

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard L. Feigen & Co., 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 3/1/74 - 2/28/77.

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 19th day of June, 1981, he served the within notice of Decision by mail upon Richard L. Feigen & Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard L. Feigen & Co., Inc.
900 Park 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
19th day of June, 1981.

Annie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Richard L. Feigen & Co., Inc. :

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Period 3/1/74 - 2/28/77.

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 19th day of June, 1981, he served the within notice of Decision by mail upon Arthur Penn 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. Arthur Penn
Penn and Fabian
81 East 74th St.
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 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
19th day of June, 1981.

Cornelia A. Hayward

J. Vredenburg

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

June 19, 1981

Richard L. Feigen & Co., Inc.
900 Park Ave.
New York, NY 10021

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) 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
Arthur Penn
Penn and Fabian
81 East 74th St.
New York, NY 10021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
RICHARD L. FEIGEN & CO., INC. : DECISION
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 & 29 :
of the Tax Law for the Period March 1, 1974 :
through February 28, 1977. :
:

Petitioner, Richard L. Feigen & Co., Inc., 900 Park Avenue, New York, New York 10021, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the the Tax Law for the period March 1, 1974 through February 28, 1977 (File No. 22748).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 9, 1980 at 1:15 P.M. Applicant appeared by Penn & Fabian, Esqs., (Arthur Penn, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq., (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the sales of various works of art by petitioner were subject to the imposition of sales tax.

II. Whether recurring purchases, and the purchase of fixtures and equipment by petitioner were subject to the imposition of sales and/or use tax.

FINDINGS OFFACT

1. On June 12, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Richard L. Feigen &

Co., Inc. in the amount of \$67,566.80, plus penalty and interest of \$36,847.68, for a total amount of \$104,414.54.

2. An audit was conducted upon petitioner. Examined were the general ledger, sales journal, purchase journals, invoices, Federal income tax returns, and state sales tax returns. Sales from December, 1975 to November, 1976 were tested. A margin of error of .0907 was computed. Reported sales were not increased upon audit. Total sales for the entire period in issue were \$3,979,098.00. A tax due of \$58,396.25 was estimated based on the total sales. Recurring purchases, and purchases for fixtures and equipment for December, 1975 through December, 1976, for which no tax was paid, amounted to \$9,170.61.

3. Petitioner operates an art gallery selling paintings and other art objects. Five sales of paintings out of 95 from December, 1975 to November, 1976 were found to be taxable in the opinion of the auditor. There were various paintings sold to Jack Cummings, Maison Brenner, Galleria Internazionale, Curtis L. Herald and Paul Mellon.

4. On June 7, 1976 Jack Cummings of Montreal, Canada bought a Cezanne painting for \$55,000.00. His brother, Robert signed a receipt that he "received [it at applicant's art gallery] in good order by hand." Robert Cummings, a long-term friend of Richard Feigen, delivered it at Richard L. Feigen's request to an exporting carrier at JFK Airport for shipment to Montreal. A receipt addressed to petitioner by Bizjet, Inc., an air cargo carrier, was signed by Jack Cummings, the purchaser in Montreal, Canada.

5. On October 26, 1976, Maison Brenner, an art gallery in Caracas, Venezuela purchased a Picasso painting for \$63,500.00. It was picked up by Bernard Brenner, a brother of the gallery's owner, who acknowledged that he "received in good order by hand." A resale certificate was obtained from a New

York gallery owned by Irwin Brenner. The painting was delivered by Milani Movers, a transporter, to JFK airport and in particular to Bernard Brenner, who was beyond the customs barrier and carried by hand to Caracas on a Pan American flight. The painting was bought for resale and the purchaser wanted it delivered without delay.

6. On January 19, 1976, Galleria Internazionale of Geneva, Switzerland, purchased a Yves Tanguy painting from petitioner for \$113,000.00. A resale certificate was secured from the Davlyn Gallery, which stored, crated and shipped it to Switzerland. Shipment was made in October, 1976, to Geneva, Switzerland.

7. On January 30, 1976, Paul Mellon of Virginia purchased a painting by Johann Heinrich Fuseli for \$106,000.00. It was bought for the Yale Center for British Art in New Haven, Connecticut. It was delivered to the Yale Center by a common carrier, Security Storage Company, an affiliate of Allied Van Lines. The van carried other paintings destined for the Yale Center.

8. On April 23, 1976 Curtis L. Herald purchased a Vlaminck for \$23,500.00 from petitioner. After it was framed in New York City, it was delivered by a common carrier to the purchaser at his residence in Teaneck, New Jersey.

9. Petitioner has insurance coverage on all paintings until they reach their destinations.

10. Petitioner had available all sales invoices for the periods in issue.

11. No tax was paid by petitioner on expense purchases for December, 1976 and January, 1977 totaling \$4,086.09; for its Bedford, New York, purchases totaling \$1,001.15; and for fixed asset purchases and leasehold improvements totaling \$36,180.48. Petitioner offered no documentary or other substantial evidence that these purchases were not taxable.

CONCLUSIONS OF LAW

A. That the sales of the five paintings in issue were non-taxable sales to foreign or out of state residents. Some were for resale. All were shipped without the state. The Cezanne was shipped by a common carrier to a purchaser in Montreal, the Picasso to Caracas, Venezuela, the Yves Tanguy to Geneva, Switzerland, the Fuseli to New Haven, Connecticut and the Vlaminck to Teaneck, New Jersey.

B. That in any event, use of test period to determine sales tax liability over a period of three years, when petitioner's purchase and sales invoices for the entire period under review were available for examination, was improper. "(R)esort to this method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit." Chartair, Inc. v. State Tax Commission, 66 A.D.2d 44,46 (3rd Dept. 1978). Consequently, only that portion of the assessment based on an actual audit of petitioner's invoices can be sustained. The portion based only on the test is cancelled.

C. That section 1145(a) of the Tax Law provides that if the delay in filing or paying over any tax found to be due is found to be excusable by the Tax Commission, it may remit any or all penalties. The delay here was excusable and all penalties and interest in excess of the statutory minimum are hereby cancelled.

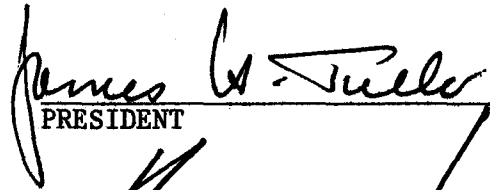
D. That the petition of Richard L. Feigen & Co., Inc., is granted to the extent indicated in Conclusions of Law "A", "B" and "C"; that the Notice of

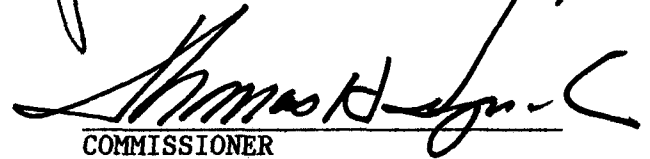
Determination issued June 12, 1978, is to be modified accordingly; and that except as so modified, the determination is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1981


PRESIDENT


COMMISSIONER


COMMISSIONER