

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

William J. Elberding

:

:

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:
3/1/75-2/28/78.

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 21st day of May, 1982, he served the within notice of Decision by certified mail upon William J. Elberding, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William J. Elberding
4 E. 30th St.
New York, NY 10016

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
21st day of May, 1982.

Camille A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

William J. Elberding :

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for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 3/1/75-2/28/78.

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 21st day of May, 1982, he served the within notice of Decision by certified mail upon Steven M. Coren 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 M. Coren
485 Madison Ave.
New York, NY 10022

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
21st day of May, 1982.

Cornie A. Hapgood

J. Vredenburg

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

May 21, 1982

William J. Elberding
4 E. 30th St.
New York, NY 10016

Dear Mr. Elberding:

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 M. Coren
485 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM J. ELBERDING	:	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 March 1, 1975	:	
through February 28, 1978.	:	

Petitioner, William J. Elberding, 4 East 30th Street, New York, New York 10016, 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, 1975 through February 28, 1978 (File No. 26978).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 5, 1981 at 1:15 P.M. Petitioner appeared by Steven M. Coren, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's business activity constituted the sale of tangible personal property subject to tax or whether the receipts therefrom were for reproduction rights of artwork which are not taxed under Articles 28 and 29 of the Tax Law.

FINDINGS OF FACT

1. On June 15, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against William J. Elberding covering the period March 1, 1975 through February 28, 1978. The Notice was

issued as a result of a field audit and asserted tax due of \$6,536.80, plus simple interest of \$1,607.29, for a total of \$8,144.09.

2. Petitioner executed consents to extend the period of limitation for assessment to September 20, 1979.

3. Petitioner is engaged in the business of preparing artwork for advertising purposes. The receipts at issue are those received from B. Altman & Co. for artwork prepared for reproduction in ads placed in the New York Times. An order for artwork was placed with petitioner by oral consultation. The product delivered to the advertising department of B. Altman & Co. was in the form of a drawing. The transfer of possession was temporary for the purpose of reproduction.

4. On audit, it was the Audit Division's position that the transfer of the artwork and the receipts therefrom constituted a sale of tangible personal property subject to tax under section 1105(a) of the Tax Law. The Division based its position on the premise that when artwork is specifically made to order for a customer, it cannot be considered a mere reproduction right. The Audit Division held receipts from B. Altman & Co. totaling \$81,710.00 subject to tax of \$6,536.80 in the audit period.

5. Invoices issued by petitioner to B. Altman & Co. and the backs of the artwork were stamped with the following legend:

"Right to reproduce without charge [sic] or alteration is hereby granted. After reproduction, said picture, painting or drawing, without charge [sic] or alteration, is to be returned to artist, and remains property of the artist."¹

6. All artwork was returned to petitioner without change or alteration after reproduction by B. Altman & Co.'s advertising department. After framing, petitioner used the artwork as samples in generating other business. The

¹ The word "charge" should be "change".

artwork was available to other customers if they chose to reproduce them. Upon obsolescence or accumulation of too many samples, the artwork was destroyed by petitioner.

CONCLUSIONS OF LAW

A. That pursuant to 20 NYCRR 526.7(f)(1) and (2), the granting of a right to reproduce is not a license to use or a sale and is not taxable. Mere temporary possession or custody for the purpose of making a reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. (Matter of Frissell v. McGoldrick, 300 N.Y. 370; 88 N.Y.S.2d 896; 91 N.E.2d 305 (1950).)

B. That since the transactions at issue involved only the granting of the right to reproduce, they were not a license to use or a sale and, therefore, not taxable. The fact that the artwork was produced by petitioner specifically for his customer does not change the nature of the transaction. The facts remain that petitioner's customer did not alter or change the artwork and returned it to petitioner after the necessary steps were taken for reproduction. (Matter of McCall Publishing Company, Inc., State Tax Commission, May 1, 1981.)


C. That the petition of William J. Elberding is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 15, 1979 is hereby cancelled.

DATED: Albany, New York

MAY 21 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER