

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

May 27, 1983

Wilfred Mallia
Arzella-Regent Avenue
Swieqi, Malta, EUROPE

Dear Mr. Mallia:

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) 1139 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 Law 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
Building #9 State Campus
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 :
Wilfred Mallia :
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 9/1/81 - 11/30/81. :

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 May, 1983, he served the within notice of Decision by certified mail upon Wilfred Mallia, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wilfred Mallia
Arzella-Regent Avenue
Swieqi, Malta, EUROPE

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, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILFRED MALLIA	:	DECISION
	:	
for a 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, 1981	:	
through November 30, 1981.	:	

Petitioner, Wilfred Mallia, Arzella-Regent Avenue, Swieqi, Malta, filed a petition for a revision of a determination or for a refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1981 through November 30, 1981 (File No. 36385).

On December 6, 1982, petitioner waived his right to a hearing and submitted his case for decision by the State Tax Commission based on the record as it exists. After due consideration of the record, the State Tax Commission renders the following decision.

ISSUE

Whether petitioner is entitled to a refund of sales tax paid on tangible personal property which he purchased and took delivery of in New York State and which he subsequently took out of the country.

FINDINGS OF FACT

1. On November 11, 1981, the petitioner, Wilfred Mallia, filed an Application for Credit or Refund of State and Local Sales and Use Taxes in the amount of \$100.75.

2. Mr. Mallia's application for refund was denied in full on December 2, 1981. On January 28, 1982 he protested the denial of the refund and on December 6,

1982 asked that his case be submitted without a hearing, to the State Tax Commission for a decision.

3. On October 23, 1981, while visiting the United States from Europe, Mr. Mallia purchased from Olden Camera, Inc. ("Olden's"), 1265 Broadway at 32nd Street, New York, New York 10001, photographic equipment in the amount of \$1,221.22 on which he paid \$100.75 in sales tax. He accepted delivery of the photographic equipment at Olden's.

4. Subsequent to taking delivery of the photographic equipment, Mr. Mallia travelled on to Chicago and thereafter returned to Europe.

5. Petitioner, in his letter of January 28, 1982 to the Audit Division, asserted that he was assured by Olden's that because he was a foreigner, that he could obtain a refund by using the following method:

- " (i) complete (Tax Department's) Form ST-137
- (ii) produce the goods to the Customs Department of the airport at time of departure
- (iii) have the ST-137 stamped as evidence that the goods were being shipped out of the U.S.
- (iv) send the form to the (Tax Department) duly completed and itemized as soon as possible after I had left New York."

Petitioner followed these instructions including having the U.S. Customs at O'Hare Field stamp his application for refund (October 30, 1981).

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines a sale as "(a)ny transfer of title or possession or both...".

Sales and use tax regulations explain further that the tax is due at the point of transfer of possession and that the tax is a destination tax as follows:

"A sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee" [20 NYCRR 526.7(e)(1)].

"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 rate of tax." [20 NYCRR 525.2(a)(3)]

B. That petitioner did take possession and control of the photographic equipment prior to leaving New York State and, therefore, is liable for the sales tax.

C. That the petition of Wilfred Mallia is denied and the refund denial issued on December 2, 1981 is sustained.

DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER