STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GRISWOLD, HECKEL & KELLY ASSOCIATES, INC.

For a Redetermination of a Deficiency or a Refund of Sales & Use Taxes under Article(s) 28 & 29 of the Tax Law for the (Year(s) 8/1/65 - 5/31/69

AFFIDAVIT OF MAILING OF NOTICE OF DECISION BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro , 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 23rd day of December , 1971 , she served the within Notice of Decision (or Determination) by (certified) mail upon Griswold, Heckel & Kelly Associates, Inc(representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Griswold, Heckel & Kelly Associates, Inc.
300 Park Avenue
New York, New York

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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
23rd day of December , 1971

Martha Funaro

Kal Zimmerman

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

GRISWOLD, HECKEL & KELLY ASSOCIATES, INC.

For a Redetermination of a Deficiency or a Refund of Sales & Use Taxes under Article(s) 28 & 29 of the Tax Law for the (Year(s) 8/1/65 - 5/31/69

AFFIDAVIT OF MAILING OF NOTICE OF DECISION BY (CERTIFIED) MAIL

State of New York
County of Albany

Martha Funaro, 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 23rd day of December, 1971, she served the within Notice of Decision (or Determination) by (certified) mail upon Thomas G. Burke & Co. (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Thomas G. Burke & Co.
230 Park Avenue
New York, New York 10017

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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
23rd day of December, 1971.

/Carl Zimmerman

Martha Funaro

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :

of :

GRISWOLD, HECKEL & KELLY ASSOCIATES, INC. :

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 August 1, 1965, through
May 31, 1969. :

Griswold, Heckel & Kelly Associates, Inc., a registered vendor, filed an application 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 August 1, 1965 through May 31, 1969. A formal hearing was held before Lawrence A. Newman, Hearing Officer, in the offices of the State Tax Commission, in the City of New York on June 16, 1971. The applicant was represented by Thomas Burke & Company, C.P.A.'s (by Hugh Janow). The Sales Tax Bureau was represented by Edward H. Best, Esq., (Solomon Sies, Esq., of Counsel).

ISSUE

Whether the "handling charge", which the vendor includes on its bills to clients, is subject to the sales tax.

FINDINGS OF FACT

1. The vendor, Griswold, Heckel & Kelly Associates, Inc., filed sales and use tax returns for the periods August 1, 1965 through May 31, 1969.

2. The vendor executed a consent on September 19, 1969 to extend the period of limitation for assessment of the periods in issue to December 19, 1970.

3. On February 16, 1970, a Notice of Determination and demand, numbered 90741581 was issued by the Sales Tax Bureau.

4. On April 27, 1970, the Sales Tax Bureau received from the vendor's representatives, a protest of the determination and an application for a hearing.

5. The corporate vendor was engaged in the business of office planning and interior design. Its services included the designing, planning and decoration of the premises which the client would later occupy. The vendor did not manufacture or install office furniture. However, at the requests of the clients, the vendor ordered furnishings from manufacturers or suppliers and supervised the arrangement and/or installation of the merchandise.

The suppliers billed the vendor for the merchandise. The vendor rebilled the clients, at cost, adding a separate amount on the invoice equal to a percentage of the cost and labeled, "handling fees". The vendor charged the clients for sales taxes on the billing price, excluding the "handling fee".

By agreement between the vendor and client, the handling charge would vary from about 8 to 15% of the vendor's cost of the merchandise. The amounts of handling charges are recorded on the vendor's records in an account labeled, "Commissions on billable expense".

Except for a small amount of fixed assets purchased without payment of the sales tax, the Notice of Determination is based solely on the Bureau's determination that the "handling fees" are subject to the sales tax.

DETERMINATION

A. The handling fees are part of the price paid by the client for the purchase of tangible personal property or the service of maintaining real property or installing tangible personal property.

B. The vendor was required to collect sales tax on its entire billings to its clients, including its "handling fees".

C. The Notice of Determination is sustained and the application for revision of the determination is denied.

DATED: Albany, New York
December 23, 1971

STATE TAX COMMISSION

Norman Gallman
COMMISSIONER

Bruce Manley
COMMISSIONER

Milton Koerner
COMMISSIONER

April 13, 1972

The Honorable Louis J. Lefkowitz
Attorney General
State Capitol
Albany, New York 12224

Re: Griswold, Nestel & Kelly Associates,
Inc. vs. State Tax Commission

Dear Mr. Lefkowitz:

Enclosed herein please find the entire file in the above matter which is sent to you in accordance with our letter of April 13, 1972 at which time Notice of Petition, Petition and Bond for Costs were forwarded to you.

Sincerely yours,

[redacted]
Director

MRK:k
Encl.

7/29/71 #28

February 8, 1972

Thomas G. Burke & Company, C.P.A.'s
230 Park Avenue
New York, New York 10017

Attention Alfred Hollis

Re: Griswold, Heckel & Kelly Associates
Sales and Use Taxes
Formal hearing determination

Gentlemen:

Your undated letter, received on January 28, 1972, includes a request to the State Tax Commission to reconsider its determination dated December 23, 1971.

However, there is no provision in the Tax Law for this procedure. The review that you are seeking is afforded to an applicant under the provisions of Article 78 of the Civil Practice Law and rules. Such action should be commenced within four months of the date of the mailing of the determination.

Very truly yours,

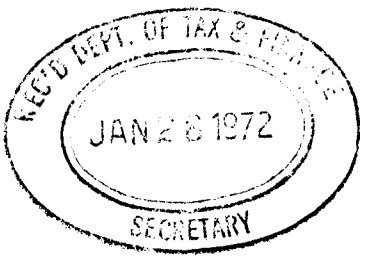
Lawrence A. Newman
Hearing Officer

THOMAS G. BURKE & COMPANY
CERTIFIED PUBLIC ACCOUNTANTS
230 PARK AVENUE • NEW YORK, N. Y. 10017

State of New York
Department of Taxation and Finance
Building 9, Room 214A
State Campus
Albany, New York 12226

CERTIFIED MAIL No 417711.

Attention: Lawrence A. Newman



State of New York
State Tax Commission
Department of Taxation & Finance
Building 9, Room 214A
State Campus
Albany, New York

Gentlemen:

We have received the Commission's determination in the Matter of the Application of Griswold, Heckel & Kelly Associates for a Revision of a Determination or for Refund of Sales and Used Taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through May 31, 1969.

We have reviewed the Findings of Fact and the Determination of the Commission and are unable to determine on what basis the Determination has been made. We have also taken note that no mention of the petitioners motion to the Commission to have the penalties and interest in excess of 6% abated is referred to in the determination.

We of course realize that the Petitioner has the right to go to Court to have the Commissions determination reviewed. However, this is an expensive procedure and one which we would hope to avoid if possible. Because we feel strongly that the Commission has erred in its determination, we respectfully request that the Commission review and reverse its findings based on the facts presented below, or schedule another hearing or meeting with Petitioners' representatives so that both parties might clarify their positions. We of course realize that an affirmative response is strictly discretionary with the

Commission and therefore if no response or a negative one is forthcoming we will proceed to have the decision reviewed by the Courts.

The Commissions Determination (A) states that "The handling fees are part of the price paid by the client for the purchase of tangible personal property (emphasis supplied) or the service of maintaining real property or installing tangible personal property (emphasis supplied).

The finding above discloses two possible bases for taxation i.e. (that the handling fees are part of the price paid for the merchandise or (2) that the charge is for installing tangible personal property. Both bases we feel lack a foundation in either fact or law.

Without repeating what has already been discussed in Petitioner Exhibit No.5, pages 9-13, we would like to state that the unchallanged testimony of Mr. Albert Heckel President of the Petitioner and the Petitioners memorandum clearly shows that substantial services were rendered by the Petitioner that, in no way, became such a part of the furniture so as to be included in the price paid for the furniture. The sales tax has been held not to apply to a transaction in which the agreement of the parties essentially call for the rendering of services not taxed, even though tangible personal property passes in connection with the performance of the services. The Petitioner is exclusively in a service business and the pass through of the furniture from the manufacturers through the Petitioner to the client is a service and not essentially the sale of tangible personal property. The client is well aware of the services that they receive under the label handling charges. They were enumerated by Mr.Heckel on page 18 of his testimony and include final selection of furniture, final pricing, purchasing procedures, the logistics of getting

the manufacturers to deliver at the right time to the right place (involves coordinating delivery and not installation), the inspection of the furniture and final invoicing. Section 1101(3) defines receipt, (price paid) as "the amount of the sale price of any property and the charge for any service taxable under the article. As discussed below there is no taxable service and it cannot be said that the services provided are so unsubstantial or physically affect the merchandise so as to become a part thereof.

We respectfully submit that the handling fees cannot on the facts adduced be considered a part of the price for tangible personal property. The handling fees are price paid for the services rendered by the Petitioner which could, and on occasion is rendered, whether furniture is purchased through the petitioner or not.

The second or alternate finding with which we take exception is that the handling fees are part of the price paid for the installing of tangible personal property. Paragraph 5 of the Findings of Fact specifically states that the vendor (Petitioner) did not manufacture or install office furniture. This finding in and of itself should eliminate the determination that the price paid is for the installing of tangible personal property. The finding goes on to state that "However, at the requests of the clients, the vendor ordered furnishings from manufacturers or supplies and supervised (emphasis supplied) the arrangement and/or installation of the merchandise. No where in statute is a tax imposed on the arrangement of furniture or the supervision thereof and we therefore are unable to understand how this finding, even if true, is relevant. The question of the supervision

of the installation of the furniture would appear to be of greater relevance, if true, because of the taxation by statute on the price paid for installing tangible personal property. The statute we would like to point out taxes payment for the installing of personal property and not the supervision of installation. This is not a question of semantics but a very important difference. The legislature could have taxed both acts if they wished but chose not to. However, our primary contention is that Petitioners do not supervise the installation of tangible personal property. Their primary function when furniture is delivered is the inspection of the furniture to determine whether it meets the specification arrived at prior to the purchasing of the furniture. They will also inspect the work done by the installers of carpeting, etc. to be sure the goods are not damaged, are the right size and are laid according to the drawings and plans specified in the purchase orders. All goods of this nature are purchased installed. No installation is done by petitioner. Petitioners employees do not supervise the installers, who are independent contractors with their own supervisors. Petitioners employees will supply installers with the plans and, if necessary and upon request, explain to the installers anything that is unclear. The preparation of the plans are not included in the "handling charge". They are charged for separately on an hourly basis.

If in the light of the above it is still felt that the petitioner is supervising the arrangement and/or installation of tangible personal property, then we would respectfully submit that such a service is not taxable under Sec. 1105(c)(3) as the installation

of tangible personal property. Statutes should be construed according to their plain meaning. Supervision of installation and installation are two different acts and the former should not and cannot be construed as being included in the latter.

As an example, it would be difficult to imagine that the fees of an independent engineer who supervises the installation of a boiler in a building would be held to be taxable as installation services. All he is doing is making sure that his plans are being carried out by independent third parties. Assuming his services are considered to be supervising installation, there would still be no sales tax applicable because he is not the installer. There would be no difference if title passed through the engineer, if the service portion of his fee were charged separately.

If the determination of the Commission is based on the above acts we submit that either the determination should be reversed or another hearing should be held to develope the facts further.

Paragraph A or the Determination is a restatement of the Opinion of Counsel of October 18, 1966, published in the New York State Sales Tax Bulletin #1966-F. pages 53-54. In light of prior rulings we feel it would be in the interest of all parties concerned if the determination were based upon the statutory language rather than an opinion of counsel that in no way explains its ruling in terms of the applicable statutory and case law. Even the facts in the aforementioned opinion are sketchy. It does not discuss the matter of the services given, whether the fee is separately billed or any other facts, some of which we might even agree should lead to the conclusions arrived at

by Counsel.

Certainly the Commission can rule in favor of the petitioner without abrogating the aforementioned opinion which should be limited because of its vagueness.

A final point, and one which we feel might have been overlooked, is the question of penalties and interest in excess of 6%. Paragraph C sustains the determination of the Sales Tax Bureau which we presume includes the penalties and interest. At the hearing we moved for removal of this penalties and interest in excess of 6%. No direct response to this motion has been made in the determination and we feel that the abatement is justified, and a reason for denial of the request for abatement is required.

In view of the above we hereby respectfully request the Commission to review its determination in the Matter of Application of Griswold, Heckel & Kelly Associates, Inc. and reverse same, or if the Commission feels it appropriate the petitioners and its representative would be most happy to meet with the Commission representatives to discuss the matter further.

Yours very truly,

Alfred Hollis

Alfred Hollis