

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

KAY HILLMAN

DETERMINATION

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 December 1,
1981 through November 30, 1984.

Petitioner, Kay Hillman, 750 Park Avenue, New York, New York 10021, 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 December 1, 1981 through November 30, 1984 (File No. 64884).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, 2 World Trade Center, New York, New York on June 9, 1987 at 9:15 A.M. Petitioner appeared by Martin L. Kaminsky, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark Volk, Esq., of counsel).

ISSUE

Whether the assessment of additional sales tax as the result of a field audit should be sustained.

FINDINGS OF FACT

1. During the period in issue petitioner, Kay Hillman, was a part-time art dealer.

2. On August 20, 1985, the Audit Division, on the basis of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Kay Hillman, assessing a deficiency of sales and use taxes for the period December 1, 1981 through November 30, 1984 in the amount of \$1,240.56 plus interest of \$356.49 for a total amount due of \$1,597.05.

3. In the course of the audit, the Audit Division found that the only original documents maintained were bank records and cancelled checks. Petitioner was unable to provide original sales records or purchase invoices. The Audit Division also found that the sales reported on petitioner's Federal income tax return for the year ending December 31, 1983 exceeded the sales reported on the sales tax return by \$30,000.00.

4. In order to determine the amount of tax due, the Audit Division examined petitioner's resale certificates for the period January 1, 1984 through November 30, 1984. Since petitioner was unable to provide any documentation with respect to one sale, the Audit Division concluded that said sale was subject to tax. The disallowed exempt sale was used to calculate an error rate of .0282. The error rate was then applied to petitioner's total sales during the audit period resulting in a finding that \$15,037.00 of claimed exempt sales were taxable and that petitioner was liable for sales and use tax of \$1,240.56.

5. Petitioner only sold items to art dealers and did not conduct business with the general public. Petitioner's clients would call petitioner at home and request that she purchase an item on their behalf. Generally, petitioner did not make more than 20 sales a year.

6. Since petitioner only purchased art work at the request of a client, an item would be sold within a week of its purchase.

7. It was petitioner's practice to record sales in a book.

8. At the hearing petitioner produced a resale certificate pertaining to a sale to a Ruth Kleinschmidt and maintained that said certificate was the document that was unavailable during the audit. The Audit Division objected to the receipt of the resale certificate on the ground that the name on petitioner's

sales record, i.e. Mr. Kennedy, did not correspond with the resale certificate. Petitioner established at the hearing that Mr. Kennedy was the individual from whom petitioner purchased the work of art.

9. At the hearing, petitioner objected to the use of the test period methodology. In response, the Audit Division maintained that petitioner orally requested that this methodology be used.

CONCLUSIONS OF LAW

A. That Tax Law § 1132(c) creates a presumption that all receipts for tangible personal property are subject to tax until the contrary is established and imposes the burden of proving that any receipt is not taxable on the person required to collect tax or the customer. Unless "a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission, the number of his registration certificate..." to the effect that the property was purchased for resale or for some use by reason of which the sale is exempt from tax, the sale is considered a taxable sale at retail (Tax Law § 1132[c]).

B. That the assessment at issue herein was premised upon petitioner's failure to produce the requested resale certificate during the audit. Upon all of the facts and circumstances presented it is found that the resale certificate produced at the hearing was the resale certificate which was unavailable during the audit. The discrepancy between petitioner's sales record and the resale certificate was obviously the result of an inadvertent error by petitioner in recording the transaction. Since petitioner has produced the previously missing New York resale certificate, the Audit Division is directed to give


effect to the resale certificate and reduce the error rate to zero (e.g.,
Matter of Allison Ayres, Inc., State Tax Commission, October 5, 1984).

C. In view of the foregoing it is unnecessary to discuss the propriety of the audit methodology.

D. That the petition of Kay Hillman is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 20, 1985, is cancelled.

DATED: Albany, New York

SEP 17 1987


ADMINISTRATIVE LAW JUDGE