

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
IDF Services, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Stock Transfer Tax :
under Article 12 of the Tax Law for the Year 1973. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of February, 1984, he served the within notice of Decision by certified mail upon IDF Services, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

IDF Services, Inc.
JFK International Airport
Northwest Terminal B106.59
Jamaica, NY 11430

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
29th day of February, 1984.

David Parchuck

Conrad A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of IDF Services, Inc.	: : : : : : :	: : : : : : :
for Redetermination of a Deficiency or Revision of a Determination or Refund of Stock Transfer Tax under Article 12 of the Tax Law for the Year 1973.		AFFIDAVIT OF MAILING

State of New York }
 ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of February, 1984, he served the within notice of Decision by certified mail upon Helen Johnson Williamson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Helen Johnson Williamson
Hall, Dickler, Lawler, Kent & Howley
460 Park Ave.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
29th day of February, 1984.

David Parchuck

Constance P. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 29, 1984

IDF Services, Inc.
JFK International Airport
Northwest Terminal B106.59
Jamaica, NY 11430

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) 279a of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 90 days 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Helen Johnson Williamson
Hall, Dickler, Lawler, Kent & Howley
460 Park Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
IDF SERVICES, INC.	:	DECISION
for Revision of a Determination or for Refund	:	
of Stock Transfer Tax under Article 12 of the	:	
Tax Law for the Year 1973.	:	

Petitioner, IDF Services, Inc., JFK International Airport, Northwest Terminal Bldg. 59, Jamaica, Queens, New York 11430, filed a petition for revision of a determination or for refund of stock transfer tax under Article 12 of the Tax Law for the year 1973 (File No. 32061).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1983 at 1:15 P.M., with all briefs to be submitted by September 22, 1983. Petitioner appeared by Hall, Dickler, Lawler, Kent & Howley (Helen Johnson Williams, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether there was a sale of stock by petitioner's shareholders to a voting trust and a subsequent resale of the stock by the voting trust back to the shareholders, which sale and resale were subject to the stock transfer tax.

FINDINGS OF FACT

1. On November 18, 1974, the Audit Division issued a Notice of Determination of Tax Due against petitioner, IDF Services, Inc., for stock transfer tax due in the amount of \$15,113.75 plus penalty of \$3,780.00 for a total due of \$18,893.75 for the year 1973.

2. Petitioner is a closely held corporation owned primarily by one family. In or about December, 1972 the owners decided to make a public offering of petitioner's common stock. In order to ensure that after the public offering control of petitioner would be retained by the family, the stockholders entered into two agreements: a voting trust agreement and a shareholders agreement. Under the voting trust agreement, all of the existing stockholders agreed to transfer their stock to voting trustees who would have the right to vote the stock of petitioner according to the trustees' wishes rather than, necessarily, those of the stockholders. The shareholders agreement placed restrictions on the shareholders' rights to sell the stock. Petitioner's stock was to be recapitalized so that its prior authorized capital of 200 shares would be changed to 3,000,000 shares authorized. Of the shares authorized, 300,000 would be owned by the existing shareholders and transferred to the voting trust and 110,000 shares would be offered for sale to the public.

3. The voting trust agreement provided, in part, that:

"This Agreement shall become effective only upon occurrence of both of the following events:

(i) A Registration Statement has been filed with the Securities and Exchange Commission ...pursuant to the Securities Act of 1933 as amended... and has been declared effective by the Commission;

(ii) Not less than 110,000 shares have been sold to an underwriter or the public pursuant to the said Registration Statement."

The shareholders agreement was also to be contingent upon the S.E.C. registration statement becoming effective. The "effective date" is the date that the S.E.C. advises that the registration statement is effective and is the point at which a company can begin selling its stock in the public market.

4. On February 28, 1973, eleven stock certificates were issued to the existing shareholders of petitioner reflecting their ownership of petitioner

based upon the recapitalization approved on January 25, 1973. The certificates were not transferred to the voting trustees.

5. On February 23, 1973, petitioner filed with the S.E.C. its registration statement covering 110,000 shares of its common stock. A copy of the statement was also filed with the New Jersey Bureau of Securities because the underwriter, a New Jersey firm, estimated that 80 percent of the securities being sold in the public offering would be sold in New Jersey. By letter dated March 19, 1973, the Bureau of Securities indicated that it objected to the offering in New Jersey. To comply with New Jersey requirements petitioner had to increase its paid-in capital by at least \$300,000.00. To accomplish this, one of the stockholders contributed property to petitioner to increase its net worth. On April 15, 1973, the shareholders executed a written consent authorizing an amendment to the Certificate of Incorporation of petitioner to enable it to issue preferred stock so as to increase the capitalization to the required \$500,000.00. The preferred stock was issued to the stockholder who had contributed his property in exchange for his contribution.

