration himself. Instead, he relied on the efforts of the Division to obtain permission from the United States Customs and Border Protection Office to release a copy of the form to him. The Division points out that petitioner does not deny that use tax is due on the items he brought into New York from Brazil.

OPINION

Petitioner has presented substantially the same arguments on exception as were considered and rejected by the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and correctly applied the

relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Peter Scher is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Peter Scher is denied; and
4. The Notice of Determination dated March 27, 2003 is sustained.

DATED: Troy, New York
June 2, 2005

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner