

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rafael Valdes :
d/b/a R & A Trading Co. :
: 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 :
6/1/73 - 5/31/76. :

State of New York
County of Albany

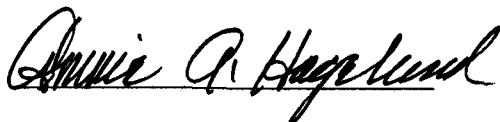
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Rafael Valdes, d/b/a R & A Trading Co. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

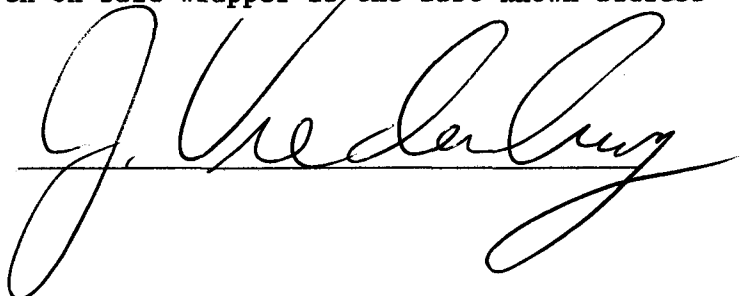
Rafael Valdes
d/b/a R & A Trading Co.
1186 Broadway
New York, NY

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
27th day of November, 1981.





STATE OF NEW YORK
STATE TAX COMMISSION

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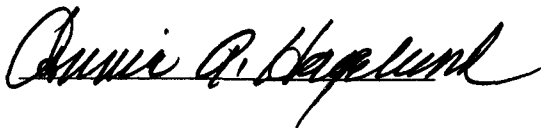
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Sidney Eagle the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

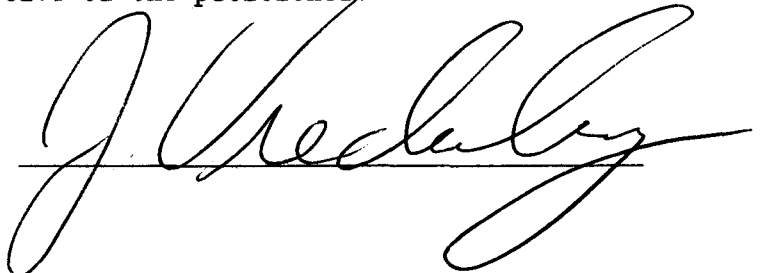
Sidney Eagle
Eagle & Fein
363 Seventh Ave.
New York, NY 10001

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
27th day of November, 1981.





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

November 27, 1981

Rafael Valdes
d/b/a R & A Trading Co.
1186 Broadway
New York, NY

Dear Mr. Valdes:

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
Sidney Eagle
Eagle & Fein
363 Seventh Ave.
New York, NY 10001
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
RAFAEL VALDES	:	DECISION
D/B/A R & A TRADING CO.	:	
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, 1973	:	
through May 31, 1976.	:	

Petitioner, Rafael Valdes d/b/a R & A Trading Co., 1186 Broadway, New York, New York 10001, filed a petition 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, 1973 through May 31, 1976 (File No. 20963).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 5, 1980 at 1:15 P.M. Petitioner appeared by Sidney Eagle, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether items sold by the petitioner were for export to a foreign country or were such items delivered to the purchaser or his designee within New York State.

FINDINGS OF FACT

1. Petitioner, Rafael Valdes d/b/a R & A Trading Co., is a retailer of general merchandise (radios, televisions, calculators, etc.) located at 1186 Broadway, New York, New York.

2. On September 20, 1977 as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period June 1, 1973 through May 31, 1976 for taxes due of \$20,939.29, plus penalty and interest of \$11,214.13, for a total of \$32,153.42.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue, to June 19, 1978.

4. During the period at issue, petitioner filed annual sales tax returns and reported no taxable sales.

5. On audit, the Audit Division examined petitioner's sales invoices for the months of September, October and November 1976 and disallowed 61 percent of petitioner's reported nontaxable sales for such period. Such sales were sales of merchandise which petitioner contended were delivered to airlines and shipping vessels for export to foreign countries. The Audit Division disallowed these sales on the grounds that petitioner did not have ocean bills of lading or receipts from a freight forwarder to substantiate that delivery or possession did not occur within New York State. The Division applied the disallowed percentage (61 percent) to gross sales of \$449,304.00 for the audit period and thereby determined total taxable sales of \$274,075.00 and tax due thereon of \$20,939.29.

6. The Audit Division conceded that sales of \$1,592.25 during the test period were nontaxable. Petitioner conceded that sales of \$5,562.00 were subject to tax for the test period which represented 18 percent of gross sales rather than the 61 percent determined by the Audit Division.

7. It was the petitioner's position, with the exception of sales of \$5,562.00 (Finding of Fact "6" supra), that the remaining sales taxed by the

Audit Division were exempt on the grounds that they were for export to foreign countries.

8. Petitioner's business consisted of selling general merchandise primarily to residents of Venezuela and Argentina. The petitioner accepted sales orders for his merchandise by telephone or verbally through friends and acquaintances of his customers. Petitioner then delivered or hired a contract carrier to deliver the merchandise to airlines or shipping vessels destined for Venezuela and Argentina. The merchandise was given to either a shipping company employee or an airline crew member. Petitioner did not obtain a receipt from the airline or the shipping company upon delivery of the merchandise. Petitioner did not charge its customers for delivery. Any such charges were paid by the customer directly to the airline or shipping company.

9. The books and records maintained by petitioner were insufficient for the Audit Division to determine the exact amount of petitioner's taxable sales.

10. Petitioner offered no documentary evidence such as bills of lading, receipts from airline personnel or shipping lines personnel, or a statement from such persons that the merchandise was transferred to the purchaser outside New York State.

11. Reasonable cause existed for petitioner's failure to collect the sales taxes at issue.

CONCLUSIONS OF LAW

A. That pursuant to 20 NYCRR 525.2(a)(3) the sales tax is a "destination tax", that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

B. That petitioner made sales of tangible personal property and delivered such personal property within New York State. That petitioner failed to establish that possession of the tangible personal property was transferred to the purchaser outside New York State and moreover failed to establish by clear and convincing evidence that the merchandise was not actually delivered to the purchaser within New York State. Therefore, petitioner is liable for the sales taxes which it failed to collect from the customer in accordance with the provisions of section 1133(a) of the Tax Law.

C. That based on Finding of Fact "6", the additional taxable sales for the period June 1, 1973 through May 31, 1976 are reduced to \$238,131.00.

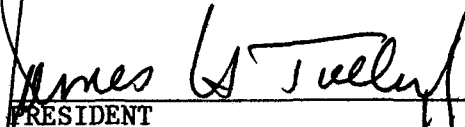
D. That the penalty and interest in excess of the minimum statutory rate imposed pursuant to section 1145 of the Tax Law are cancelled.


E. That the petition of Rafael Valdes d/b/a R & A Trading Co. is granted to the extent indicated in Conclusions of Law "C" and "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1977; and that, except as so granted, the petition is in all other respects denied.

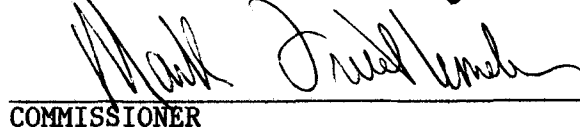
DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER