

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARY RINALDI SWET	:	DETERMINATION
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, 1982	:	
through November 30, 1985.	:	

Petitioner, Mary Rinaldi Swet, 14 Cox Avenue, West Hampton Beach, New York 11978, filed a 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, 1982 through November 30, 1985 (File No. 805287).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 19, 1989 at 1:15 P.M., with additional evidence to be submitted on or before December 1, 1989. Petitioner appeared by Kase & Druker, Esqs. (James O. Druker, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether purchases made by petitioner which were subsequently resold to her clients at her cost plus a fee based upon a percentage of her cost were properly determined to be subject to sales tax by the Division of Taxation.

II. Whether the Division of Taxation properly assessed sales tax on purchases made by petitioner for a client which were subsequently installed by a contractor for such client as part of a capital improvement.

III. Whether certain fees or commissions charged by petitioner to her clients constituted receipts from sales of tangible personal property and were, therefore, subject to the imposition

of sales or use tax.

FINDINGS OF FACT

Pursuant to a field audit of Mary Rinaldi Swet d/b/a Mary Michael Rinaldi Interior Design ("petitioner"), the Division of Taxation, on June 11, 1986, issued to such petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$11,153.28, plus interest, for a total amount due of \$14,130.31 for the period December 1, 1982 through November 30, 1985.

Previously, on February 27, 1986, petitioner executed a consent extending the period of limitation for the assessment of sales and use taxes whereby she agreed that such taxes for the period December 1, 1982 through February 28, 1983 could be assessed at any time on or before June 20, 1986.

During the period at issue, petitioner was an interior decorator and designer who consulted, designed rooms and provided furnishings for homeowners and commercial accounts in Suffolk and Nassau Counties and in New York City. Books and records for the entire audit period were requested by the auditor. Petitioner produced sales tax returns, Federal and State income tax returns, a cash book which set forth purchases and cash receipts, a client folder which contained the final statements sent by petitioner to her clients, monthly bank statements and cancelled checks. Sales journals, sales invoices (other than the final statements) and worksheets for sales and Federal income tax returns were not provided to the auditor.

From the aforesaid records, the auditor determined that sales tax accrued had not been remitted in a timely manner, i.e., sales tax was accrued until each job was completed. Gross sales were not reported on petitioner's sales tax returns. Personal and business checkbooks were combined. Petitioner's cash books were categorized by the auditor as being "confused and out of sequence." The auditor thereupon requested petitioner to reconstruct her data for a one-year period (December 1, 1982 through November 30, 1983), but she was unable to do so. Gross sales (commission income) and net income reported on petitioner's 1983 and 1984 Federal income tax returns could not be reconciled to her books and records nor to the sales tax returns

filed during these years. The books and records were, therefore, deemed to be inadequate due to the lack of an audit trail.

The auditor (along with petitioner) then attempted to summarize petitioner's cash books and client folders. The cash books revealed that petitioner had performed services for 28 different clients (excluding multiple jobs for two clients) during the audit period. Petitioner was able to produce 23 client folders and 14 final statements for the period. The auditor categorized the figures contained in the cash books into fees, purchases, expenses and other on a client-by-client basis. Petitioner was asked to summarize the cash books in a similar manner and to provide specifics regarding wholesale versus retail purchases and the sales tax paid or billed. By comparing these summaries, the auditor determined audited gross sales to be \$337,214.90 for the audit period. Audited taxable sales and sales tax due thereon were computed, by locality (with tax due at the applicable rate), as follows:

<u>Locality</u>	<u>Taxable Sales</u>	<u>Sales Tax Due</u>
Suffolk County	\$112,580.98	\$ 8,266.43
Nassau County	26,309.42	2,170.52
New York City	<u>193,675.68</u>	<u>15,978.23</u>
Total	\$332,566.08	\$26,415.18

An allocation of sales tax paid at retail and per sales tax returns was performed to correct errors in locality reporting and to allow credit when tax was paid on petitioner's purchases. While she had remitted sales tax in the amount of \$12,400.93 with her returns, the auditor could identify only \$12,111.56 with clients specifically analyzed through petitioner's cash books. Total sales tax paid was determined to be \$15,262.90 and, when applied to audited tax due of \$26,415.18, additional tax due was calculated to be \$11,153.28 which is the amount of the assessment at issue herein.

Petitioner's fees were computed in one of the following ways:

- (a) Purchases were made, at wholesale, through the design trade which is the decorating and designer building also known as 979 in the trade. Petitioner would add in her 30 percent commission when billing her client for such purchases; or
- (b) Because purchases from the decorating and designer building were expensive,

petitioner would sometimes purchase at retail. The client would then be billed for petitioner's expenditures plus a designer fee which would be computed in a manner similar to that set forth in subparagraph (a) or, in some cases, on an hourly basis or by the design. For some of the retail purchases, the client would accompany petitioner and make the actual purchase. In most cases, however, petitioner would make the purchase herself.

In her perfected petition (Exhibit "C"), petitioner conceded that she owed approximately \$4,333.00 in sales tax on commissions charged in conjunction with wholesale purchases made on behalf of her clients. In these instances, she was reimbursed the net price plus 30 percent (her commission). Petitioner stated that she had failed to pay tax on the commission due to the fact that she was unaware that such commissions were taxable. In addition, petitioner conceded that she owed \$2,000.00 in tax from a particular job (later identified as the Jacobs job) where the client was supposed to pay the sales tax directly (petitioner had used her resale number), but failed to do so.

At the hearing, petitioner conceded that, in instances where she bought merchandise at a designer discount and then billed the client for the cost plus her commission, these purchases were taxable along with the fees when based upon a percentage thereof. Subsequent to the hearing, petitioner submitted a list of items which she agreed had been properly assessed (which comprised the approximately \$4,333.00 referred to in the perfected petition). These items were as follows:

<u>Client</u>	<u>Items Conceded</u>	<u>Taxable Amount</u>
Scharf	Fees	\$ 1,767.00
	Resales	5,344.00
Jacobs	Resales	32,005.00
Bouy, Unit 11	Resales	3,027.00
	Fees	2,000.00
Konheim	Fees	7,735.00

With respect to the Scharf account, an examination of the audit report indicates that tax was assessed on fees totalling \$1,944.29, purchases of \$5,878.24 and expenses of \$133.16. Petitioner paid sales tax (either at the time of the purchases or with the filing of sales tax returns) in the amount of \$342.10. Tax was assessed at the rate of 7.25 percent on all but

\$400.00 worth of purchases (the applicable rate at the time of these purchases was 7.50 percent). Total tax due on this account is \$577.79 ($\$7,555.69 \times .0725$ [$\$547.79$] + $\$400.00 \times .075$ [$\$30.00$] = \$577.79). Petitioner has conceded tax liability on fees and resales totalling \$7,111.00 (tax due thereon at 7.25 percent would be \$515.55). Petitioner, therefore, concedes liability for all but \$62.24 of the total assessment (\$577.79) relating to this account.

On the Jacobs account, tax was assessed on fees in the amount of \$13,871.35, purchases of \$41,688.91 and expenses of \$779.51. Tax due thereon (at 8.25 percent) is \$4,648.03. Petitioner conceded liability on resales totalling \$32,005.00 with tax due thereon in the amount of \$2,640.41. Tax had previously been paid in the amount of \$585.98. Remaining at issue, therefore, is \$1,421.64 ($\$4,648.03 - \$2,640.41 - \585.98).

For Bouy, Unit 11, tax was assessed on fees of \$3,138.59 and purchases of \$9,256.02 with tax due thereon (at 7.5 percent) in the amount of \$929.60. Petitioner conceded liability on resales and fees totalling \$5,027.00 with tax due thereon in the amount of \$377.03. Tax had previously been paid in the amount of \$578.27. Remaining at issue, therefore, is \$25.70.

On the Konheim account, tax was assessed on fees of \$8,642.03, purchases of \$32,788.13 and expenses of \$804.10 with tax due thereon of \$3,484.33. Petitioner conceded liability on fees of \$7,735.00 with tax due thereon of \$638.14. Tax had previously been paid on purchases or with returns in the amount of \$1,916.05. Remaining at issue, therefore, is tax assessed in the amount of \$930.14.

Based upon the foregoing, total concessions by petitioner were in the amount of \$4,171.13, thereby reducing the portion of the assessment at issue to \$6,982.15. It is unclear how petitioner arrived at the amounts of resales and fees which were conceded to be taxable. In addition, it is also unclear whether petitioner concedes an additional tax liability on the Jacobs account due to the failure of the client to pay the tax directly. As noted above, petitioner admitted liability for sales tax in instances where she bought merchandise at a designer discount and then billed the client for her cost plus commission. It must, therefore, be presumed that the balance of the assessment (exclusive of the capital improvement certificate issues which will

hereinafter be addressed) relates to purchases made at retail along with commissions computed thereon.

Petitioner submitted certificates of capital improvement for work performed by Creative Millwork (contractor) for two of her clients, Goldstein and Lipton. She contends that materials purchased by her in connection with the work performed should be exempt from tax on the basis that such materials became part of a capital improvement.