6. The S.E.C. sent petitioner a deficiency letter detailing certain changes to petitioner's registration statement which would be required prior to the S.E.C. approving an effective date. On April 26, 1973, petitioner filed the first amendment to its registration statement with the S.E.C. Immediately thereafter the S.E.C. advised petitioner's legal counsel that, with the exception of a few minor changes which could be corrected by a second amendment, petitioner's registration would be approved.

7. Based on the S.E.C. advice all parties to the transaction anticipated that within a matter of days a second amendment would be filed and declared effective and seven days thereafter the public offering would be commenced and

the sale would close with the underwriter. Accordingly, petitioner's legal counsel began preparing closing documents. As part of the preparation, on May 1, 1973, counsel prepared a stock certificate naming the voting trustees designated in the voting trust agreement. The stock certificate was held in escrow to be delivered to the trustees on the date of the closing with the underwriter, at which time, by its own terms, the voting trust agreement was to become effective.

8. At this time, the underwriter requested a delay in filing the second amendment because of unfavorable market conditions. As a result, petitioner's counsel waited until May 21, 1973 to file the amendment. Within two or three days the S.E.C. advised counsel by telephone that it had no further objections to the registration and petitioner could request an acceleration of the effective date to such time as petitioner wanted. The underwriter then surprised petitioner's stockholders by refusing to sign the request for acceleration as required by the S.E.C. and announced, by letter dated July 24, 1973, that it was withdrawing as underwriter due to unfavorable market conditions which would preclude a successful sale of the offering.

9. Petitioner's shareholders held a meeting and decided to withdraw the registration statement. Petitioner filed the third amendment to its registration statement requesting leave to withdraw. On August 30, 1973, the S.E.C. issued an order consenting to the withdrawal.

10. Because the transaction had collapsed, petitioner's counsel destroyed all the closing documents which had been held in escrow. One of counsel's secretaries, in anticipation of the closing, wrote "cancelled" across the stock certificates which had been issued to the shareholders upon the recapitalization. She also wrote "cancelled" on the stock certificate naming the voting trustees

which was to have been delivered to the trustees at the closing. Instead of redelivering the original eleven certificates which had been marked "cancelled", counsel had eleven new certificates prepared which were identical in all respects, except as to date, to the original certificates. These eleven new certificates were delivered to the shareholders.

11. On audit, the Audit Division determined that the stock certificate naming the voting trustees, which was to have been delivered at the closing, was a transfer of stock subject to the stock transfer tax. The Audit Division also determined that the delivery of the eleven new stock certificates to the shareholders to replace the originals was a second transfer of stock subject to the tax. The auditor advised petitioner's counsel that had the word "void" instead of the word "cancelled" been written on the certificates, he would not have assessed tax because the word "void" indicated to him that nothing had happened in the first place, whereas the word "cancelled" indicated that something had happened and a tax was due.

12. Petitioner argued that its shareholders continued to act and vote as individual shareholders prior to the withdrawal and at no time was any power transferred to the voting trust. Petitioner also maintained that, since the existence of the voting trust was contingent upon an effective date of registration from the S.E.C. and sale of the 110,000 shares to the public and these events never occurred, the voting trust never came into existence and the stock certificate from the shareholders was never delivered to it since the closing never took place. Moreover, petitioner argued that the taxability of a transaction should not be determined by the semantic difference between the words "cancelled" and "void"; rather the substance of the transaction should control.

CONCLUSIONS OF LAW

A. That subdivision 1 of section 270 of the Tax Law imposes a tax "on all sales or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock... whether made upon or shown by the books of the ...corporation...or by any assignment in blank, or by any delivery...".

B. That the aforesaid section "contemplate[s] something more than a theoretical change of title. [It] contemplate[s] some physical act; the delivery of a certificate; the execution and delivery of a bill of sale; an entry upon the books of the corporation." (Phelps-Stokes Estates v. Nixon, 222 N.Y. 93, 99-100. See also Schwartzman v. Kimler, 57 Misc 2d 102, 108). In the instant case, there was no such physical act of delivery or transfer of the stock certificates nor does it appear from the record that any entries were made in petitioner's books and records reflecting a transfer. The only physical act which occurred was the delivery of the stock certificates to an escrow agent in preparation for a closing which never took place. Moreover, since the S.E.C. registration never became effective and no stock was sold, neither the voting trust agreement nor the shareholders agreement ever came into effect. Since there was no voting trust, there was no taxable transfer of stock from the shareholders to the trust and, therefore, no retransfer from the voting trust back to the shareholders. The new stock certificates were merely substituted for the old certificates which had been defaced and the fact that "cancelled" was written on the certificates instead of "void" does not alter the nature of the transaction. There were, therefore, no transfers of stock subject to the stock transfer tax.

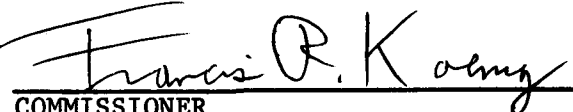
C. That the petition of IDF Services, Inc. is granted and the Notice of Determination of Tax Due issued November 18, 1974 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1984


PRESIDENT


COMMISSIONER


COMMISSIONER