

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

FINE ARTS TABLE APPOINTMENTS, LTD.

DECISION

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, 1981  
through May 31, 1984.

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**Petitioner, Fine Arts Table Appointments, Ltd., 1595 Elmwood Avenue,**  
Rochester, New York 14620, 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, 1981 through May 31, 1984 (File No. 60446).

A hearing was held before Timothy J. Alston, Hearing Officer, at the  
offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on  
**June 5, 1986 at 2:45 P.M.**, with all briefs to be submitted by July 14, 1986.  
Petitioner appeared by its president, Stephen E. Webster. The Audit Division  
appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether petitioner properly paid sales tax on receipts designated as  
"Packing, Del. & Ins."

#### FINDINGS OF FACT

1. On October 31, 1984, petitioner, Fine Arts Table Appointments, Ltd.,  
filed an application for refund **or** credit of sales tax paid in the amount of  
\$3,367.21, together with interest thereon of \$603.54 for the period September 1,  
1981 through May 31, 1984. Petitioner had paid the disputed tax at issue  
herein **in** response to its receipt of a statement of proposed audit adjustment

issued to it on September 19, 1984 asserting tax due in the aforementioned amount. Of the \$3,367.21 in sales tax paid for which petitioner filed its refund claim, \$665.00 is no longer claimed by petitioner and, consequently, \$2,702.21 is the amount of tax for which petitioner claims a refund in this proceeding.

2. Petitioner's refund claim was premised upon the results of an audit of petitioner's books and records for the period in question. Said refund claim was denied in full by the Audit Division on April 5, 1985.

3. On audit, the Audit Division determined that petitioner had improperly failed to charge and collect sales tax upon a certain charge listed as "Packing, Del. & Ins." on each bill of sale executed during the audit period. The Audit Division took the position that, given the lack of a separately stated charge for transportation, the full amount of such charges was properly subject to sales tax. Petitioner contended that such charges were for transportation costs only and were therefore not subject to tax.

4. Petitioner agreed to a test period audit to determine total charges for "Packing, Del. & Ins." for the audit period. The quarter ended May 31, 1984 was chosen for the test period and the Audit Division determined that "Packing, Del. & Ins." charges amounted to 3.878 percent of petitioner's gross sales for the test period. The Audit Division then applied this percentage to petitioner's total gross sales for the audit period and found \$38,603.00 in "Packing, Del. & Ins." charges for said period. Based upon this determination, the Audit Division asserted \$2,702.21 in sales tax due from petitioner in the statement of proposed audit adjustment referred to in Finding of Fact "1".

5. At all times relevant herein, petitioner was engaged in the sale (primarily at retail) of tableware. Petitioner's salespeople conducted business

in individual customer's homes where orders were placed for merchandise. The "Packing, Del. & Ins." charge was added to the bill by the salesperson at the time the customer placed his or her order. Petitioner then transmitted that order to the wholesaler who shipped the merchandise directly to the purchaser. The wholesaler subsequently billed petitioner for its actual costs of shipping. With respect to a small number of items, petitioner ordered a large shipment directly from the wholesaler and, upon customer order, shipped directly to the purchaser. Petitioner used United Parcel Service to transport those items which it shipped directly.

6. Throughout the audit period, petitioner's charges for "Packing, Del. & Ins." amounted to 5 percent of the value of the merchandise sold up to a maximum charge of \$25.00 per order. Petitioner used this criteria for its "Packing, Del. & Ins." charges because, given the various wholesalers with which petitioner dealt, its salespeople could not readily determine at the time of sale the actual costs of transporting the purchased merchandise. The designation "Packing, Del. & Ins." was used because petitioner's president had seen such a designation used on an old contract.

7. Petitioner did not engage in packaging merchandise, nor did petitioner separately purchase any insurance for the merchandise shipped to its customers. In addition, petitioner's actual transportation costs were in excess of the amounts charged under the designation "Packing, Del. & Ins."

8. Petitioner contended that inasmuch as the charges at issue were, in substance, transportation charges, such charges should be excluded from imposition of sales tax.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a sales tax upon the receipts from every retail sale of tangible personal property. **As** defined in section 1101(b)(3) of the Tax Law, a receipt includes the amount of the sale price of any property and the charge for any service taxable under Article 28 of the Tax Law, but excludes "the cost of transportation of tangible personal property sold at retail where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser."

B. That 20 NYCRR 526.5(g)(3) provides the following with respect to section 1101(b)(3) of the Tax Law:

"Transportation charges shall be deemed to be separately stated if they can be computed from information appearing on the bill."

C. That the charges at issue herein were not separately stated within the meaning and intent of the aforecited statute and regulation. Inasmuch as the additional charge was designated "Packing, Del. & Ins.", it is impossible, without additional information, to determine which portion of said charge constituted transportation and therefore impossible to compute petitioner's transportation charges "from information appearing on the bill." Accordingly, notwithstanding the absence of any handling or insurance costs with regard to the charges in question and the reasonableness thereof, said charges nonetheless fail to qualify for the transportation exclusion and must therefore be considered receipts properly subject to sales tax within the meaning of sections 1101(b)(3) and 1105(a) of the Tax Law.

D. That regarding petitioner's contention that since the charges at issue were, in substance, transportation charges, such charges should be excluded from tax, it is noted that "[i]n determining the applicability of an exclusion,

it is the form of the transaction, not the substance which controls'' (Matter of Greco Brothers Amusement Co. v. Chu, 113 AD2d 622, 625; citations omitted).


Petitioner could have chosen to separately designate its transportation charges on its bills, but did not do **so**. The reasons for petitioner's failure to do **so** are irrelevant; petitioner must bear the tax consequences of its actions (see Matter of Sunny Vending Co. v. State Tax Commission, 101 AD2d 666; Matter of Ormsby Haulers v. Tully, 72 AD2d 845; Matter of Sverdlow v. Bates, 283 App Div 487).

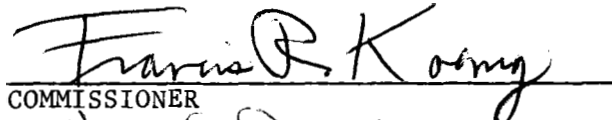
E. That the petition **of** Fine Arts Table Appointments, Ltd. is in **all** respects denied and the Audit Division's denial letter dated April 5, 1985 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER