

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Allied Thermal Corporation : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Year 1979. :

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State of New York  
County of Albany

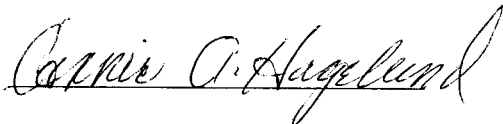
Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Allied Thermal Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

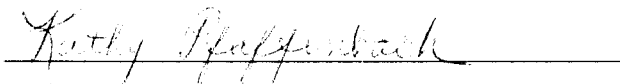
Allied Thermal Corporation  
Box 1111  
Parsippany, NJ 07054

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
24th day of January, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Allied Thermal Corporation : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Year 1979.

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State of New York  
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Eugene Chester the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eugene Chester  
Everett, Johnson & Breckinridge  
20 Exchange Place  
New York, NY 10005

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
24th day of January, 1983.

Cecilia A. Haglund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

January 24, 1983

Allied Thermal Corporation  
Box 1111  
Parsippany, NJ 07054

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Eugene Chester  
Everett, Johnson & Breckinridge  
20 Exchange Place  
New York, NY 10005  
Taxing Bureau's Representative

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ALLIED THERMAL CORPORATION : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Corporation Franchise Tax under :  
Article 9-A of the Tax Law for the Year 1979. :

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Petitioner, Allied Thermal Corporation, Box 1111, Parsippany, New Jersey 07054, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1979 (File No. 33562).

Petitioner filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether the assignment of the entire interest in a leasehold except for a right of re-entry constitutes "leasing" for Corporation Franchise Tax purposes within the meaning and intent of section 209 of the Tax Law.

FINDINGS OF FACT

1. On September 9, 1980 petitioner, Allied Thermal Corporation, filed a timely Corporation Franchise Tax Report for the calendar year 1979 which reflected allocated taxable net income of \$199,822.00 and tax due of \$19,982.00, which was duly paid.

2. On December 16, 1980 petitioner filed a Claim for Credit or Refund of Corporation Tax Paid in the amount of \$19,982.00 for the year 1979, alleging that it was not subject to New York State Franchise Tax in 1979 because it did

not do any business, employ capital, maintain an office or own or lease property in New York State during 1979.

3. The Audit Division denied petitioner's claim for refund by letter dated February 5, 1981 claiming that petitioner was subject to the Franchise Tax for the year 1979 as a result of its having leased property in New York State during said year.

4. Petitioner is a corporation organized under the laws of the State of Connecticut and is engaged in the manufacture of air distribution equipment. Petitioner was authorized to do business in New York State on January 1, 1956.

5. In December, 1969 petitioner entered into a ten-year lease for warehouse property in New York State with Alenat Corp., a corporation unrelated to petitioner. The agreed upon rental for the year in issue was \$12,600 per annum.

6. On October 1, 1974 petitioner, by a form document labelled "Sub-Lease", released its entire interest in the lease of the warehouse to Custom Concentrates, Inc. ("Custom"), a corporation unrelated to petitioner, at an annual rental of \$8,760. Petitioner maintains that, because it had relinquished its entire interest in the leasehold except for a right of re-entry for condition broken, the aforesaid transaction was, in fact, an assignment of its interest in the property, notwithstanding the document's labelling as a sublease.

7. Custom had the option of renewing the sublease on October 1, 1977 until January 14, 1980 at the same annual rental. Custom exercised this renewal option on October 1, 1977 and continued its tenancy through the year in issue. Custom was the exclusive tenant of the property during this period and an affidavit submitted by petitioner stated that at no time after October 1, 1974, did petitioner enter or make use of the warehouse property.

8. Other than the interest in the leasehold, petitioner, by affidavit, indicated that it did not maintain an office or employ capital in New York State, did not own or lease any other property in the State, nor did it do business within New York except for solicitation of orders which were approved and shipped from points outside New York.

CONCLUSIONS OF LAW

A. That subdivision 1 of section 209 of the Tax Law imposes a tax on every domestic or foreign corporation, with certain exceptions not herein applicable, "for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state" for all or part of the calendar year.

B. That "the relation of landlord and tenant involves in every case the existence of an estate in the tenant...by virtue of which he is owner of the land during the term. A tenant...is entitled to its exclusive possession and control...as against all the world including his landlord, and if this be absent in any disputed case the relationship of landlord and tenant does not exist" (Kaypar Corp., v. Fosterport Realty Corp., 1 Misc. 2d 469 aff'd 272 A.D. 878).

C. That "when a lessee assigns his interest in the whole...of the demised premises for the residue of the unexpired term, the assignee is substituted in place of the original lessee as tenant" (3A Thompson, Real Property, §1210). An assignment entails the transfer of the entire term of the lease. It is not a sublease regardless of the form of the agreement. The original lessee no longer has privity of estate with the original lessor upon an assignment. A sublease is a transfer of only part of the leased premises for a period less

than the original term. A transfer is not a sublease unless the seller retains a reversionary interest (Thompson, supra). Moreover, an assignment does not become a sublease merely because of the presence of a right of re-entry for condition broken in the assignor (See Gillette Brothers, Inc. v. Aristocrat Restaurant, Inc., 239 N.Y. 87; Stewart v. Long Island Railroad Co., 102 N.Y. 601; Herzig v. Blumenkrohn, 122 A.D. 756).

D. That the transaction entered into between petitioner and Custom was an assignment of petitioner's entire interest in the original lease despite the labelling of the document as a sublease. For the year 1979 the only interest petitioner retained in the leasehold was a right of re-entry for condition broken.

E. That a "right of re-entry is not an estate or interest in land nor the reservation of a reversion but is merely a chose in action" (49 Am. Jur. 2d Landlord and Tenant § 395). Petitioner was, therefore, not leasing property in New York during 1979 within the ordinarily accepted meaning of that term. Furthermore, the legislative intent of subdivision 1 of section 209 of the Tax Law, as expressed in memoranda of the Governor and the Department of Taxation and Finance, was to tax multistate corporations which had minimum contacts with New York State and were competing with local business, but which were evading New York taxes (1969 N.Y. Session Laws (McKinney) 2503 and 2576). A right of re-entry is neither a lease nor a minimum contact with New York which would compete with local business and cannot, therefore, be considered "leasing" within the meaning and intent of section 209.

F. That petitioner's only other contact with New York State was solicitation of orders which were approved out of state and shipped from points out of state, the taxation of which is specifically prohibited by U.S. Code, tit. 15,

§381. Petitioner, therefore, had no relationships to New York which would subject it to the Corporation Franchise Tax under section 209 of the Tax Law.

G. That the petition of Allied Thermal Corporation is granted and the Audit Division is directed to refund the sum of \$19,982.00, together with such interest as may be lawfully owing.

DATED: Albany, New York


STATE TAX COMMISSION

JAN 24 1983

ACTING

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER