STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER SCHER	:	DETERMINATION 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 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 October 28, 2001.

On August 12, 2004 the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel), brought a motion seeking summary determination in the above-referenced matter, pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing *pro se,* filed a response to the Division of Taxation's motion on August 23, 2003, which date commenced the 90-day period for issuance of this determination.

Based upon the motion papers, the affirmation and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. 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.

[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.

2. 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.

3. 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 Declarations[2] 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

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[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).

> 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. 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.

5. 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.

SUMMARY OF THE PARTIES' POSITION

6. In support of its Motion for Summary Determination, the Division submitted the affirmation of Justine Clarke Caplan, a copy of the Notice of Determination issued to petitioner, and a copy of the Customs Declaration that petitioner submitted to Customs at John F. Kennedy Airport on October 28, 2001. The Division's affirmation asserts that petitioner "refused to obtain the Customs Declaration himself even though it would have been quicker and easier" for

him to obtain the Customs Declaration directly from U.S. Customs. It submits that, pursuant to petitioner's request, the Division obtained permission from the U.S. Customs Office to give a copy of the Customs Declaration to petitioner. It further submits that the tax due is a result of petitioner's own Customs Declaration. According to the Division, petitioner does not dispute that tax is owed on the items he brought into New York State upon his arrival from Brazil. Rather, it claims that "petitioner is merely trying to obviate his tax liability based on fabricated procedural technicalities." The Division requests that the petition be dismissed, its Motion for Summary Determination be granted and the Notice of Determination be sustained.

7. In response to the Division's Motion for Summary Determination, petitioner submitted a letter. In that letter, petitioner asserts that the Division has handled this matter poorly and has also failed to live up to its responsibility to him as a taxpayer. He contends that the Division sent the letter dated October 15, 2002 to another taxpayer who forwarded it to him. Petitioner argues that the Division failed to include a copy of the Customs Declaration with the October 15, 2002 letter. He maintains that after he received that letter he made numerous telephone calls to Division staff members in an effort to obtain a copy of the Customs Declaration. However, petitioner claims that these uncooperative employees gave him conflicting information. Petitioner avers that despite numerous requests the Division still has not provided him with an accurate accounting of how the tax was arrived at and therefore he is unable to determine if that amount is correct. He contends that the Division's failure to explain how the tax was computed and the abuse he has received at the hands of the Division warrant the cancellation of the Notice of Determination at issue.

CONCLUSIONS OF LAW

A. 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 (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment 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 the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see, Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

B. Tax Law § 3003 provides in pertinent part that:

> Any first letter of proposed deficiency or determination (commonly called a thirty day letter) . . . and any . . . notice of determination which is issued by the commissioner, which is manually initiated and which is the first such letter or notice issued to the taxpayer with respect to the subject matter of such notice, shall describe the basis for (such as the statutory or regulatory law, or judicial or tax appeals tribunal decision), and identify the amounts (if any) of the tax due. An inadequate description under this section shall not invalidate such letter or notice.

C. 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).

"The compensating use tax is imposed on the use within the State of certain tangible personal property . . . purchased by a New York resident outside of the State, which would have been subject to sales tax if purchased in this state" (20 NYCRR 525.2[b][1][i]).

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."

D. In the instant matter, petitioner does not deny that he purchased tangible personal property in Brazil and brought it into New York. Inasmuch as no sales tax has ever been or could have been imposed upon petitioner for bringing that tangible personal 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 the Notice of Determination should be cancelled because the Division failed to give him an accurate accounting of the computation of the use tax is without merit. The record shows that the Division sent a letter to petitioner 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 he brought into New York on October 28, 2001 and reported on his Customs Declaration. It further shows that the Division issued a Notice of Determination that not only stated the amount of tax due, in the computation section it also stated that the use tax was being assessed under sections 1110, 1138 and 1145 of the Tax Law. I find that the contents of both the October 15, 2002 letter and the Notice of Determination adequately notify petitioner of the basis of the assessment and the amount of tax due (***see***, Tax Law § 3003). It is noted that the taxable value of the tangible personal property used by the Division in its computation of the use tax due is less than the value of the tangible personal property listed by petitioner on his Customs Declaration.

Petitioner's contention that the manner in which he was treated by Division personnel while trying to obtain a copy of his Customs Declaration justifies cancellation of the Notice of Determination, is without merit. Petitioner began trying to obtain a copy of the Customs

Declaration referenced in the Division's letter of October 15, 2002 immediately upon receipt of that letter. He did not obtain a copy of the Customs Declaration from the Division until August 2004. Obviously, there has been a breakdown in communications between petitioner and the Division concerning the availability of a copy of the Customs Declaration at issue. However, even though the specific items listed by petitioner on the Customs Declaration were not identified in the October 15, 2002 letter sent to him, the letter does explain that use tax in the amount of $193.60 is due on tangible personal property having a taxable value of $2,346.75 that petitioner brought into New York State on October 28, 2001 and reported on the Customs Declaration. That letter made petitioner aware of the exact date on which he brought the tangible personal property into New York State, the taxable value of that property and the use tax due on that property. Furthermore, the Division's failure to promptly supply a copy of the Customs Declaration does not negate the fact that both the October 15, 2002 letter and the Notice of Determination adequately notify petitioner of the basis of the assessment and the amount of tax due and it also does not invalidate the Notice of Determination (***see***, Tax Law § 3003).

E. There being no material and triable issue of fact requiring a hearing, the Division of Taxation's Motion for Summary Determination is granted.

F. The petition of Peter Scher is denied and the Notice of Determination (assessment number L-022075454-5), dated March 27, 2003, is sustained.

DATED: Troy, New York
November 10, 2004

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE