

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

April 27, 1983

The Bank of California, N.A.  
P.O. Box 45000  
San Francisco, CA 94145

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  
Peter W. Schmidt  
Willkie, Farr & Gallagher  
1 Citicorp Center, 153 E. 53rd St.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
THE BANK OF CALIFORNIA, N.A.	:	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 November 30, 1976.	:	

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Petitioner, The Bank of California, N.A., P.O. Box 45000, San Francisco, California 94145, 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 November 30, 1976 (File No. 26239).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 13, 1982 at 9:15 A.M. Petitioner appeared by Wilkie, Farr & Gallagher (Peter W. Schmidt, Esq. and Lynn Caverly, Esq., of counsel). The Audit Division appeared by Paul B. Coburn (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the payments made under an equipment lease agreement were subject to sales tax as receipts from a lease of tangible personal property or constituted nontaxable payments under a security agreement.

II. Whether the transaction was a sale for resale within the meaning and intent of section 1101(b)(4) of the Tax Law.

FINDINGS OF FACT

1. Petitioner is a successor in interest to Randolph Computer Corporation ("Randolph") with respect to an Equipment Lease Agreement ("lease agreement") between Randolph, as lessor, and Leasco Response, Inc. ("Leasco"), as lessee.

2. On February 26, 1979 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1974 through November 30, 1976. The Notice assessed a tax due of \$34,801.90, plus interest of \$8,543.16, for a total amount due of \$43,345.06. The deficiency was premised upon receipts from Leasco of certain payments.

3. On April 26, 1971 Randolph, as lessor, and Leasco, as lessee, entered into a sale and leaseback agreement with respect to certain computer equipment. The entire agreement was evidenced by three separate documents: the lease agreement, a rider to the lease agreement, and a bill of sale.

4. Paragraph one of the lease agreement provided that "[n]othing herein contained shall be construed to convey to, or create in, Lessee any right, title or interest in and to the Units, or any of them except as a lessee." The fourth paragraph required Leasco to pay all premiums for insurance, taxes and other charges assessed or payable during the terms of the lease.

The seventh paragraph of the lease agreement required Leasco to maintain the equipment and further provided that Randolph "...shall be permitted to indicate its ownership of the Equipment, or any part thereof, by means of stencils, decalcomania or plates affixed thereto...". The lease agreement further provided that Leasco maintain all permits and licenses necessary for the subject equipment and also that Leasco either file or deliver to Randolph "...any or all returns and reports required to be filed with any regulatory, taxing or other governmental authority...". Paragraph ten of the lease agreement

required Leasco to assume all risk of loss of, or damage to, the equipment. The following paragraph required Leasco to indemnify Randolph against all risk and liability for injury to individuals or damage to property.

The monthly rental payment was set at 1.8526 percent of Randolph's "Purchase Price" which, according to the rider to the lease agreement, was 89.36 percent of the cost of the computer equipment when originally acquired by Leasco. Initially, the rent was determined to be \$157,610.53 per month. The rental payment reflected an implied interest on the value of the equipment of approximately 12.25 percent.

5. On the same day the lease agreement was entered into, Randolph and Leasco executed a rider to the agreement which set forth Leasco's options regarding the agreement. In essence, Leasco was given the option at stated intervals to either continue the lease or purchase the leased equipment at, inter alia, a declining fraction of Randolph's purchase price of the equipment. Leasco was eventually required to repurchase the leased equipment at the end of the third renewal period at two and one-half percent of the purchase price.

6. On April 26, 1971, the same date the lease agreement and rider were entered into, Leasco sold the subject computer equipment to Randolph for \$8,507,606.00.

7. On April 23, 1971 Randolph, as the secured party, filed a financing statement pursuant to the Uniform Commercial Code which was executed by Leasco and Randolph regarding:

"Computer equipment leased by Secured Party to Debtor, including but not limited to the items set forth on the annexed Schedule, together with additions, substitutions, replacements and accessories."

8. Petitioner became the successor in interest to Randolph on or about January 12, 1976 by purchasing at a discount Randolph's rights under the

agreement between Randolph and Leasco. Petitioner treated the lease agreement between Randolph and Leasco as a financing agreement for accounting and income tax purposes.

#### CONCLUSIONS OF LAW

A. That a taxable sale includes a lease agreement (Tax Law § 1101(b)(5)). However, "[a] lease which has been entered into merely as a security agreement, but which does not in fact represent a transaction in which there has been a transfer of possession from the lessor to the lessee, is not a 'sale' within the meaning of the Tax Law." (20 NYCRR 526.7(c)(3)).

B. That section 1-201(37) of the New York Uniform Commercial Code characterizes the distinction between a lease and a security agreement as follows:

"Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that, upon compliance with the terms of the lease, the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

C. That to determine whether the agreement at issue is a true lease or a security agreement one must examine both the intention of the parties and the underlying substance of the transaction (In Re Sherwood Diversified Services, Inc., 382 F. Supp. 1359 [S.D.N.Y. 1974]; Matter of Petrolane Northeast Gas Service, Inc. v. State Tax Comm., 79 A.D.2d 1043, lv. to app. den. 53 N.Y.2d 601).

D. That based upon all of the facts and circumstances presented herein, the agreement at issue is a security agreement and, therefore, not subject to sales and use tax. This conclusion is buttressed by the following factors: (1) that Leasco was required by the terms of the agreement to reacquire the computer equipment at nominal consideration; (2) that Randolph filed a security

agreement characterizing itself as the secured party and Leasco as the debtor;  
(3) that the agreement itself was discounted to petitioner; and (4) that Randolph never obtained possession of the computer equipment. (See In Re Sherwood Diversified Services, Inc., supra.)

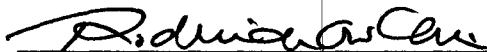
E. That in view of Conclusion of Law "D", it is unnecessary to determine whether the transaction was a sale for resale within the meaning and intent of section 1101(b)(4) of the Tax Law.

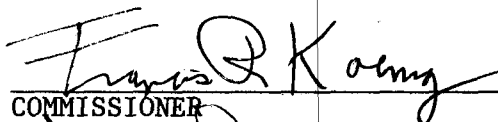
F. That the petition of The Bank of California, N.A. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is cancelled.

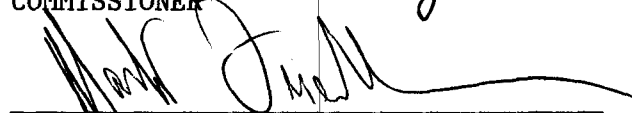
DATED: Albany, New York

STATE TAX COMMISSION

APR 27 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
The Bank of California, N.A. :  
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 9/1/74-11/30/76. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, 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 April, 1983, he served the within notice of Decision by certified mail upon The Bank of California, N.A., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Bank of California, N.A.  
P.O. Box 45000  
San Francisco, CA 94145

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 April, 1983.

David Parchuck

Charles P. Vogelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
The Bank of California, N.A. :

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 9/1/74-11/30/76. :

State of New York  
County of Albany

David Parchuck, 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 April, 1983, he served the within notice of Decision by certified mail upon Peter W. Schmidt the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter W. Schmidt  
Willkie, Farr & Gallagher  
1 Citicorp Center, 153 E. 53rd St.  
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  
27th day of April, 1983.

David Parchuck

Annice A. Skye

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



**P 389 758 841**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Peter W. Schmidt Willkie, Farr & Gallagher	
Street and No. 1 Citicorp Center, 153 E. 53rd St.	
P.O., State and ZIP Code New York, NY 10022	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

**P 389 758 840**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to The Bank of California, N.A.	
Street and No. P.O. Box 45000	
P.O., State and ZIP Code San Francisco, CA 94145	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982