

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Don Allen Studio, 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 9/1/74-8/31/77.

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 8th day of September, 1982, he served the within notice of Decision by certified mail upon Don Allen Studio, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Don Allen Studio, Inc.
136 East 64th St.
New York, NY 10023

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
8th day of September, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Don Allen Studio, Inc. :

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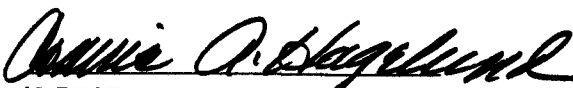
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of September, 1982, he served the within notice of Decision by certified mail upon Steven B. Hyams the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven B. Hyams
11 Sagamore Way
Jericho, NY 11753

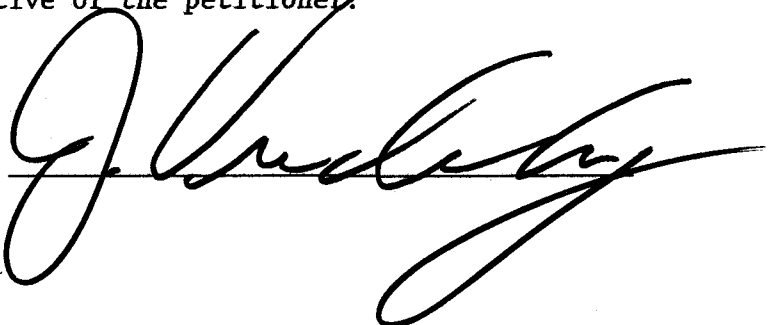
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
8th day of September, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW



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

September 8, 1982

Don Allen Studio, Inc.
136 East 64th St.
New York, NY 10023

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Steven B. Hyams
11 Sagamore Way
Jericho, NY 11753
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DON ALLEN STUDIO, INC.

DECISION

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 September 1, 1974 through
August 31, 1977.

Petitioner, Don Allen Studio, Inc., 136 East 64th Street, New York, New York 10023, 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 September 1, 1974 through August 31, 1977 (File No. 21908).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 27, 1979. Petitioner appeared by Steven B. Hyams, CPA. The Audit Division appeared by Peter Crotty, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner's photographs are tangible personal property subject to tax on retail sales imposed pursuant to section 1105(a) of the Tax Law.

II. Whether petitioner's practice of medical photography constitutes the performance of a medical service.

III. Whether petitioner's sales of photographs used by physicians are exempt from the tax imposed under section 1105(a) by operation of section 1115(a)(3) of the Tax Law.

FINDINGS OF FACT

1. By Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 9, 1978, the Audit Division assessed a deficiency of \$27,961.72, plus penalty and interest of \$11,411.61, totalling \$39,373.33 against petitioner, Don Allen Studio, Inc., for the tax period September 1, 1974 through August 31, 1977 in accordance with a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law, executed by Don Allen, President, on October 17, 1977.

2. Petitioner is engaged in the practice of medical photography.

3. Medical photography is the depiction by photographic means of the soft tissues of the human body, in such manner as can be utilized in the practice of reconstructive plastic surgery.

4. The creation of a photographic report of soft tissues is necessary for surgical purposes inter alia (a) to record the progress of a course of surgical treatment, and (b) to demonstrate details of contour which vanish from supine or anesthetized patients. The petitioner analogized its work to radiology, which records the anatomical configuration of hard or fibrous tissues. The technique of radiology cannot depict soft tissues to the degree required for certain types of surgery. Often a radiologist's services and petitioner's services are utilized in conjunction with each other for the same operation.

5. Petitioner's president, Don Allen, received training as a medical photographer at the Rockefeller Institute for Medical Research, and founded the medical photographic department at Manhattan Eye, Ear, Nose and Throat Hospital. He received forty hours of instruction in oculoplastic surgery and is a member of the Oculoplastic Fellowship Society.

6. The practice of medical photography is not licensed or otherwise regulated by the State of New York.

7. Petitioner takes photographs, develops negatives and makes prints to exacting standards designed to accurately and unflatteringly reflect anatomical features which are relevant to a course of medical treatment.

8. Petitioner requires that the subject patient have a prescription for his services from a physician. This is not a legal requirement.

9. Petitioner delivers a set of prints directly to the physician. Petitioner retains the title to and possession of the negatives. Petitioner collects sales tax from patients who request and to whom are furnished additional prints.

10. Petitioner's services are recognized as medical expenses for purposes of (1) Major Medical Insurance coverage provided by New York Life Insurance Co. and (2) medical reimbursement provided by the County of Erie Department of Health.

11. The amount of the assessment in this matter is not in controversy.

CONCLUSIONS OF LAW

A. That section 1101(b)(6) of the Tax Law defines "tangible personal property" to be corporeal personal property of any nature; that, therefore, petitioner's photographs constitute tangible personal property subject to tax on retail sales imposed pursuant to section 1105(a) of the Tax Law.

B. That the petitioner does not provide medical services, but is a photographer; the petitioner provides neither diagnosis nor treatment for patients.

That the petitioner does not perform services for the patients involved. The services in connection with each transaction are performed for the physician who requested the photographs. The photographs prepared by petitioner are used

by the referring doctor for diagnosis or treatment of the patient. The petitioner performs no medical services such as protecting the patient from harmful effects of radiation. (Pub. Hlth. L. Sec. 3500).

C. That section 1115(a)(3) of the Tax Law provides, in part, for an exemption from the sales and use taxes for "medical equipment (including component parts thereof) and supplies."

That the burden of proof is upon the petitioner to establish that the receipts in issue are not subject to tax. (Tax Law Sec. 1132(c)). "Tax exemptions, however, are limitations of sovereignty and are strictly construed. (Hale v. State Board of Assessment, 302 U.S. 95; Perry Co. v. City of Norfolk, 220 U.S. 472). If ambiguity or uncertainty occurs, all doubt must be resolved against the exemption. (People ex rel. Mizpah Lodge v. Burke, 228 NY 245)". (People v. Brooklyn Garden Apartments, 283 NY 373, 380). The petitioner has not established that its sales of photographs used by physicians are within the exemption of section 1115(a)(3) of the Tax Law.

D. That the petition of Don Allen Studio, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 9, 1978 is sustained.

DATED: Albany, New York

SEP 08 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER