

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

William Hengerer Co.
Div. Assoc. Dry Goods Corp.

: 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:
3/1/74-2/28/78.

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 May, 1982, he served the within notice of Decision by certified mail upon William Hengerer Co., Div. Assoc. Dry Goods Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Hengerer Co.
Div. Assoc. Dry Goods Corp.
c/o C. A. Scaccia, Vice Pres./Treas.
465 Main St.
Buffalo, NY 14205

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 May, 1982.

Annice P. Highland

Jay Vredenburg

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

May 27, 1982

William Hengerer Co.
Div. Assoc. Dry Goods Corp.
c/o C. A. Scaccia, Vice Pres./Treas.
465 Main St.
Buffalo, NY 14205

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM HENGERER CO.	:	DECISION
DIVISION OF ASSOCIATED DRY GOODS CORP.	:	
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 March 1, 1974	:	
through February 28, 1978.	:	

Petitioner, William Hengerer Co., Division of Associated Dry Goods Corp., 465 Main Street, Buffalo, New York 14205, 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 March 1, 1974 through February 28, 1978 (File No. 25511).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York on November 19, 1980 at 2:45 P.M. Petitioner appeared by Carmelo A. Scaccia, Vice President and Treasurer. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner's layaway charge of \$1.00 is subject to sales tax.

FINDINGS OF FACT

1. Petitioner, William Hengerer Co., Division of Associated Dry Goods Corp., operated five retail department stores located in and around the Buffalo, New York area.
2. On October 30, 1978, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes

due against petitioner covering the period March 1, 1974 through February 28, 1978 for taxes due of \$3,962.92, plus penalty and interest of \$2,336.38, for a total of \$6,299.30.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1974 through August 31, 1977 to December 20, 1978.

4. The audit conducted by the Audit Division resulted in two unresolved issues: 1) disallowed bad debt credits of \$1,413.08 and 2) additional taxes determined due of \$2,549.84 on a \$1.00 layaway charge.

5. The Audit Division conceded that the petitioner should be allowed the credits on bad debts.

6a. Petitioner's layaway plan requires a customer to deposit a minimum of 10 percent of the purchase price. When a customer makes a layaway deposit, petitioner removes the merchandise from the selling floor and stores the item for the customer until the entire purchase price is paid. In the event the sale is cancelled, the deposit is refunded to the customer.

b. In addition to the 10 percent minimum deposit, petitioner charges the customer \$1.00 for purchases made on the layaway plan, regardless of the sales price or the size of the item. The \$1.00 charge is separately stated on the sales invoice as a layaway charge and petitioner does not collect sales tax on said charge. In the event the sale is cancelled, the \$1.00 layaway charge is not refunded to the customer.

7. Petitioner argued that the \$1.00 layaway charge is actually a finance charge.

8. Petitioner acted in good faith at all times and reasonable cause existed for petitioner's failure to collect the sales tax at issue.

CONCLUSIONS OF LAW

A. That a finance charge is the consideration paid for the privilege of credit. That under the layaway plan described in Finding of Fact "6", petitioner does not extend credit to the purchaser; therefore, the \$1.00 layaway charge cannot be construed as a finance charge.

B. That petitioner's \$1.00 layaway charge is payment by the customer for an option to purchase tangible personal property at a future date.

Where the option to purchase is exercised and title to and possession of the tangible personal property is transferred to the purchaser, the charge is taxable as a part of the "receipt" from the "retail sale" of tangible personal property (Tax Law sections 1101(b)(3), 1101(b)(4) and 1105(a)).

Where, however, the option is not exercised, the purchase of the option is the purchase of an intangible and not subject to tax.

C. That the tax assessed on disallowed bad debts is cancelled.

D. That the penalty and interest in excess of the minimum statutory rate are cancelled.

E. That the petition of William Hengerer Co., Division of Associated Dry Goods Corp., is granted to the extent indicated in Conclusions of Law "B", "C" and "D" above; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued October 30, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 27 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER