

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Sterling Optical 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 6/1/72-2/29/76. :

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 12th day of March, 1981, he served the within notice of Decision by mail upon Sterling Optical Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sterling Optical Co., Inc.
138 Fulton St.
New York, NY 10038

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
12th day of March, 1981.

Annie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Sterling Optical Co., Inc. :

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Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/72-2/29/76. :

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 12th day of March, 1981, he served the within notice of Decision by mail upon Neil Lavin 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. Neil Lavin
IPOC Hospital Supply Corp.
1025 Westchester Ave.
White Plains, NY 10604

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
12th day of March, 1981.

Connie A. Hagelund

J. Vredenburg

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

March 12, 1981

Sterling Optical Co., Inc.
138 Fulton St.
New York, NY 10038

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
Neil Lavin
IPOC Hospital Supply Corp.
1025 Westchester Ave.
White Plains, NY 10604
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
STERLING OPTICAL CO., INC.
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 through February 29,
1976.

DECISION

Petitioner, Sterling Optical Co., Inc., 138 Fulton Street, New York, New York, 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, 1972 through February 29, 1976 (File No. 16641).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 27, 1980 at 1:15 P.M. Petitioner appeared by Neil Lavin, Assistant Corporate Controller. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether petitioner's purchases of eyeglass frames for use as replacement parts in repairing eyeglasses are subject to sales or use tax.

FINDINGS OF FACT

1. Petitioner, Sterling Optical Co., Inc., a subsidiary of IPCO Hospital Supply Corp., is engaged in the operation of an optical retail store. The primary business activity consists of filling prescriptions for eyeglasses and contact lenses which are received from staff optometrists as well as outside optometrists and ophthalmologists. Trained personnel assist the customer in selecting a frame and properly fit and adjust the frame. Other activities

include performing repair work on prescription glasses, such as replacing a temple or broken lens, eye examinations and selling non-prescription sunglasses.

2. On August 10, 1976, 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, 1972 through February 29, 1976 for taxes due of \$5,104.10, plus penalty and interest of \$1,932.40, for a total of \$7,036.50.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the period June 1, 1972 through May 31, 1975 to September 20, 1976.

4. The Audit Division performed an audit of the books and records of all Sterling Optical locations in New York State. The tax assessed on the aforementioned notice represents tax on that portion of eyeglass frames purchased which the Audit Division determined were used as replacement parts in servicing or repairing eyeglasses. Petitioner consented to and paid all other tax deficiencies determined on audit.

5. Petitioner, as part of its business activities, repairs eyeglasses for its customers. Replacement parts are taken from similar complete frames in stock. If such part is not available, petitioner will attempt to sell a complete new frame. Petitioner contended that it did not charge customers for repair services unless it was necessary to replace a broken part and that such charge was only for the part itself.

6. Petitioner issued a resale certificate for the purchase of eyeglass frames. Petitioner argued that the frames are resold to customers regardless of whether some are sold as replacement parts rather than complete units. The Audit Division's position was that petitioner is performing a service not subject to tax and the purchase of tangible personal property used in performing such a service constitutes a purchase at retail and therefore subject to tax.

CONCLUSIONS OF LAW

A. That section 1115(a) of the Tax Law provides for an exemption from the sales and use taxes for:

"(4) Prosthetic aids, hearing aids, eyeglasses and artificial devices and component parts thereof purchased to correct or alleviate physical incapacity in human beings."

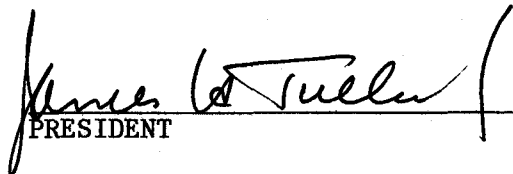
B. That the eyeglass frames purchased by applicant for use as replacement parts in repairing prescription eyeglasses constitute component parts of said eyeglasses and, therefore, are exempt from tax pursuant to section 1115(a)(4) of the Tax Law.


C. That the application of Sterling Optical Co., Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 10, 1976 is cancelled.

DATED: Albany, New York

MAR 12 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER