STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **SANDRA ANN TORQUATO** For Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 1998.	:	DETERMINATION DTA NO.816973

Petitioner, Sandra Ann Torquato, 24501 Heavenly Court, West Hills, California 91307, 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 year 1998.

On July 3, 1999 and July 20, 1999, respectively, petitioner, appearing *pro se*, and the Division of Taxation by Barbara Billett , Esq. (Justine Clarke Caplan, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by November 8, 1999, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a refund of a portion of the total sales tax paid at the inception of a motor vehicle lease agreement upon petitioner's move to another state with its attendant requirement to pay sales tax on the remaining lease payments to such other state.

FINDINGS OF FACT

1. On April 26, 1997, petitioner, Sandra Ann Torquato, entered into a lease agreement with Toyota Motor Credit Corporation for the lease of a 1997 Toyota Corolla. The lease provided for 36 monthly payments of $189.00 for a total lease amount of $6,804.00. The lessor collected sales tax of $685.02 at the inception of the lease based on petitioner's total payment of $8,059.07.[1]

2. There is no dispute that petitioner was a resident of New York State at the inception of the lease. Petitioner made eleven lease payments before she relocated to California in February 1998. Thereafter, petitioner's lease payments increased by $15.59 per month. Petitioner inquired and was advised by the lessor that the increase represented California sales tax on each of the remaining 25 lease payments, and that California "would not honor the prepaid state tax already paid to New York."

3. On March 18, 1998, petitioner filed an Application for Credit or Refund ("Form Au-11") seeking a refund of a portion of the New York sales tax collected at the inception of the lease. Petitioner calculated the amount of refund claimed by dividing the total sales tax paid ($685.02) by the number of lease payments (36) to arrive at the amount of sales tax per month ($19.03). Petitioner multiplied such amount ($19.03) by the number of lease payments she made while in New York (11) to arrive at $209.31. Petitioner then subtracted such amount ($209.31) from the total sales tax paid ($685.02) to result in the amount of claimed refund ($475.71). In sum, petitioner takes the position that although the tax was paid at the inception of the lease, her move to California constituted a change of circumstances which should allow her to apportion the tax equally among each of the lease payments, to pay tax only on those payments made while

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[1] The tax was imposed at the Nassau County rate of 8½% on the $6,804.07 total amount of the lease payments ($189.00/month x 36 months) plus petitioner's down payment amount of $1,255.00.

she was living in New York, and to receive a refund of the balance of tax apportioned to those remaining payments made (or to be made) when petitioner was no longer living in New York.

4. The Division of Taxation ("Division") denied the refund claim by letter dated May 22, 1998 for the following reason:

> When a lease, an option to renew or similar provision, or a combination of these, is entered into on or after June 1, 1990, the amount due under the agreement and for the entire period covered (including renewals and/or options) will be immediately subject to sales tax.
>
> There is no provision in the New York State sales and use tax law to allow for a refund of sales tax paid on the lease of a vehicle where the lessee relocated to another state where they may also be required to pay tax.

5. Petitioner challenged this denial by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. Petitioner opted to have the conference decided upon correspondence and, after submission and review of such correspondence, a Conciliation Order (CMS No. 168676) dated January 15, 1999 was issued sustaining the Division's denial of petitioner's refund request.

6. Petitioner continued her challenge by filing a petition with the Division of Tax Appeals. Petitioner's position remains that she should be entitled to a refund of part of the sales tax paid, calculated as apportioned to the 25 payments on the lease remaining after she moved to California. Petitioner points out that without such a refund she will have paid the total New York sales tax, plus an additional $389.75 in California sales tax (15.59 x 25 payments = $389.75), rather than New York sales tax on only those lease payments made while petitioner was living in New York and the California sales tax thereafter.

7. The Division continues to oppose petitioner's refund claim for the reasons set forth in its May 22, 1998 refund denial letter. The Division's letter brief states that the tax was properly

collected in the first instance (Tax Law §1111[i][A]; 20 NYCRR 527.15), and that there is no provision under which such tax, properly imposed and collected, may be refunded under the circumstances presented (Tax Law §§1119, 1139). Finally, the Division points out that petitioner may be entitled to a reciprocity credit from the State of California based on the New York taxes already paid (20 NYCRR 527.15[f]), and it has advised her by letter to contact the State of California in this regard.

CONCLUSIONS OF LAW

A. The words "sale," "selling" or "purchase" mean any transaction in which there is a transfer of title or possession or both of tangible personal property for a consideration. Among the transactions included in the words "sale," "selling" or "purchase" are exchanges, barters, rentals, leases or licenses to use or consume tangible personal property (Tax Law § 1101[b]; 20 NYCRR 526.7[a][1],[2]).

B. Tax Law § 1111(i)(A) (as added by L 1990, ch 190; amended by L 1992, ch 20) provides special rules for the payment of sales and use taxes on certain leases of motor vehicles, vessels and noncommercial aircraft. Rather than the tax being due upon each periodic lease payment, the Tax Law provides that with respect to leases of motor vehicles that cover a period of one year or more, the tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease (20 NYCRR 527.15[a]).

C. A refund or credit is allowable for any tax, penalty or interest which was erroneously, illegally or unconstitutionally collected or paid (Tax Law § 1139; 20 NYCRR 534.8[a][1]). In this case, the lessor collected and petitioner paid the proper amount of sales tax as required by Tax Law § 1111(i). There is no claim or evidence that the tax was erroneously, illegally or unconstitutionally collected or paid, and there is no provision under Tax Law §1139 for a refund

of any portion of the sales tax properly paid at the inception of the lease when or if the leased vehicle is removed to another jurisdiction.[2]

D. The petition of Sandra Ann Torquato is hereby denied and the Division's May 22, 1998 denial of petitioner's claim for refund is sustained.

DATED: Troy, New York
March 30, 2000

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[2] In fact, 20 NYCRR 527(e) prevents allowance of a refund or credit under circumstances where the tax is paid at lease inception, as required, and the receipts (i.e., lease payments) are not actually paid as in the case of early termination of a lease, failure to exercise an option to renew a lease or bad debt since, under Tax Law §1111(i)(A), such receipts are deemed to have been paid. In this case, there is no claim or evidence that the lease agreement was terminated or canceled, and thus no basis for a refund claim under Tax Law § 1132(e). Any recoupment (or offset) of the tax originally paid on the lease of the vehicle must, as the Division points out, involve petitioner's attempt to secure a reciprocity credit from the State of California (***see,*** 20 NYCRR 527[f]).