

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JERRY SHAPIRO</b>	:	DETERMINATION
	:	DTA NO. 822259
for Revision of a Determination or for Refund of	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Year 2007.	:	

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Petitioner, Jerry Shapiro, 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 2007.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on July 7, 2009 at 10:30 A.M. Petitioner appeared by Neil D. Menashe, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund of sales tax paid upon the purchase of a motor vehicle which was subsequently shipped out of the United States.

***FINDINGS OF FACT***

1. Petitioner, Jerry Shapiro, resides in Lawrence, New York, and is the president and sole owner of Eurex International Corporation (Eurex), a domestic international sales corporation (DISC) located and conducting business in Woodmere, New York.

2. On April 24, 2007, petitioner contracted to purchase from Habberstad BMW of Huntington Station, New York, a 2007 BMW X5 automobile. This purchase was made at the request of one of petitioner's clients located in Gdynia, Poland, and there is no dispute that the purchase was made with the intent that the vehicle was to be exported by ship from the United States to the client in Poland. The purchase agreement lists the "purchaser's name" as Jerry Shapiro, the "company name" as c/o Eurex International, and reflects the imposition and collection of registration fees (\$179.00) and sales tax at the rate of 8.625% (\$5,860.69).

3. By an automobile insurance policy effective May 15, 2007, the vehicle was insured in petitioner's name. The vehicle was registered in petitioner's name, license plates were issued, and a Certificate of Title dated June 19, 2007 was issued in petitioner's name.

4. The vehicle remained at Habberstad's premises until approximately July 11, 2007, when the vehicle was transported by flatbed truck to the Port of New York and was placed in a 20-foot automobile shipping container. On July 18, 2007, the vehicle in its container was loaded onto the ocean-going vessel Ever Dynamic for transport to Gdynia, Poland, with an estimated arrival date of August 3, 2007. The transportation to the port by flatbed truck was arranged by petitioner; procuring the automobile shipping container and loading and packing of the vehicle was arranged by Eurex with Pembroke Marine Services, Inc., and the shipping was arranged by Eurex with Cartainer Ocean Line, Inc. The passage of time between the date of the purchase agreement and the date of shipping appears to have resulted from waiting for the issuance of a certificate of title for the vehicle and from waiting for availability of space on a shipping vessel.

5. There is no dispute that from the date of purchase, there was no intent by petitioner to physically use the vehicle in New York State (or elsewhere), nor was the vehicle in fact physically used by petitioner in New York State (or elsewhere). Petitioner explained that he has

exported other vehicles without having paid sales tax (apparently under circumstances where the dealer arranged for transport of the vehicle directly to the export shipping point), but that in this instance the dealer (Habberstad) was unwilling to release the vehicle from its premises until sales tax was paid and the vehicle had been registered and titled.

6. On July 25, 2007, petitioner filed an Application for Credit or Refund of Sales or Use Tax (Form AU-11) seeking a refund of sales tax in the amount of \$5,860.69 paid on the purchase of the vehicle. By a letter dated November 2, 2007, the Division of Taxation (Division) denied petitioner's claim for refund

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1105(a) imposes tax, at the rate specified therein, on the receipts from every retail sale of tangible personal property in this state, except as otherwise provided under Article 28 of the Tax Law. As the Division points out in its answer to the petition, all sales of tangible personal property in New York State, including sales of motor vehicles, are presumed to be subject to such tax (Tax Law § 1132[c]), and the burden of proving otherwise rests with the petitioner.

B. Tax Law § 1117 provides, in relevant part, as follows:

(a) Receipts from any sale of a motor vehicle or vessel shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five of this article, despite the taking of physical possession by the purchaser within this state, provided that:

(1) the purchaser, at the time of taking delivery,

(i) is a nonresident of this state,

(ii) has no permanent place of abode in this state, and

(iii) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle or vessel will be used in this state;

(2) (i) the vendor of such motor vehicle does not issue to such purchaser with respect to such motor vehicle either a temporary certificate of registration pursuant to subdivision seven of section four hundred twenty of the vehicle and traffic law or a temporary registration pursuant to section four hundred twenty-a of the vehicle and traffic law, or other like certificate or registration;

(3) the purchaser does not register such motor vehicle or vessel, as the case may be, in this state prior to registering such motor vehicle or vessel in another state or jurisdiction; and

(4) prior to taking delivery such purchaser furnishes to such vendor any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require to ensure proper administration of the tax imposed under subdivision (a) of section eleven hundred five of this article.

Tax Law § 1117(b) goes on to provide that a vendor shall not be held liable for its failure to collect sales tax on receipts from the sale of a motor vehicle, provided the vendor obtains and keeps available the affidavit, statement or additional evidence specified above at subsection (4), and has no knowledge prior to making delivery of the vehicle that such information is false.

C. As set forth above Tax Law § 1117(a) provides a means by which sales tax on the purchase of a motor vehicle will not be imposed, notwithstanding the taking of “physical possession” of the vehicle within this state, so long as the purchaser is a nonresident who has no permanent place of abode in the state and who is not engaged in any employment, business, trade or profession in which the vehicle will be used in this state, and so long as the vendor does not issue a temporary registration to the purchaser, the purchaser does not register the vehicle himself in this State, and the purchaser furnishes an affidavit (or other evidence) “prior to taking delivery” as described (Tax Law § 1117[a][1], [2], [3]). In this case, the dealer of the vehicle appears to have been made aware of the fact that the vehicle was being purchased for export out of the United States. Nonetheless the dealer was not willing to arrange for transport of the vehicle directly to the place of export, and in fact refused to allow “release” of the vehicle from

its premises unless it was registered and sales tax was paid. As a result petitioner paid the tax, insured, registered and took title to the vehicle in his name, and thereafter arranged for the vehicle to be transported by flatbed truck to the Port of New York for shipment to his client, as described.

D. The sales tax imposed under Tax Law § 1105 is a “destination tax,” and the point of delivery or the point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate (Tax Law § 1105[a]; 20 NYCRR 525.2[a][3]). In the face of the dealer’s apparent unwillingness or inability (due to legal constraints or otherwise) to arrange for the vehicle to be transported directly to the export shipping location or for the transaction be consummated so as to otherwise comply with the terms of Tax Law § 1117(a), petitioner, a resident of New York State, opted to insure, register and take title to the vehicle in his name. As a result, under the circumstances of this transaction and notwithstanding petitioner’s intent to cause the vehicle to be shipped directly out of the United States to the client in Poland, petitioner held the right to possession, control and use of the vehicle, and the tax was properly imposed, collected and remitted by the dealer (Tax Law § 1101[b][7]; § 1105[a]; 20 NYCRR 526.7[e][4]). Accordingly, the Division properly denied petitioner’s claim for refund of the sales tax he paid on the purchase of the vehicle.

E. The petition of Jerry Shapiro is hereby denied and the Division’s November 2, 2007 denial of petitioner’s claim for refund is sustained.

DATED: Troy, New York  
December 17, 2009

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE