

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

May 6, 1983

Bishop Retouching, Inc.  
236 E. 36th St.  
New York, NY 10016

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  
Herbert S. Tepper  
31-53 Crescent St.  
Long Island City, NY 11106  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
BISHOP RETOUCHING, 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 March 1, 1976	:	
through August 31, 1979.	:	

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Petitioner, Bishop Retouching, Inc., 236 East 36th 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, 1976 through August 31, 1979 (File No. 31011).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 16, 1982 at 1:15 P.M. Petitioner appeared by Herbert S. Tepper, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioner.

II. Whether petitioner is liable for tax on an automobile reflected in its books and records as an asset for the purpose of substantiating depreciation expenses claimed on income tax returns.

FINDINGS OF FACT

1. Petitioner, Bishop Retouching, Inc., was a photographer that retouched photographs belonging to others (photographers, magazine publishers, advertising agencies).

2. On May 20, 1980, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1976 through August 31, 1979 for taxes due of \$7,674.32 plus minimum statutory interest of \$1,523.54, for a total of \$9,197.86.

3. On audit, the Audit Division reviewed petitioner's reported nontaxable sales for the months of July, 1976, October, 1977 and August, 1978. Such sales totaled \$31,860.00 for said months of which \$11,045.00 (34.67 percent) were disallowed on the basis that exemption certificates were not on file or petitioner could not substantiate that photographs were delivered to the customer outside New York State. The Audit Division applied 34.67 percent to nontaxable sales reported for the audit period which resulted in additional taxable sales of \$88,215.00 and taxes due thereon of \$7,057.20.

The Audit Division also determined use taxes due of \$217.12 on expense purchases. However, this amount is not at issue. A review of fixed assets disclosed that petitioner acquired a 1977 Plymouth for \$5,000.00. The automobile was depreciated for income tax purposes. Petitioner did not establish that sales or use tax was paid on said vehicle and therefore, the Audit Division asserted tax of \$400.00 thereon.

4. The auditor advised petitioner at the time the audit was started that he intended to use a test period method of audit. He explained the audit procedures and the months selected for audit. He asked petitioner if the length of the test was sufficient, if any of the months selected were not representative or if a detailed audit was desired.

Petitioner agreed to the use of a test period audit and had no objections to the months selected.

5. The disallowed nontaxable sales from the test months consist of the following:

Robert Daniels Co.	\$ 125.00
Don Eldridge Associates, Inc.	1,060.00
Mc Coy Advertising	100.00
Warner Brothers	2,550.00
Cine Artists	225.00
Racila and Vallarta Associates	1,610.00
Rafshoon Advertising	3,950.00
Wells, Rich and Greene	50.00
Playboy Magazine	1,375.00
	<u>\$11,045.00</u>

6. Robert Daniels Co.; Don Eldridge Associates, Inc.; Racila and Vallarta Associates; and Rafshoon Advertising, Inc. operated businesses located outside New York State. Petitioner retouched photographs for these customers. The photographs were returned by first class mail or Federal Express.

7. The photographs retouched for Mc Coy Advertising; Wells, Rich and Greene; and Playboy Magazine were delivered in New York State.

Wells, Rich and Greene furnished petitioner with an exempt use certificate. The certificate was dated April 24, 1981 and did not indicate the basis for exemption or whether the certificate was for a single purchase or applicable to all purchases.

8. Warner Brothers and Cine Artists were located in California. However, the photographs on which petitioner worked were furnished by Francesco Scavullo, a photographer in New York City. Petitioner returned the photographs to Mr. Scavullo in New York although the charges for the services rendered were billed directly to Warner Brothers and Cine Artists.

9. Petitioner argued that the automobile referred to in Finding of Fact "3" was owned by Dona Bishop, a corporate officer and not the corporation.

When the automobile was recorded in petitioner's books and records as an asset, a liability was recorded in an account entitled "Officers Loan Payable".

#### CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law specifically provides, in part, that it shall be presumed that all receipts for property or services... are subject to tax until the contrary is established and the burden of proving that any receipt... is not taxable shall be upon the person required to collect tax.

B. That pursuant to 20 NYCRR 525.2(a)(3), the sales tax is a "destination tax", that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

C. That the sales to the customers set forth in Finding of Fact "6" amounting to \$6,745.00 were delivered outside New York State, and therefore, said transactions were not subject to tax.

D. That the sales made to the customers set forth in Findings of Fact "7" and "8" were delivered in New York State and that customers did not issue proper exemption certificates that would relieve petitioner from its obligation to collect sales tax. Therefore, petitioner is liable for the sales taxes which it failed to collect from the customers in accordance with the provisions of section 1133(a) of the Tax Law.

E. That petitioner purchased the automobile referred to in Finding of Fact "3" as evidenced by the accounting entries to record the acquisition; that said entries effectuated a "sale" within the meaning and intent of section 1101(b)(5) of the Tax Law and therefore, is subject to the taxes imposed by sections 1105(a) and 1110 of the Tax Law.

F. That the petition of Bishop Retouching, Inc. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1980; and that except as so granted, the petition is in all other respects denied.

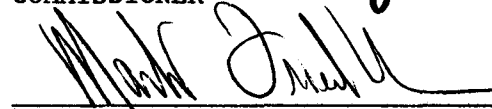
DATED: . Albany, New York

MAY 06 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Bishop Retouching, 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 3/1/76-8/31/79.

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Bishop Retouching, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bishop Retouching, Inc.  
236 E. 36th 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  
6th day of May, 1983.

David Parchuck

James O'Sullivan

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Bishop Retouching, 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 3/1/76-8/31/79. :

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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Herbert S. Tepper the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert S. Tepper  
31-53 Crescent St.  
Long Island City, NY 11106

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  
6th day of May, 1983.

David Parchuck

James A. DeGuzman

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



**P 389 758 918**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Herbert S. Tepper</i>	
Street and No. <i>31-53 Crescent St.</i>	
P.O., State and ZIP Code <i>Long Island City, NY 11106</i>	
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 389 758 917**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Bishop Retouching, Inc.</i>	
Street and No. <i>236 E. 36th St.</i>	
P.O., State and ZIP Code <i>New York, NY 10016</i>	
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