STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WARREN J. GROSSMAN	:	DETERMINATION DTA NO. 817112
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 August 23, 1997.	:	

Petitioner, Warren J. Grossman, 145 East 81st Street, Apartment 6A, New York, New York 10028, 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 August 23, 1997.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 28, 2000 at 10:30 A.M. Since neither party requested additional time in which to file a brief, the six-month period for the issuance of this determination began on January 28, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claim for refund of the use tax assessed on tangible personal property which he had purchased overseas.

II. Whether the audit selection process applied to this case violates the equal protection clauses of the United States Constitution and the Constitution of the State of New York.

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FINDINGS OF FACT

1. On August 23, 1997, prior to arrival in the United States, petitioner, Warren J. Grossman, as head of his family, prepared a United States Customs Declaration providing information concerning various items which had been purchased in Europe. The items listed on the back of the Customs Declaration included the following: shirts, place mats, children's clothing, a model boat, charms, a necklace and earrings. Petitioner declared $1,534.00 as the total value for the items listed above. On the Customs Declaration petitioner listed his United States address as 145 East 81st Street, Apartment 6A, New York, New York.

2. Upon review of the Customs Declaration, the Customs officer, after allowing duty-free exemptions totaling $800.00, determined that duty in the amount of $63.00 was due. Petitioner paid the duty.

3. Subsequently, on May 1, 1998, the Division of Taxation ("Division") sent a letter to petitioner which stated, in pertinent part, as follows:

> A review of United States Customs Declarations[1] 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. You valued the property at $1,530.00 and brought it into New York State on 08/23/97.
>
> 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. . . .

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[1]Apparently, the United States Custom 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.

> 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 $126.22. The current interest amount due on your unpaid tax amount is $8.13. 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 $134.35 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 estimate of your unpaid use tax for the past three years. (Capitalization in original.)

4. On or about May 6, 1998, petitioner paid the total amount due of $134.35.

5. On June 22, 1998, petitioner filed an Application for Credit or Refund ("Form AU-11") seeking a refund of the compensating use tax paid on the items brought through Customs on August 23, 1997. The rationale for his refund claim was that the items were presents for his children, their respective spouses and his grandchildren which were sent to their homes in Kittery Point, Maine and Connecticut. He further claimed that the "items did not stay in New York, nor were they used in New York."

6. The Division denied the refund claim by letter dated August 10, 1998 for the following reason:

> The use tax is imposed on purchases which would normally be subject to the New York State sales tax if the purchase was made within the state. Since you purchased items which you used for gifts and brought them into New York the tax was properly imposed and paid. The tax can not be refunded even if the items were subsequently sent out of the state for use out of the state.

7. Petitioner challenged this denial by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. After a conciliation conference, a Conciliation Order (CMS No. 170071) dated April 23, 1999 was issued sustaining the Division's denial of petitioner's refund request. Petitioner then filed a petition with the Division of Tax Appeals which was received on May 13, 1999.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner does not dispute that he brought tangible personal property into New York from Europe; kept it in the State for about a week; and thereafter, sent it out of State as gifts to various family members. He argues that the use tax calculated on that property was unfairly and arbitrarily assessed against him because he was a New York resident. Petitioner maintains that the use tax should be uniformly assessed on all property brought into New York, not just property brought in by New York residents. He also contends that had he estimated the total value of the property at less than $800.00 (the $400.00 per person duty-free exempt amount), the Division would not have selected his Customs Declaration for audit, nor assessed the use tax against him.

9. The Division asserts that its assessment of the use tax in issue was proper. It maintains that petitioner's storage of the property in New York prior to its shipment as gifts constitutes a use which is subject to tax under Tax Law § 1110(a). The Division contends that it did not engage in discriminatory enforcement of the Tax Law.

CONCLUSIONS OF LAW

A. As relevant here, Tax Law § 1110(a) provides as follows:

> Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person *a use*

> *tax for the use within this state* . . . of any tangible personal property purchased at retail (emphasis added).

Tax Law § 1101(b)(7), 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 . . . of such property."

B. The use tax is not imposed on personal property which is brought into New York State but not "used" before it is subsequently removed from the State. Rather, it is a levy based on the use within this State of tangible personal property purchased at retail (***Matter of Billauer***, Tax Appeals Tribunal, August 8, 1998). The purpose of the use tax is to complement the sales tax by taxing property brought into and used within the State under circumstances that prevent collection of the sales tax (***Matter of Niagara Junc. Ry. Co. v. Creagh***, 2 AD2d 299, 303, 154 NYS2d 229, ***affd*** 3 NY2d 831, 166 NYS2d 74, quoted in ***Matter of Datascope Corp. v. Tax Appeals Tribunal***, 196 AD2d 35, 608 NYS2d 562, 564). "The tax has sometimes been referred to as one levied on the privilege of ownership or possession in the storage, use or consumption of tangible property within the taxing area" (***Matter of Datascope Corp. v. Tax Appeals Tribunal***, ***supra***, 608 NYS2d at 564).

In the instant matter, petitioner admits that he purchased tangible personal property in Europe, brought it into New York, retained it within the State for about one week and then sent it out of the State as gifts. Inasmuch as no sales tax has ever been or could have been imposed upon petitioner for bringing that tangible property into New York and retaining it within the State, a use tax was properly imposed pursuant to Tax Law § 1110(a). Petitioner's contention that his due process rights have been violated by the imposition of the use tax on the tangible property is without merit. Imposition of use tax is not violative of the due process clause since

there is a definite link or minimum connection between New York, petitioner, the property and the transaction sought to be taxed (***Matter of Airlift International, Inc. v. State Tax Commission***, 52 AD2d 688, 382 NYS2d 572; ***see also, Matter of International Telephone and Telegraph Corporation v. State Tax Commission***, 70 AD2d 700, 416 NYS2d 387).

C. Petitioner's alternative claim that the Division's selection process violated the equal protection clauses of both the New York State and United States Constitutions must be rejected. In ***Matter of Balan Printing, Inc.*** (Tax Appeals Tribunal, April 17, 1991), the Tribunal stated as follows:

> Administrative actions and classifications are subject to equal protection review (***see, Matter of Doe v. Coughlin***, 71 NY2d 48, 523 NYS2d 782, 787) under both the United States Constitution (US Const 14th amend) and the New York State Constitution (NY Const, art I, § 11). However, "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination" (***Williamson v. Lee Optical of Okla.***, 348 US 483, 489). Thus, unless the State draws distinctions between similarly situated taxpayers whereby it classifies on the basis of a suspect class or impairs a fundamental right, equal protection only requires that such uneven treatment be rationally related to the achievement of a legitimate governmental purpose and not be palpably arbitrary (***see, Town of Tonawanda v. Ayler***, 68 NY2d 836, 508 NYS2d 171; ***Trump v. Chu***, 65 NY2d 20, 489 NYS2d 455). In addition, within the field of taxation more than in other fields, governmental authorities possess even more flexibility in making classifications and drawing lines which in their judgment produce reasonable systems of taxation (***see, Krugman v. Board of Assessors***, 141 AD2d 175, 533 NYS2d 495, 501; ***Shapiro v. City of New York***, 32 NY2d 96, 343 NYS2d 323, 329, ***appeal dismissed for want of a substantial fed. question*** 414 US 804, ***pet for rehr denied***, 414 US 1087; ***see also, Madden v. Kentucky***, 309 US 83, 87-88). A denial of equal protection will arise only where a purposeful, invidious and intentionally unfair discrimination in the enforcement of a statute is present (***Di Maggio v. Brown***, 19 NY2d 283, 279 NYS2d 161, 166-167; ***People v. Friedman,*** 302 NY 75, ***appeal dismissed for want of a substantial fed. question*** 341 US 907; ***Matter of Doe v. Coughlin, supra***). Equal protection does not require identity of treatment. It only requires that classification rest on some real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary (***Walters v. St. Louis***, 347 US 231, 237).

The equal protection issue raised by petitioner amounts to a claim of discriminatory enforcement. To establish a claim of discriminatory enforcement, petitioner must show not only selectivity in enforcement, but also that the selectivity "arose from an intentional invidious plan of discrimination on the part of the Division" (***Matter of Petro Enterprises***, Tax Appeals Tribunal, September 19, 1991). "It is only where the party affected can show a palpable and deliberate scheme to oppress him while excluding all others who come within the terms of the [statute] that such an objection (unconstitutionality) can be sustained." (***People v. Dahlman*** 82 Misc 2d 927, 371 NYS2d 60, 63, ***affd*** 87 Misc 2d 261, 383 NYS2d 946 [citations omitted].)

In the instant matter petitioner has clearly failed to make such a showing. There is no evidence in the record to show that petitioner was singled out for enforcement, much less the target of an intentional invidious plan of discrimination. Furthermore, there is no evidence indicating that the Division failed to enforce the provisions of Article 28 of the Tax Law except with respect to petitioner. Petitioner was thus simply expected to comply with the provisions of Article 28 of the Tax Law and the Division of Taxation was merely enforcing the Tax Law.

D. The petition of Warren J. Grossman is denied, and the Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
July 06, 2000

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE