

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Shearson, Hayden, Stone, Inc. :
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 2/29/72-8/31/74. :

AFFIDAVIT OF MAILING

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 23rd day of May, 1980, he served the within notice of Determination by mail upon Shearson, Hayden, Stone, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Shearson, Hayden, Stone, Inc.
1 Western Union Plaza
New York, NY 10004

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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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 23rd day of May, 1980, he served the within notice of Determination by mail upon Hill M. Lalin 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. Hill M. Lalin
J. H. Cohn & Co.
810 Broad St.
Newark, NJ 07102

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
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 23, 1980

Shearson, Hayden, Stone, Inc.
1 Western Union Plaza
New York, NY 10004

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) 1139 & 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
Hill M. Lalin
J. H. Cohn & Co.
810 Broad St.
Newark, NJ 07102
Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 8, 1977 at 1:15 P.M. Applicant appeared by Hill M. Lalin of J.H. Cohn & Co., Accountants. The Audit Division appeared by Peter Crotty, Esq. (Alfred Rubinstein, Esq. and James J. Morris, Esq. of counsel). Following the reading of a stipulation into the record and the introduction of exhibits, the hearing was continued until August 31, 1977. Subsequently, the Department of Taxation and Finance and applicant, with the approval of the Hearing Officer, agreed to waive a continuation of the formal hearing and instead, to submit memoranda of law in support of their positions.

ISSUE

Whether payments made under a lease of equipment were subject to sales tax as receipts from a lease of tangible personal property, or rather constituted payments under a financing arrangement and were not subject to tax.

FINDINGS OF FACT

1. Applicant and the Department of Taxation and Finance stipulated on the record as follows:

(a) Shearson, Hammill Assets Corp. ("Shearson Assets") was a wholly-owned subsidiary of Shearson, Hammill & Co., Inc., ("Shearson") and was a subsidiary during the tax periods in question.

(b) Shearson, Hayden Stone, Inc., which appears as applicant is the successor in interest to Shearson, and has authority to act in this matter.

(c) Shearson purchased furniture and fixtures during the years 1971 through 1974 ("the assets"), some of which were purchased in and used in New York State and New York City.

(d) Shearson transferred title to that furniture and fixtures to Shearson Assets, which simultaneously paid therefor and leased the furniture and fixtures back to Shearson.

(e) Shearson Assets obtained the money to make that payment as a loan, which loan was secured by the assets and the lease.

(f) Shearson Assets billed Shearson for New York State and local sales and use taxes, and collected and remitted said taxes for the periods ended February 29, 1972 through August 31, 1974, inclusive, on the lease payments.

(g) There is to be established at a later date, proof of payment by Shearson of the applicable sales tax on the assets transferred to Shearson Assets, for which the lease payments herein are involved.

(h) Shearson, Hayden Stone, Inc. is the successor in interest to Shearson by virtue of a merger agreement entered into in 1974, which merger agreement was consummated.

2. On March 17, 1975, applicant filed applications for credit or refund of state and local sales tax on the lease payments totalling \$48,399.00. The claims were denied in full by the Sales Tax Bureau on October 1, 1975.

3. The Department of Taxation and Finance asserts no tax liability with respect to the sale of the assets by Shearson to Shearson Assets as said sale represents a sale for resale, but claims that the lease-back transaction is taxable.

4. By Bill of Sale dated as of February 11, 1972, Shearson sold to Shearson Assets, the assets:

"owned by the Grantor [Shearson] on the date hereof and located in the offices of the Grantor....TO HAVE AND TO HOLD all and singular the Equipment [the assets] unto the Grantee [Shearson Assets], its successors and assigns, to its and their own use and benefit, forever."

5. The Lease Agreement dated as of February 15, 1968 provides, in part, that "The Equipment is and shall remain the property of the Lessor [Shearson Assets], and the Lessee [Shearson] does not now have and shall have no rights of property therein but only the right to the possession and use thereof...". In Schedule No. 6 to the Lease Agreement dated February 11, 1972, the Lessee "represents, warrants and confirms to the Lessor that the Equipment ... has been duly delivered to the Lessee...".

6. Applicant contends that Shearson Assets has no Board of Directors, no officers and no separate facilities. Shearson created Shearson Assets for the sole purpose of achieving an improved net capital position under the rules of the Securities and Exchange Commission and the New York Stock Exchange. Under these rules, amounts invested in furniture and fixtures were not to be considered as capital in computing the ratio of aggregate indebtedness to capital. By transferring its furniture and fixtures to Shearson Assets, Shearson replaced

its non-qualifying fixed assets with qualifying cash, while retaining the beneficial use of the furniture and fixtures.

7. Shearson paid New York State sales and use taxes when purchasing the assets which were subsequently transferred to Shearson Assets. Shearson paid New York State sales and use taxes on these same assets, in response to billings of Shearson Assets.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax upon the receipts from every retail sale of tangible personal property, except as otherwise provided by statute.

B. That section 1101(b)(5) provides as follows:

"(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

C. That the payments made under the lease of equipment were receipts from a "rental, lease or license to use" and constituted a "sale" within the meaning of sections 1101(b)(5) and 1105(a) of the Tax Law and were thus subject to sales tax.

D. That the application of Shearson, Hayden Stone, Inc. is denied and the denial of the claims for credit or refund is sustained.

DATED: Albany, New York

MAY 23 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER