

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions
of
DAVID HAZAN, INC.
F/K/A DAVID FUR COUTURE, INC.
AND THE ESTATE OF DAVID HAZAN,
AS OFFICER OF DAVID FUR COUTURE, INC. : DETERMINATION

for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1978
through February 28, 1983.

Petitioners, David Hazan, Inc. f/k/a David Fur Couture, Inc. and the Estate of David Hazan, as officer of David Fur Couture, Inc., c/o Victor Hazan, Administrator of the Estate of David Hazan, deceased, Calle Della Testa Cannaregio 6125, 3012 Venice, Italy, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through February 28, 1983 (File Nos. 48541 and 48542).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 10, 1987 at 9:15 A.M., with all briefs to be filed on or before July 10, 1987. Petitioners appeared by Raucher, Ehrlich & Laracuenta, P.C. (Fred Ehrlich, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether certain of petitioners' sales took place in New York State, thereby subjecting the receipts therefrom to New York State sales tax.

FINDINGS OF FACT

1. On October 27, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, David

Fur Couture, Inc., in the amount of \$15,794.63, plus interest of \$1,735.98, for a total due of \$17,530.61 for the period March 1, 1982 through February 28, 1983. On the same date, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, David Fur Couture, Inc., in the amount of \$151,969.00, plus interest of \$55,397.46, for a total amount due of \$207,366.46 for the period September 1, 1978 through February 28, 1982. On the same date, officer assessments were issued against David Hazen (sic), officer of David Fur Couture, Inc., in the identical amounts and for the identical periods issued against the corporation.

2. Petitioner, by its president, David Hazan, executed a series of consents extending the period of limitation for assessment of sales and use taxes for the period September 1, 1978 through August 31, 1981 to December 20, 1983.

3. Petitioner David Fur Couture, Inc. ("the corporation"), a corporation which had a place of business in the City of New York, was engaged for over 35 years in the business of manufacturing, storing, cleaning and selling furs at retail.

4. Upon audit, the Audit Division discovered that the corporation's books and records were in good condition, being both complete and adequate. Therefore, the Audit Division decided to do a test period audit and received permission from petitioners' accountant, Harry Rossman, CPA, to perform a test period audit using the test period June 1, 1981 through August 31, 1981 and the month of October 1980. A test of nontaxable sales revealed that sales invoices were filed in numerical order and that all sales for the test period were accounted for and could be traced back to the sales journal. All out-of-state sales were found to be properly substantiated with acceptable delivery receipts for commercial carriers. Foreign sales made to persons leaving the United States were supported with letters titled "Certificates of Export for Tax Exemption".

5. It was the practice of the corporation, in situations where a sale was made to a person leaving the United States, to have its merchandise delivered to the customer's airline at Kennedy Airport for ultimate delivery to the passenger. A messenger employed by the corporation

delivered the furs from its New York City store to Kennedy Airport immediately prior to the customer's departure. The delivery person would obtain a receipt from someone behind the airport ticket counter confirming receipt of the package, but these receipts were destroyed by petitioners upon the return receipt from the customer of the Certificate of Export for Tax Exemption.

6. These certificates of export for tax exemption which were kept on file by the corporation stated the passenger's name, home address, departure date and time, airline and flight number, the passenger's itinerary and a description of the merchandise. The salient, pre-printed language on the form which was attested to by an airline employee or steward read as follows:

"I hereby certify that the above named passenger while aboard the above indicated flight, and outside the territorial limits of the United States, opened a package in my presence. The package was from David Fur Couture, Inc., of 50 West 57 Street, New York City, and its contents were described as follows: [Blank]. The articles contained in the package appeared to be those so described."

Following this attestation by an airline steward or employee, a statement which was followed by the passenger's signature read as follows:

"I hereby attest that I am the passenger named above; that I purchased the above described furs from David Fur Couture, Inc.; that these articles were wrapped and sealed by the vendor before delivery to me; that I opened the package for the first time outside the territorial limits of the United States; and that said furs were not used by me within the United States."

The following line was printed at the bottom of the form below the signature of the passenger:

"Fraudulent use of this certificate to secure exemption will subject the guilty parties to prosecution and fine or imprisonment or both upon conviction."

7. These certificates of export for tax exemption were prepared on a form of unknown origin and all of the information except for the signatures of the airline steward or employee and customer/passenger was provided by David Fur Couture, Inc. The customer was instructed to secure the airline steward or employee's signature, sign it himself, and mail the certificate back to the corporation in New York City from the passenger's destination in the envelope provided for said purpose.

8. The Audit Division did not accept these certificates of export for tax exemption submitted by petitioner as substantiation of sales for export during the period in issue. All

foreign sales were disallowed, yielding additional taxable sales of \$2,081,612.00, and resulting in additional sales tax liability of \$167,763.63.

9. David Hazan, president of David Fur Couture, Inc., was the manager of the family business known as David Fur Couture, Inc. He signed all of the tax returns submitted into evidence for the period covered by the audit.

10. Petitioners contend that the imposition of sales tax upon the subject transactions violates the United States Constitution and applicable Federal statutes, and that Tax Advisory Opinion A-81(68)S is an unconstitutional interference with Federal regulation of imports and exports.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28. Further, 20 NYCRR 525.2(a)(3) provides that:

"[t]he 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."

B. That, in the instant case, petitioners submitted no credible documentation or testimony which demonstrated anything other than transfer by the corporation to its customer while the customer was still in the State of New York. Although petitioners were able to show that the merchandise was delivered to an international air carrier at Kennedy Airport, they were unable to sustain their burden of showing that delivery actually took place outside of the territorial boundaries of the State of New York. In fact, the Certificate of Export for Tax Exemption was carefully drafted so that employees or stewards of the airline would not attest to the fact that the package was delivered outside of the boundaries, but only that the package was opened outside of the territorial limits of the United States. This situation differs from a transaction where delivery is made to airline ticket counters and the customer does not take possession until arriving at his or her destination. In such a case, there is no tax because the petitioner takes possession outside New York State (Matter of M & B Appliances, Inc., State Tax Commission, April 25, 1984).

Since petitioners did not carry their burden of showing where possession of the merchandise was taken by its customers, it must be inferred that possession was taken within the State of New York and that such sales were properly held subject to the sales tax (Matter of Jacques Francais Rare Violins, Inc., State Tax Commission, October 5, 1984).

C. That petitioners' reliance on Richfield Oil Corp. v. State Board of Equalization (329 US 69) and Harder's Express v. State Tax Commission (70 AD2d 1010) for the proposition that the goods sold were exempt from taxation because they had entered an "export stream" is misplaced. In those cases no completed sale had occurred. The goods were transferred to a common carrier for delivery out of state. In the instant case, petitioners did not carry their burden of showing that the goods had been delivered to a common carrier and therefore the sales occurred in New York State.

D. That David Hazan, as officer of David Fur Couture, Inc., was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and, therefore, is personally liable for sales and use taxes due from David Hazan, Inc. f/k/a David Fur Couture, Inc. in accordance with section 1133(a) of the Tax Law (Matter of A-1 Fence Company, Inc., State Tax Commission, August 7, 1981).

E. That the constitutionality of the laws of the State of New York and their application in particular instances is presumed at the administrative level.

F. That the petitions of David Hazan, Inc. f/k/a David Fur Couture, Inc. and the Estate of David Hazan, as officer of David Fur Couture, Inc., are denied and the notices of determination and demands for payment of sales and use taxes due dated October 27, 1983 are sustained.

DATED: Albany, New York
April 21, 1988

ADMINISTRATIVE LAW JUDGE