9 (3-68)

Sales Tax Determinations
A-Z

# BUREAU OF LAW

MEMORANDUM Food Transport, Inc.

TO: The State Tax Commission

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: Food Transport, Inc.
Application for Refund of Sales Tax and Use Tax for the Period August 1, 1965 to December 31, 1965

A hearing on the above matter was held before me at the office of the State Tax Commission, 80 Centre Street, New York, N. Y. on November 28, 1967.

The issue is whether the taxpayer is entitled to a refund of sales tax on the basis of a change of status of certain vehicles upon which the sales tax had been paid.

Taxpayer, at the time the sales tax became effective, was a contract carrier for one client. From October 25, 1965 to November 9, 1965 taxpayer purchased vehicles and bodies on which there was paid sales tax totaling $1,851.49 and use tax totaling $866.47. On January 2, 1966 the taxpayer's status as contract carrier was discontinued and the contracts were replaced by truck lease agreements on which they are now required to collect a sales tax based upon the rentals.

It is the claim of the taxpayer that since the vehicles have become rental vehicles upon which no sales tax is due on purchase that the amount of the sales tax paid on purchase should be refunded.

Section 1101(b)(4) of the Tax Law defines a retail sale as any sale of tangible personal property other than for resale, and other limitations not here pertinent. A sale is defined in subdivision (b)(5) of the same section to include rentals.

The tax is due at the time the sale takes place. The intent to retain or resell determines taxability at that time. Since the tax was paid and no resale certificate could be given to the seller at the time of purchase by the taxpayer of the vehicles, that sale was subject to the tax. The subsequent change of the taxpayer's operations would not operate retroactively to change the amount of the tax due.

Based upon the foregoing I recommend that the decision of the Commission denying the application for revision of the sales tax be substantially in the form submitted herewith.

/s/ V. P. Molineaux
Hearing Officer

VPM:dv
Enc.
April 25, 1968

5-6-68

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION :

OF :

FOOD TRANSPORT, INC. :

FOR REFUND OF SALES AND USE TAXES :
UNDER ARTICLES 28 AND 29 OF THE
TAX LAW FROM AUGUST 1, 1965 TO :
DECEMBER 31, 1965
:

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Food Transport, Inc. having filed an application for refund of sales and use tax paid on the purchase of motor vehicles and vehicle bodies in the amount of $2,719.98 pursuant to Articles 28 and 29 of the Tax Law, and a hearing having been held at the office of the State Tax Commission, 80 Centre Street, New York, New York on November 28, 1967 before Vincent P. Molineaux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered, the

State Tax Commission hereby finds:

(1) That the taxpayer during the period August 1, 1965 to January 2, 1966 was a contract carrier for one client.

(2) That in that period taxpayer purchased certain motor vehicles and vehicle bodies which were used by the taxpayer in the performance of his activities as a contract carrier; that the taxpayer paid New York State and New York City sales taxes on such purchases in the amount of $1,851.49 and use taxes on such purchases in the amount of $866.87.

(3) That on January 2, 1966 the carrier contract was terminated and taxpayer entered into new contracts for lease of the aforesaid vehicles to the client.

(4) That taxpayer has collected sales tax on all vehicle rentals from January 2, 1966.

(5) That on June 30, 1967 the taxpayer applied for a refund pursuant to section 1139 of the Tax Law of the amounts paid as sales and use taxes upon the purchase of the aforesaid vehicles contending that the imposition of the tax on the purchase of the motor vehicles by the taxpayer and the subsequent imposition of a sales tax upon the rental of the vehicles by the taxpayer "comprises taxation upon taxation".

Based upon the foregoing findings and all of the evidence presented herein the State Tax Commission hereby

DECIDES:

(A) That at the time of purchase, the motor vehicles and vehicle bodies were purchased for taxpayer's use and not for resale and that accordingly the sale to the taxpayer of such motor vehicles and vehicle bodies were retail sales of tangible personal property as defined in section 1101(b)(4) of the Tax Law.

(B) That the receipts from such retail sales were subject to the sales and compensating use taxes under sections 1105 and 1110 of the Tax Law.

(C) That the rentals on motor vehicles rented by the taxpayer to his client were sales of tangible personal property in accordance with the definition of sale set forth in section 1101(b)(5) of the Tax Law; that such rentals were subject to the sales tax pursuant to section 1105 of the Tax Law.

(D) That accordingly taxes were properly imposed both on the purchases of the motor vehicles and vehicle bodies, and on the subsequent rentals of the motor vehicles; that such imposition does not constitute double taxation as contended by the taxpayer; that further there is no authority under Article 28 of the Tax Law for refund of sales and use taxes based upon a subsequent change of the taxpayer's operations from that of the

use of motor vehicles in his own business to the renting of the same.

Dated: Albany, New York this 28th day of May , 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ A. BRUCE MANLEY
Commissioner

/s/ SAMUEL E. LEPLER
Commissioner

The taxpayer contends (1) that the admission charge is a fee for admission to a place of assembly for a live choreographic performance, (2) that the relative state of undress of the performer is not a factor to be considered, (3) that the performance represents a new art form, and (4) that the performance is choreographic art solely with respect to unescorted males, who are charged an admission fee (but not to females or their male escorts neither of whom are required to pay an admission fee).

The determination imposing the tax on the admission charges levied by the taxpayer was imposed pursuant to section 1105 of the Tax Law. Subdivision (d)(1) imposes the tax on receipts from sales in or by "restaurants" or "taverns" where alcoholic beverages are sold including any charge made to patrons or customers for "cover", "minimum", "entertainment" or "other charge" except receipts taxed pursuant to subdivision (f). Subdivision (f)(1) of section 1105 imposes the tax on admission charges in excess of 10¢ for any place of amusement (subject to certain exceptions) and subdivision (f)(3) imposes the tax on

> "The amount paid as charges of a roof garden, cabaret or other similar place in the state."

Taxpayer's contention is that the determination is in error on the ground that its activities are within the exception contained in subdivision (f)(1) as "dramatic or musical art performances".

The phrase "Dramatic or musical admission charge" is defined in section 1101 of the Tax Law, at subdivision (d)(5) as

> "Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."

and the charge of a roof garden, cabaret or similar place is defined at subdivision (d)(4) of the same section as

> "Any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place."

In addition, subdivision (d) of section 1101 defines other terms used in subdivision (f) of section 1105 as follows: "Admission charge" at paragraph (2), "Amusement charge" at paragraph (3), "Patron" at paragraph (9), "Place of amusement" at paragraph (10), and "Roof garden, cabaret or other similar place" at paragraph (12).

As taxpayer does not allege that the place where the performances are given is a theatre, opera house or concert hall, nor that the performances in question are live dramatic or live musical ones, the claim for exemption is based, solely, on such performances as live choreographic ones in a place of assembly, within the meaning of the statute.

Tax statutes should be interpreted as the ordinary person reading them would so interpret them, and strict construction may not be used to defeat their clear and unmistakable meaning and intent, Steinbeck v. Gerosa, 4 N Y 2d 302; Business Statistics Organization v. Joseph, 299 N.Y. 443; Wien v. Murphy, 25 A D 2d 222.

The use of the phrase "place of assembly" in conjunction with "theatre", "opera house" and "concert hall" clearly indicates that the statute intended to exempt from the tax admission charges to exhibitions of the performing arts, the primary and predominant functions of such places. That some theatres, opera houses and concert halls may serve food or beverages does not change their essential character. They do so under special licenses, and not as cabarets, restaurants, or taverns. It was not intended to exempt an establishment such as the Club Escapade, self-described on its tax returns as a "restaurant" and which is licensed by the State Liquor Authority as a "tavern", whose primary and predominant business activity consists of the sale of food and beverages for on-premises consumption, as all receipts of such purveyors of food and beverages are specifically subject to the sales tax under section 1105 of the Tax Law. Clearly then, the taxpayer's premises are not a "place of assembly" within the definition contained in subdivision (d)(5) of section 1101.

I am of the opinion that the Club Escapade is a roof garden, cabaret, or other similar place as that term is defined in common usage. The present Tax Law, at subdivision (d)(12) of section 1101, merely defines the term as, "Any roof garden, cabaret or other similar place which furnishes a public performance for profit" and resort may be had to the definition contained in section 1(d) of Chapter 278 of the Laws of 1947 and carried over unchanged in Chapter 742 of the Laws of 1952, the former enabling acts permitting counties and cities to levy certain local special taxes, and which were repealed by Chapter 93 of the Laws of 1965 when the present sales tax law was enacted, and which reads:

> "The term 'roof garden, cabaret or other similar place' shall include any room in any hotel, restaurant, hall or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are

> afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."

or a cabaret as defined by the Administrative Code of the City of New York, at section B32-296.0(3), of Article 38, the licensing law, as

> "Any room, place or space in the city in which any musical entertainment, singing, dancing or similar amusement is permitted in connection with the restaurant business or the business of directly or indirectly selling to the public food or drink."

(See People v. Bickoff, 31 Misc 2d 549; People v. Greenberg, 12 Misc 2d 396 and People v. Liquorman, 171 Misc. 535 for judicial interpretations of this definition in connection with prosecution for violation of regulatory statutes where strict interpretation is required.)

No competent evidence was adduced as to the educational, cultural or edifying nature of the performances sufficient to allow a finding that they constituted choreography, the receipts of which are exempt from the sales tax on admission charges to places of amusement. The witness, Paul N. Rood, testified that in his opinion the dances were choreography and an art form. His judgment was based on, "what I see in mass media today". Prior to assuming the presidency of the taxpayer, Mr. Rood's experience included engagement as a home builder, real estate salesman, wholesale plywood and lumber sales and as a Marine Corps pilot. He is a graduate of Syracuse University College of Forestry, and has never done any interpretive dancing.

Accordingly, and based on the evidence, it is my opinion that the Club Escapade is not a place of assembly for a live dramatic, choreographic or musical performance within the meaning of subdivision (d)(5) of section 1101 of the Tax Law; that the receipts of Club Escapade from admission charges for the privilege of viewing "topless" dancers are not admission charges for dramatic or musical arts performances within the meaning of subdivision (f)(1) of section 1105 of the Tax Law; that such admission charges are subject to the sales tax imposed by section 1105 of the Tax Law under subdivisions (d)(1)(1), (f)(1) and (f)(3), and that the determination assessing additional sales taxes against the taxpayer should be sustained.