

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

April 1, 1983

Orth-O-Vision, Inc.
31-19 37th Ave.
Long Island City, NY 11101

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
Sidney Siller
Siller & Galian
217 Broadway
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Orth-O-Vision, 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:
6/1/77-5/31/80.

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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Orth-O-Vision, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Orth-O-Vision, Inc.
31-19 37th Ave.
Long Island City, NY 11101

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
1st day of April, 1983.

David Parchuck

James R. Hagan
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Orth-O-Vision, 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 6/1/77-5/31/80.

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 1st day of April, 1983, he served the within notice of Decision by certified mail upon Sidney Siller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sidney Siller
Siller & Galian
217 Broadway
New York, NY 10017

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
1st day of April, 1983.

David Parchuck

James A. [Signature]

AUTHORIZED TO ADMINISTER
OATHS UNDER THE TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ORTH-O-VISION, 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 June 1, 1977	:	
through May 31, 1980.	:	

Petitioner, Orth-O-Vision, Inc., 31-19 37th Avenue, Long Island City, New York 11201, 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, 1977 through May 31, 1980 (File No. 32696).

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 June 15, 1982 at 9:15 A.M. Petitioner appeared by Sidney Siller, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the purchase by petitioner of antennas and converters used in providing its pay television services are subject to the sales and use tax.

FINDINGS OF FACT

1. On December 30, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Ortho-O-Vision, Inc. [sic] covering the period June 1, 1977 through May 31, 1980. The Notice asserted additional tax due in the amount of \$15,895.04, plus simple interest of \$2,481.48, for a total due of \$18,376.52.

2. Petitioner executed a consent to extend the period of limitation for the issuance of an assessment to September 20, 1981.

3. Petitioner provides a single channel pay television service to subscribers by means of a microwave signal transmitted from New York City's Empire State Building. Petitioner charges a \$100.00 installation fee for the equipment necessary to receive the signal. Sales tax is charged and remitted on the installation fees for such equipment. Charges for petitioner's television services are not subject to sales tax.

4. On audit, the Audit Division reviewed petitioner's sales as recorded in its books and found that petitioner underreported taxable sales by \$1,947.00 on sales and use tax returns filed for the audit period. The Audit Division determined additional sales tax due of \$155.76 which is not at issue.

The Audit Division reviewed purchases made by petitioner during the entire audit period. It found that petitioner did not pay sales tax on its purchases of antennas and converters installed on subscribers' premises. It held purchases amounting to \$196,741.00 subject to use tax totalling \$15,739.28 pursuant to section 1110 of the Tax Law. The Audit Division thereby asserted the total sales and use tax deficiency of \$15,895.04.

5. It was the Audit Division's position that the antennas and converters were subject to tax under section 1105(a) of the Tax Law in that they were not resold to petitioner's subscribers. The equipment was listed on petitioner's books as fixed assets and title to same remained with petitioner.

6. Petitioner's arguments were threefold:

First, it argued that it was not a cable company and therefore the taxability of its equipment purchases should not be treated in the same manner as purchases made by cable television companies.

Second, petitioner argued that the same type of equipment was offered for sale by retail stores throughout the area and that those transfers are considered retail sales.

Third, petitioner alleged that it relinquished dominion and control over the antennas and converters once they were installed on the subscribers' premises. Oftentimes, when service was terminated, petitioner was unable to repossess the equipment. It therefore argued that the equipment was resold to its subscribers.

7. Petitioner failed to submit a copy of its sales agreement. No evidence was presented to show that a sale of equipment occurred at the time of installation of the equipment at issue or thereafter.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Section 1101(b)(4) defines a retail sale as "a sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

B. That petitioner neither purchases the equipment at issue for resale as such nor for use by it in providing a service subject to tax under section 1105(c) of the Tax Law. That the receipts from the sales to petitioner of such equipment are therefore subject to sales and use tax.

C. That the petition of Orth-O-Vision, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 30, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 01 1983

Roderick G. W. Can
PRESIDENT

Francis R. K. Kermey
COMMISSIONER

[Signature]
COMMISSIONER

P 389 758 743
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to	
Orth-o-Vision, Inc.	
Street and No.	
31-19 37th Ave.	
P.O., State and ZIP Code	
Long Island City, NY 11101	
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	
TOTAL Postage and Fees	\$
Postmark or Date	

P 389 758 744
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to	
Sidney Spiller	
Siller + Galian	
Street and No.	
217 Broadway	
P.O., State and ZIP Code	
New York, NY 10017	
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	
TOTAL Postage and Fees	\$
Postmark or Date	