

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 :
 of :
 :
 DUPLAD COPIER CORP. :
 :
 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 September 1, 1978 :
 through October 13, 1981. :

In the Matter of the Petition :
 :
 of :
 :
 JEROME GOLDMAN, :
 Officer of Duplad Copier Corp., :
 :
 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 1, 1981 :
 through October 13, 1981. :

DECISION

In the Matter of the Petition :
 :
 of :
 :
 STEVEN DAVIS, :
 Officer of Duplad Copier Corp., :
 :
 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 1, 1981 :
 through October 13, 1981. :

Petitioner Duplad Copier Corp., c/o Jerome Goldman, 300 East 59th Street,
New York, New York 10022, 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 September 1, 1978 through October 13, 1981 (File No. 39537).

Petitioner Jerome Goldman, officer of Duplad Copier Corp., 300 East 59th Street, New York, New York 10022, 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 1, 1981 through October 13, 1981 (File No. 39536).

Petitioner Steven Davis, officer of Duplad Copier Corp., c/o Steven M. Coren, P.C., 485 Madison Avenue, New York, New York 10022, 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 1, 1981 through October 13, 1981 (File No. 39535).

A consolidated hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1984 at 1:15 P.M. Petitioners appeared by Steven M. Coren, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether, subsequent to receipt of a Notification of Sale, Transfer or Assignment in Bulk, the Audit Division timely gave notice to Duplad Copier Corp. (as the seller, transferor or assignor) of taxes claimed to be due.

II. Whether the transfer of assets from Duplad Copier Corp. to Minoco Copier Corporation constituted a sale, transfer or assignment in bulk.

III. Whether the Audit Division properly held subject to sales tax the transfer of customer files from Duplad Copier Corp. to Minoco Copier Corporation.

IV. Whether the Audit Division is required to proceed against Minoco Copier Corporation (the purchaser, transferee or assignee) prior to proceeding

against Duplad Copier Corp. (the seller, transferor or assignor) for the sales and use taxes at issue.

V. Whether the Audit Division properly employed a test period method in calculating sales and use taxes due upon Duplad Copier Corp.'s expense purchases.

FINDINGS OF FACT

1. On December 30, 1981, the Audit Division issued to petitioner Duplad Copier Corp. ("Duplad") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through October 13, 1981, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
11/30/78	\$ 964.64	\$ 264.74	\$ 1,229.38
2/28/79	1,020.24	258.61	1,278.85
5/31/79	1,157.44	268.60	1,426.04
8/31/79	953.20	200.77	1,153.97
11/30/79	1,169.52	221.55	1,391.07
2/28/80	1,066.56	178.38	1,244.94
5/31/80	522.88	76.77	599.65
8/31/80	902.48	113.17	1,015.65
11/30/80	1,033.12	107.66	1,140.78
2/28/81	1,318.80	109.79	1,428.59
5/31/81	1,819.28	112.47	1,931.75
8/31/81	708.32	24.72	733.04
9/30/81	123.67	2.89	126.56
10/13/81	57,809.48	665.39	58,474.87
	<u>\$70,569.63</u>	<u>\$2,605.51</u>	<u>\$73,175.14</u>

The assessment represents amounts found due as the result of a field audit and sales tax allegedly due on a sale in bulk of Duplad's business assets. On December 30, 1981, the Audit Division issued to petitioner Jerome Goldman, as an officer of Duplad, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes for the period October 1, 1981 through October 13, 1981 in the amount of \$57,750.38, plus interest; said

amount represents sales tax allegedly due on the bulk sale previously mentioned. On December 30, 1981, the Audit Division issued to petitioner Steven Davis, as an officer of Duplad, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes for the period October 1, 1981 through October 13, 1981 in the amount of \$57,750.38, plus interest; again, said amount represents sales tax allegedly due on a bulk sale of Duplad's assets.

Petitioners Goldman and Davis presented no evidence regarding their personal liability for any sales tax found due from Duplad, and it is thus presumed that they do not contest such derivative liability.

On December 1, 1981, Mr. Goldman had executed on the corporation's behalf a consent extending the period of limitations for assessment of tax for the taxable period September 1, 1978 through November 30, 1978 to March 20, 1982.

2. Duplad was engaged in the sale, leasing and servicing of photocopying machines manufactured by Minolta Corporation ("Minolta"). Mr. Goldman was president of Duplad, and Mr. Davis, vice president.

3. Late in 1981, subsequent to the alleged bulk sale, the Audit Division conducted an examination of Duplad's books and records.

The sales tax examiner tested Duplad's expense purchases for the month of December, 1980 and found that Duplad had not paid tax upon expense purchases in the amount of \$3,008.93. He then computed an error rate of 1.64, which he applied to all expense purchases during the audit period resulting in tax due of \$93,204.93. The examiner resorted to the use of a test period because Duplad did not maintain complete purchase invoices. Petitioners allege that

all purchase invoices were maintained but failed to offer at the hearing any example of such records.

The examiner also investigated Duplad's purchases of fixed assets and found tax due thereon of \$5,300.08.

Finally, the examiner assessed sales tax upon the transfer of machinery and equipment, furniture and fixtures, and a "customer list" by Duplad to Minoco Copier Corporation (["Minoco"] a wholly-owned subsidiary of Minolta), which transfer the examiner viewed as a bulk sale. He relied upon correspondence between Minolta and its attorney, Whitman & Ransom, in valuing the assets as follows:

Machinery and equipment	\$125,000
Furniture and fixtures	75,000
Customer list	500,000
	<u>\$700,000</u>

4. Duplad began business as a Minolta equipment dealer in September, 1975 at which time Minolta extended to Duplad credit in the approximate amount of \$15,000.00. Duplad and Minoco were the two exclusive Minolta representatives in the New York area. Because Minoco was directly owned by Minolta, it obtained favorable prices from Minolta and was able, in turn, to sell equipment at favorable prices. In order to remain competitive, Duplad was compelled to sell equipment at equally low prices. Within a short time, Duplad had become one of the largest dealers of Minolta photocopier equipment in the United States and was indebted to Minolta in the amount of one and one-half million dollars for equipment. Minolta continuously supplied equipment to Duplad on credit, holding security interests in the equipment, parts, accessories and accounts receivable arising from the rental of equipment. Minolta made the appropriate Uniform Commercial Code Financing Statement filings to evidence its security interests.

5. In the beginning of 1981, Minolta refused to continue its relationship with Duplad unless Duplad paid one million dollars to Minolta over the period January through December, 1981; moreover, Minolta stationed two of its employees on Duplad's premises to manage Duplad's affairs. Duplad's principals believed they had no alternative but to accede to Minolta's demands; because of Duplad's large debts to Minolta, other equipment suppliers would have been extremely reluctant or would have refused to do business with Duplad.

6. Apparently, the above-described arrangement did not operate satisfactorily, and on September 25, 1981, Minolta, Minoco, Duplad, Mr. Goldman and Mr. Davis entered into an asset acquisition agreement which recited that: Duplad was indebted to Minolta in the amount of approximately \$3,300,000.00 for goods sold and delivered; Minolta assigned to Minoco its rights in \$2,000,000.00 of Duplad's indebtedness to Minolta; and Minoco desired to acquire all Duplad's assets in exchange for \$2,000,000.00 of Duplad's indebtedness to Minoco. Subject to the terms and conditions of the agreement, Duplad sold, assigned, transferred and delivered to Minoco all its inventory, machinery and equipment, furniture and fixtures, accounts receivable, customer records, general intangibles (licenses, trademarks, programs and software, etc.) and cash and cash equivalents. The purchase price was allocated as shown below.

Inventory	\$ 450,000
Machinery and equipment	125,000
Accounts receivable	525,000
Customer records	500,000
Miscellaneous assets	75,000
Covenant not to compete	325,000
	<u>\$2,000,000</u>

The terms of the agreement and the allocation of the purchase price were dictated by Minolta. Although represented by counsel, Duplad had little, if

any, say regarding the allocation. A balance sheet of Duplad dated September 25, 1981 and appended to the agreement reflects machinery and equipment at \$218,395.00, furniture and fixtures at \$54,087.00, and accounts receivable at \$619,000.00; a recapitulation of inventory appended to the agreement reflects an inventory of machines, supplies and parts of \$836,530.68.

7. During the course of drafting the agreement, the parties did not discuss the transfer of customer records. The records consisted of manila folders which contained, for each Duplad customer, the sales contract, service maintenance agreement, shipping and billing documents and a history chart displaying chronologically the customer's orders. The files were physically delivered to Minoco in the course of executing the agreement in order that Minoco could continue servicing the customers. Duplad never compiled a list of its customers, and neither a customer list nor customer records appear as an asset on Duplad's September 25, 1981 balance sheet.

8. On October 1, 1981, the attorney for Minolta and Minoco prepared a Notification of Sale, Transfer or Assignment in Bulk, advising the Audit Division of the transfer. The notification stated the total purchase price as \$2,000,000.00, with \$125,000.00 allocated to furniture, fixtures, equipment and supplies, \$450,000.00 to inventory and \$1,425,000.00 to goodwill and other assets. The notification further stated the terms and conditions of sale as "assignment by purchaser to seller of accounts receivable valued at \$2,000,000." There is no evidence with respect to when the notification was mailed nor when it was received by the Audit Division.

CONCLUSIONS OF LAW

A. That subdivision (c) of section 1141 of the Tax Law provides that whenever a person required to collect tax makes a sale, transfer or assignment

in bulk of any part or the whole of his business assets, other than in the ordinary course of business, the purchaser, transferee or assignee shall, at least ten days before taking possession of the asset(s) or paying therefor, notify the Tax Commission of the proposed sale. For failure to comply with the provisions of such subdivision, the purchaser, transferee or assignee shall be personally liable for payment to the state of any taxes theretofore or thereafter determined to be due to the state from the seller, transferor or assignor, limited to an amount not in excess of the purchase price or fair market value of the asset(s), whichever is higher. Minoco, as the transferee in the September 25, 1981 transaction, may have failed to comply with the procedural requirements prescribed by section 1141(c). This failure is irrelevant, however, to the determination of whether the assessment against Duplad was timely issued. Mr. Goldman's execution of the consent to extend the period of limitations occurred well before the expiration of the period for assessment and thus served to validly extend such period (section 1147[c]). The assessment was accordingly issued in a timely manner.

B. That the transfer of assets by Duplad to Minoco (as Minolta's designee) on September 25, 1981 did not constitute a bulk sale of such assets but rather, a transfer in settlement of Duplad's sizable debts to Minolta (Uniform Commercial Code section 6-103[3]; 20 NYCRR 537.1[a][4][i]). The transaction was nonetheless within the scope of the definition of "sale" for purposes of Articles 28 and 29 (20 NYCRR 526.7[a][3]), and the Audit Division properly subjected to taxation the transfer of machinery and equipment, furniture and fixtures, and customer files. The first two categories of assets were clearly taxable under section 1105(a), and the sale of the customer files

constituted the sale of information taxable pursuant to 1105(c) (Matter of Long Island Reliable Corp. v. Tax Comm., 72 A.D.2d 826).

C. That as the seller, Duplad was required to collect and remit the tax imposed (section 1133[a]). Where any customer has failed to pay sales or use tax to a person required to collect the tax, in addition to all other rights, obligations and remedies provided by the Tax Law, the tax is deemed payable by the customer directly to the Tax Commission (section 1133[b]).

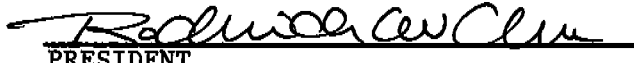
D. That the employment by the Audit Division of a test period analysis to determine additional tax due on Duplad's expense purchases was warranted and proper in light of the inadequacy of Duplad's record keeping.

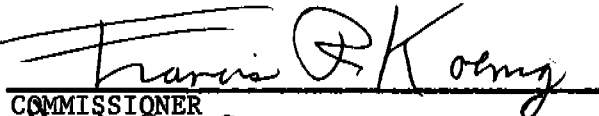
E. That the petition of Duplad Copier Corp. is denied, and the assessment issued against it on December 30, 1981 is sustained. The petitions of Jerome Goldman and Steven Davis, as officers of Duplad Copier Corp., are denied, and the assessments issued against them on December 30, 1981 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1985


PRESIDENT


COMMISSIONER


COMMISSIONER