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

December 24, 1982

Sattlers, Inc.
998 Broadway
Buffalo, NY 14212

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 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
Samuel L. Shapiro
Kavinoky, Cook, Sandler, Gardner, Wisbaum & Lipman
120 Delaware Ave.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of SATTLER'S, 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, 1971 through February 28, 1973.	DECISION

Petitioner, Sattler's Inc., 998 Broadway, Buffalo, New York 14212, 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, 1971 through February 28, 1973 (File No. 10408).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on May 17, 1978 at 1:15 P.M. and on March 22 and March 23, 1979 at 9:00 A.M. Petitioner appeared by Kavinoky, Cook, Sandler, Gardner, Wisbaum & Lipman (Samuel L. Shapiro, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the agreements executed by petitioner in 1962 and 1969 relative to the Boulevard Mall and to the Seneca Mall, respectively, should be treated as "true leases" or as "leases intended as security" within the terms of UCC Section 1-201(37).

II. Whether petitioner is entitled to a partial refund of sales and use taxes paid incidental to payments under these agreements, based upon a characterization of certain items as capital improvements.

III. Whether petitioner bears the burden of proof as to the material elements and, in particular, as to the character of the agreements which are at issue.

IV. Whether timeliness of mailing of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is at issue, and if so, whether said notice was timely mailed, or mailed at all.

FINDINGS OF FACT

1. Petitioner timely filed its sales tax returns for the periods ended August 31, 1971 through February 28, 1973.

2. The Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 17, 1975 bearing Number 90,203,688 assessing additional taxes of $62,054.66, plus penalties and interest of $23,261.84, for a total of $85,316.50 under section 1138(a) of the Tax Law.

3. Petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax dated June 9, 1975 seeking a refund of $71,484.48, and simultaneously petitioner timely filed on June 9, 1975 a petition to review the determination contained in Notice No. 90,203,688.

4. Petitioner executed two substantially similar agreements in 1962 and 1969 with the Thrift Credit Corporation, each of which was entitled "Equipment Lease Agreement".

5. Petitioner paid no sales tax to vendors upon the execution of those agreements nor upon the purchase of any of the equipment covered thereby. Petitioner did not pay sales taxes to Thrift Credit Corporation when the equipment purchases were made. No evidence was offered to show whether Thrift Credit Corporation paid sales taxes to the vendors of the equipment purchased

under the two agreements, but invoices presented failed to show any charge for sales tax.

6. Both agreements clearly state that "such articles, when purchased by the Lessor, shall become the sole and exclusive property of the Lessor without any right of the Lessee in or to the same other than as a Lessee under this Agreement."

7. Both agreements label all payments as rent thereunder.

8. The 1962 agreement applicable to petitioner's store at the Boulevard Mall provided (on p. 6) "Nothing herein contained shall give to the Lessee any right, title and interest in and to any equipment leased hereunder, except as Lessee."

9. The 1962 agreement provided at p. 9 that "The Lessee will report and pay...any and all taxes...including sales taxes, if any...".

10. The 1969 agreement applicable to petitioner's store at the Seneca Mall provides (on p. 2 at para. 4) that "Lessor covenants it is the owner of the equipment... Title to the equipment shall at all times remain in the Lessor." Also, p. 2 above states that "This lease shall terminate and the equipment leased hereby shall be returned to the Lessor...".

11. Both agreements contain language commonly found in leases regarding title and possession of the leased property, obligations of maintenance and care, provisions for insurance, and clauses on rental payments, buy-out options and defaults.

12. The 1962 agreement at p. 8, para. 7 specifically refers to pending legislation regarding special tax benefits that might become available to the parties and how such benefits were to be treated, to wit: that if the law were to allow tax credits on "leased equipment", then petitioner was to be entitled

to those credits and Lessor would assign its rights to Lessee, or, if the benefits inured to Lessor, only, presumably incidental to its ownership of the equipment, then the appropriate adjustment was to be made to the rental payments thereafter made by Lessee to Lessor.

13. Petitioner selected or negotiated the form of the said agreements as well as the provisions therein.

14. Petitioner deducted all payments made by it to Thrift Credit Corporation as rental payments, and petitioner paid sales taxes on each monthly rental payment, to wit, $32,181.64 on the Boulevard Mall agreement and $39,302.84 on the Seneca Mall agreement. These sales tax payments were, in no way, apportioned, but were applied to the various monthly payments. On the original purchases of more than $2,000,000.00 under the two agreements, no sales tax was paid upon purchase.

15. Petitioner exercised buy-out options on both agreements in 1971 and 1972 and also made various improvements to some of its stores, and the Audit Division determined on audit of petitioner's books and records additional tax of $79,198.45, but some of this amount was not included in the ultimate Notice of Determination and Demand because of the lapse of the Consent Extending Period of Limitation.

16. Petitioner did not act as if it was owner of the items covered by these two agreements to the extent that no tax deduction was taken for depreciation nor were the monthly rental payments apportioned so as to be partially deductible as interest. In fact, the total of each payment was deducted as rent under lease agreements.

17. Petitioner exercised its buy-out options before the expiration of the leases, even though the option prices upon expiration were less than 10 percent

of the total. At the time the options were actually exercised, the prices paid far exceeded 10 percent of the total lease agreement price, to wit; $225,000 in 1971 on the 1962 agreement and $580,000 in 1972 on the 1969 agreement. These payments constituted the balance due on the purchase of the items covered by these two agreements, plus a 10 percent interest charge for what would have been the remaining period of the lease.

18. Petitioner, as part of these agreements, paid for various items and services such as painting, carpeting, installation of perimeter walls, electrical wiring and plumbing for various stores located within the malls. All of these items and services added to the value of the property and greatly prolonged its useful life. They could not be removed without being destroyed and were intended to be permanent. As a result of these facts, petitioner maintains they were capital improvements.

19. Petitioner, whether by accident or design, filed its petition for a hearing within the time limit set forth in the Notice of Determination, and said petition clearly referred to the number assigned to the Notice of Determination, the periods involved, the amounts in question, and the items or transactions giving rise to the determination.

20. Petitioner did not plead the lapse of the Statute of Limitations. In addition, petitioner did not plead or try to prove that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was never mailed or received.

21. Petitioner commenced these proceedings by filing of the petition heretofore mentioned, and the State Tax Commisison has duly accorded it processing in the ordinary course, and, in fact, has endured inordinate delays due to special circumstances affecting the availability of petitioner's witnesses.

22. Petitioner, at all times, sought, obtained and relied upon professional advice from its attorneys and accountants.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, as follows:

> "...the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect the tax or the customer."

Petitioner's two agreements clearly refer to payments thereunder as "rent", and petitioner would certainly be defined as the "customer".

B. That petitioner selected the form of its agreements, reaped the benefits of the form for some period and is now precluded from altering the form to reap additional benefit. The two agreements of 1962 and 1969 were drawn, executed, and abided by, as leases, and all payments thereunder were labeled, paid and deducted as rent. Petitioner cannot characterize those agreements as "security interests" because in form and wording, the agreements themselves are "true leases". Bare compliance with part of UCC 1-201(37) does not render these agreements "security". (Sverdlow v. Bates, 129 N.Y.S.2d 88.)

C. That petitioner failed to satisfy its burden of proof as to the nature of the agreements and the intent of the parties thereto in that the agreements, on their face, contradict what petitioner offers as evidence of intent. (Shlakman v. Board of Higher Education, 161 N.Y.S.2d 529.)

D. That petitioner had all the benefits of the lease agreements as leases, and has not shown that the intent of the parties was otherwise.

E. That petitioner purchased those items of equipment which were in excess of the ceiling amounts set out in the agreements, therefore, they owned rather than leased these items. The mere fact that such items were included on the list of equipment does not necessarily lead to the conclusion that they

were intended as security or that the remainder of the equipment which was covered by these agreements was the subject of a security agreement rather than a "true lease".

F. That petitioner, Sattler's, Inc., executed and fulfilled the aforesaid agreements as "true" leases; the leases were not only "intended for security".

G. That petitioner satisfied its burden of proof as to the characterization of capital improvements, and the painting, carpeting, electrical and plumbing work, and perimeter wall jobs are clearly capital improvements and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due should be adjusted to reflect credit or refund for sales taxes paid on all those items qualifying as capital improvements and so designated either under the two agreements heretofore described or identified within the record in the form of testimony or by reference or evidentiary introduction in the form of invoice or ledger record.

H. That mailing of the Notice of Determination and Demand was timely. Petitioner does not deny receipt of the Notice, and its actions indicate its receipt of the Notice.

I. That section 1105(a) of the Tax Law imposes a tax upon the receipts from every retail sale of tangible personal property, and section 1101(b)(5) is written so as to include "...rental, lease...". The payments made under the Equipment Lease Agreements executed by petitioner in 1962 and 1969 were receipts from a "rental, lease or license to use" and constituted a "sale" within the meaning of sections 1105(a) and 1101(b)(5) of the Tax Law and were thus subject to sales tax, except insofar as those payments included items now accepted as being capital improvements, and for those items, credit or refund is hereby required.

J. That petitioner is entitled to a further credit or refund for those items of work done in 1971 and 1972 on its other stores proved to be capital improvements, and the Audit Division is hereby directed to adjust the Notice of Determination and Demand accordingly.

K. That petitioner should not be subject to penalty or interest in excess of the minimum statutory amount since it relied upon its attorneys and accountants.

L. That the petitions of Sattler's, Inc. are denied except as set forth hereinabove regarding capital improvement items being exempt from imposition of sales taxes, and waiver of penalties and excess interest, and, to that extent, the petitions are granted.

DATED: Albany, New York
DEC 24 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Sattlers, 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 6/1/71-2/28/73.	

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 24th day of December, 1982, he served the within notice of Decision by certified mail upon Sattlers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sattlers, Inc.
998 Broadway
Buffalo, NY 14212

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
24th day of December, 1982.

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Sattlers, 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 6/1/71-2/28/73.
:

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 24th day of December, 1982, he served the within notice of Decision by certified mail upon Samuel L. Shapiro the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel L. Shapiro
Kavinoky, Cook, Sandler, Gardner, Wisbaum & Lipman
120 Delaware Ave.
Buffalo, NY 14202

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
24th day of December, 1982.

Kathy Boyd-Barrett

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 278 401 529

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO Samuel L. Shapiro
Kurinoky, Cook, Sandler, Gardner, Wisbaum & Lipsitz
STREET AND NO. 120 Delaware Ave.
P.O. STATE AND ZIP CODE Buffalo, NY 14202

POSTAGE		$
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢
OPTIONAL SERVICES	SPECIAL DELIVERY	¢
OPTIONAL SERVICES	RESTRICTED DELIVERY	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		$
POSTMARK OR DATE		

PS Form 3800, Apr. 1976

P 278 401 528

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO Sattler's Inc.
STREET AND NO. 998 Broadway
P.O. STATE AND ZIP CODE Buffalo, NY 14212

POSTAGE		$
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢
OPTIONAL SERVICES	SPECIAL DELIVERY	¢
OPTIONAL SERVICES	RESTRICTED DELIVERY	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
OPTIONAL SERVICES / RETURN RECEIPT SERVICE	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		$
POSTMARK OR DATE		

PS Form 3800, Apr. 1976