

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Ethel Rogers Inc.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/72-5/31/75. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of June, 1980, he served the within notice of Determination by mail upon Ethel Rogers Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ethel Rogers Inc.
802 Madison Ave.
New York, NY 10021

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
20th day of June, 1980.

Joanne Krapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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for the Period 6/1/72-5/31/75. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of June, 1980, he served the within notice of Determination by mail upon Herbert Willig the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Herbert Willig
68-37 Exeter St.
Forest Hills, NY 11375

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
20th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 20, 1980

Ethel Rogers Inc.
802 Madison Ave.
New York, NY 10021

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herbert Willig
68-37 Exeter St.
Forest Hills, NY 11375
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
ETHEL ROGERS, 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 June 1, 1972 to May 31, 1975.	:	

Applicant, Ethel Rogers, Inc., 802 Madison Avenue, New York, New York 10021, 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 June 1, 1972 to May 31, 1975 (File No. 13037).

A small claims hearing was held before Raymond Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 15, 1977. Applicant appeared by Herbert Willig, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether sales of flowers in New York State for delivery out of state by Florists' Transworld Delivery ("FTD") are subject to New York State sales tax.

FINDINGS OF FACT

1. Applicant, Ethel Rogers, Inc., operated as a retail florist at 802 Madison Avenue, New York, New York 10021. It filed New York State sales tax returns for all tax periods from June 1, 1972 through May 31, 1975.

2. On December 3, 1975 as the result of an audit of applicant's books and records, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1972 through May 31, 1975 against Ethel Rogers, Inc. and Ethel Rogers, individually and as an officer. The Notice and Demand was in the sum of \$11,674.08, consisting of additional sales tax of \$8,714.64, plus penalty and interest of \$2,959.44. This was based on additional taxable sales of \$119,129.21.

3. The audit findings were arrived at as follows:

(a) It was discovered that for the entire audit period, applicant had not charged tax on sales originating in New York City and delivered by Florists' Transworld Delivery ("FTD") to locations outside New York State. These sales were deemed to be taxable sales. An analysis of applicant's FTD monthly reports for the entire audit period resulted in additional FTD taxable sales of \$114,884.21 for the period June 1, 1972 to May 31, 1975.

(b) In addition, it was discovered that applicant had not been charging sales tax to one regular customer located in New York City.

An analysis of this customer's account was made from applicant's customer ledger, which resulted in additional taxable sales of \$4,245.00 for the period June 1, 1972 to May 31, 1975.

(c) The total additional sales tax due of \$8,714.64 is based on total additional taxable sales of \$119,129.21, on which the vendor-applicant failed to charge or to collect sales tax at the New York City statutory rates of 7% for the period June 1, 1972 to June 30, 1974, and 8% for the period July 1, 1974 to May 31, 1975.

4. Ethel Rogers, president of Ethel Rogers, Inc., had been in charge of sales and Nan Kaufman, secretary of the corporation, had been in charge of the records, bookkeeping and filing of sales tax returns. Applicant's representative, Herbert Willig, CPA, stated that Ethel Rogers, Nan Kaufman, and he, Herbert Willig, had been unaware of the Sales Tax Bureau's policy of requiring that sales tax be charged at the point of origin for all FTD sales.

5. Applicant cited Opinion of Counsel, Department of Taxation and Finance, dated March 11, 1966, in regards to out-of-state delivery:

"New York State and local sales taxes do not apply to the transfer of personalty located outside New York not being brought into New York, even if the agreement to sell is in New York and/or the instruments transferring title are delivered in New York. Any portion of the transferred property delivered to the purchaser in New York State is taxable...".

CONCLUSIONS OF LAW

A. That there is nothing in the Tax Law nor in the Sales and Use Tax Regulations which would specifically exclude out-of-state

FTD floral deliveries from the exemption provided inter-state transactions per the Commerce Clause of the Federal Constitution; therefore, the Sales Tax Bureau has erroneously determined that out-of-state FTD deliveries are taxable, based on the point of origin of the sale.

B. That applicant had acted in good faith.

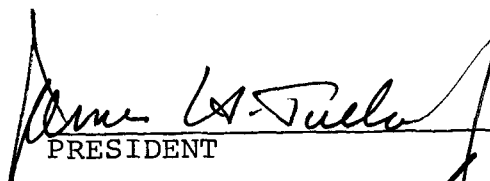
C. That the application of Ethel Rogers, Inc. is granted to the extent of reducing additional taxable sales (by the amount of "FTD additional taxable sales" of \$114,884.21) from \$119,129.21 to \$4,245.00, which correspondingly reduces the sales tax due from \$8,714.64 to \$311.15, and of cancelling all penalties.


D. That the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 3, 1975 and that, except as so granted, the application is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 20 1980


PRESIDENT


COMMISSIONER


COMMISSIONER