With respect to the purchases made at retail by petitioner for her clients, it is her position that such purchases were made as an agent for these clients and, as such, are exempt from sales or use tax. Admittedly, petitioner did not enter into a written agreement with any of the clients which authorized her to act as their agent nor did she communicate to vendors (either verbally or by notation on purchase invoices) that she was purchasing the merchandise as agent for the client.

Tax was not assessed by the Division of Taxation on any purchases made by the clients, but tax was assessed on all purchases (and fees based thereon), whether at wholesale or retail, made by petitioner. Tax was not assessed on fees charged solely for designer services and which were not computed based upon the amounts expended by the clients for the purchase of services and materials.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes sales tax upon the receipts from every retail sale of tangible personal property. Tax Law § 1101(b)(3) defines the term "receipt", in part, as "[t]he amount of the sale price of any property and the charge for any service taxable under this article...."

Petitioner has conceded liability for sales tax in those instances wherein she purchased merchandise at a designer discount and then billed the client for the cost plus her commission (see, Finding of Fact "4"), acknowledging that both the purchases and her fee were subject to tax. Since she contests the assessment of tax in cases where she purchased merchandise at retail (petitioner contends that she acted as agent for the client), the issue of whether or not petitioner

made such purchases as agent for her client must be examined.

"An agency relationship is created as the result of conduct by the parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. However, the principal must in some manner indicate that the agent is to act for him, and the agent must act, or agree to act on his behalf, and subject to his control." (2 NY Jur 2d, Agency, § 18.)

As indicated in Finding of Fact "6", supra, petitioner had no written authorization from her clients to act as their agent. While, admittedly, a formal written contract is not always required to prove the existence of a principal-agent relationship, petitioner has produced no evidence in support of her contention that such a relationship existed. Moreover, petitioner acknowledges that, at the time of the retail purchases, she did not disclose to the vendors that she was acting as a purchasing agent for the various clients. It is clear, therefore, that while petitioner may have believed that she was acting as an agent, the legal relationship of an agent acting for and on behalf of a principal was never created and purchases made by petitioner which were subsequently sold to her clients were properly subjected to the imposition of sales tax.

Since it has hereby been determined that petitioner was not acting as an agent on behalf of her clients, the entire amount of her bill (the cost of her purchases plus her fee or commission) is taxable since the merchandise was resold to the client and the fee or commission is considered to be a part of the selling price of tangible personal property subject to tax (see, Matter of T. K. Design, Inc., State Tax Commission, June 28, 1985). Despite petitioner's arguments to the contrary, it is immaterial whether she made the purchases at wholesale or retail. The only apparent difference between wholesale and retail purchases is that petitioner paid no sales tax upon the wholesale purchases and tax was, therefore, assessed on the entire bill (purchases plus commissions) issued to the client. In the case of retail purchases, petitioner was given credit for sales tax paid on these retail purchases in all instances where payment thereof was documented. The fees or commissions which were tacked onto petitioner's costs are, nonetheless, taxable as part of the selling price of the goods to the client. Petitioner's contention that a "pyramiding" of taxes results from assessing tax on her retail purchases is without merit since petitioner has been given credit for tax paid on these purchases.

B. As indicated in Finding of Fact "5", supra, petitioner produced certificates of capital improvement which she contends render nontaxable her purchases of materials used in a capital improvement. With respect to Exhibit "1", a certificate issued by the customer (Goldstein) to the contractor (Creative Millwork), such certificate is undated and contains a description of neither the capital improvement made nor the materials provided. As such, this certificate does not overcome the burden of proving the nontaxability of this transaction. The other certificate, submitted and executed subsequent to the hearing, related to kitchen improvements (new sink, countertops and tiling) performed by a contractor (Creative Millwork) for a customer (Lipton) of petitioner's. Such a certificate does not permit the purchase by a contractor of building materials or other tangible personal property tax free, but merely relieves the contractor of the duty to collect tax from the customer on the labor and materials provided by the contractor in making a capital improvement to the customer's real property. Since petitioner was neither the customer nor the contractor who made the capital improvement (her name was not listed on the certificate), a certificate of capital improvement has no effect whatsoever on the taxability of the materials which she purchased in conjunction with the making of this capital improvement.

C. Tax was not assessed by the Division of Taxation on flat or hourly fees charged by petitioner where such fee was solely for designer services rendered by petitioner and which was not based upon the amounts expended by the client for the purchase of services and materials.

D. The petition of Mary Rinaldi Swet is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to her by the Division of Taxation on June 11, 1986 is hereby sustained in its entirety.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE