

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jacques Francais Rare Violins, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/75 - 11/30/78. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon Jacques Francais Rare Violins, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jacques Francais Rare Violins, Inc.
140 W. 57th St.
New York, NY 10019

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
5th day of October, 1984.

David Parchuck

William A. H. H. H.
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

James R. Hays
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

Jacques Francais Rare Violins, Inc.
140 W. 57th St.
New York, NY 10019

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Michael A. Varet
Milgrim, Thomajan, Jacobs & Lee
405 Lexington Ave.
New York, NY 10174
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JACQUES FRANCAIS RARE VIOLINS, 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 December 1, 1975 :
through November 30, 1978. :

Petitioner, Jacques Francais Rare Violins, Inc., 140 West 57th Street, New York, New York 10019, 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 December 1, 1975 through November 30, 1978 (File No. 28767).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 6, 1983 at 9:15 A.M., with all briefs to be submitted by March 29, 1984. Petitioner appeared by Milgrim, Thomajan, Jacobs & Lee, Esqs. (Michael A. Varet, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether certain of petitioner's sales took place in New York State thereby subjecting the receipts therefrom to New York sales tax.

FINDINGS OF FACT

1. On December 19, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand For Payment of Sales and Use Taxes Due against petitioner, Jacques Francais Rare Violins, Inc., in the amount of \$65,721.80 plus interest of \$13,461.86 for a total due of \$79,183.66

for the period December 1, 1975 through November 30, 1978. On January 3, 1979, petitioner, by its president, had executed a consent extending the period of limitation for assessment of sales and use taxes due for the period December 1, 1975 through November 30, 1978 to December 19, 1979.

2. Petitioner, a corporation with a place of business in New York City, has been engaged for 30 years in the business of selling rare violins, cellos, violas and bows to a worldwide clientele. Petitioner's instruments and bows are extremely fragile and sensitive to temperature and moisture and, therefore, require careful handling during transportation. For this reason it is unusual for such instruments and bows to be shipped by common carrier. Petitioner developed a procedure whereby, in the majority of its out-of-state sales, petitioner's president, Jacques Francais, or his employee, personally delivered the instrument or bow to the nonresident customer at the airport as the customer was about to depart on a flight to an out-of-state destination. In each instance, delivery was made to the customer at the last point at the airport beyond which persons not holding tickets for a departing flight were not permitted by airport security personnel. Petitioner was unable to arrange to have airline personnel deliver instruments or bows to customers after the aircraft had left the state because the airlines were unwilling to assume responsibility for handling the instruments and bows in view of their fragile nature and high value.

3. Petitioner considered the aforementioned procedure to be delivery outside of New York State and did not collect sales tax on such sales. On audit, the Audit Division determined that such airport deliveries were actually deliveries within New York and the receipts therefrom subject to sales tax. The auditor investigated all of petitioner's reported nontaxable sales to

determine if they were actually taxable. The auditor disallowed 50 sales claimed as nontaxable by petitioner. The sales were disallowed because the auditor determined that, in each case, delivery was made in New York State. The total disallowance was \$805,685.00 in non-taxable sales resulting in \$64,454.80 in tax.¹

4. Of the 50 disallowed sales, 34 involved deliveries made to the customer at the airport by Mr. Francais or his employee. Four of the disallowed sales involved delivery to the customer at petitioner's place of business in New York City. The remainder of the transactions in issue were conducted as follows:

a. On February 6, 1976, petitioner sold a violin to Mr. Julio Bredo of Mexico City, Mexico, for \$15,000.00. The violin was delivered to Mr. Bredo in Mexico City by Mr. Carlos Prieto who had purchased his own instrument and delivered the violin to Mr. Bredo at Mr. Francais's request as an agent of petitioner. Mr. Prieto obtained a signed receipt from Mr. Bredo upon delivery.

b. On February 12, 1976, petitioner sold a cello to Margaret Smith of Boulder, Colorado for \$6,000.00. The instrument was taken from petitioner's shop by one Mr. de Lemas, who acted at Mr. Francais's request as petitioner's agent and delivered the cello to Ms. Smith in Colorado.

c. On August 25, 1976, petitioner sold a violin bow to Mr. Kenway Lee of San Francisco, California for \$6,000.00. Mr. Francais was unable to deliver the bow to Mr. Lee at the airport and, therefore, the bow was specially packed in a metal box and shipped to Mr. Lee in California by commercial carrier.

d. On January 7, 1977, petitioner sold a violin bow to Mr. Geraldo Modern of Sao Paulo, Brazil for \$13,000.00. Mr. Francais flew to Zurich, Switzerland and personally delivered the bow to Mr. Modern at the Zurich Airport.

e. On September 25, 1978, petitioner sold a cello to A. Lindsay Groves of Hackensack, New Jersey for \$40,000.00. Mr. Francais drove in his automobile to Ms. Groves' home and personally delivered the violin to her on September 30, 1978.

¹ The remainder of the assessment consisted of \$1,267.00 tax due on taxable sales not reported which is not in issue.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

1. The first of these is the fact that the United States has a large and growing population of people who are not citizens of the United States. This is a result of the large number of people who have immigrated to the United States in recent years, and the fact that many of these people are not naturalized citizens.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the root cause of the problem. Once the causes of the problem have been identified, the next step is to develop a plan to address the problem. This involves identifying the actions that need to be taken to address the problem and determining the resources that will be needed to implement the plan. Once a plan has been developed, the next step is to implement the plan. This involves taking the actions that have been identified in the plan and monitoring the progress of the plan. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in addressing the problem and identifying any lessons learned from the process.

[illegible]

f. On April 4, 1978, petitioner sold a violin to Elizabeth Weiss, of Vienna, Austria, for \$40,000.00. Mr. Gerald M. Wechsler, an airline official, acting at Mr. Francais's request, delivered the violin to Ms. Weiss in Vienna as petitioner's agent.

g. On December 22, 1978, Mr. Stefan Reuss of Tegernese, West Germany selected two violins from petitioner's shop, had them delivered at Kennedy Airport and took them to Germany, intending to keep one and return the other. Mr. Reuss decided to keep a \$50,000.00 violin and, instead of returning the second violin, found a buyer for it and sold it for \$20,000.00 on behalf of petitioner.

h. On October 19, 1977, Mr. Walter Levin received two violin bows from petitioner at La Guardia Airport. Mr. Levin brought the two bows to Cincinnati, Ohio where he sold them, on behalf of petitioner, to two of his students for \$600.00 and \$350.00 respectively. Payment was sent to petitioner on November 11, 1977.

i. On November 24, 1976, petitioner sold three violin bows to Mr. Gerald Stanick of the Vancouver Violin Shop, Vancouver, British Columbia, Canada for \$1,000.00. Mr. Stanick is a dealer in instruments, however, no resale certificate or other documentation indicating that the bows were resold was in evidence.

j. Two transactions involved sales of violins to Herbert Kornfield and Peter Guth for \$20,000.00 and \$10,000.00, respectively, which violins were returned by the purchasers with subsequent cancellation of the purchase agreements. Mr. Kornfield's payment was returned to him; Mr. Guth received a credit or trade-in for his purchase. No credit was allowed by the Audit Division with respect to such sales and returns.

5. It was petitioner's policy to sell all instruments and bows on a conditional sale or "on approval" basis. The customer could return the instrument for any reason usually within a period of 30 to 60 days. Mr. Francais explained that customers wished to have the opportunity to have an instrument examined by their teacher, or to try out the instrument at a place of performance, or to obtain financing for the purchase. Generally, the customer left a downpayment on the purchase. If the customer decided to keep the instrument, he or she paid the balance. If the instrument was returned the downpayment was refunded. Petitioner maintained insurance on the instruments until the approval period expired.

6. In those cases where third persons delivered purchases out of state for petitioner, petitioner would usually pay them a commission for their services.

7. Petitioner offers several alternative arguments as to why its receipts from sales to nonresidents were not subject to sales tax. Petitioner asserts that, since the purchases may be returned by the customer for any reason during the "approval" period, title does not pass until the customer has accepted the goods under section 2-327 of the Uniform Commercial Code and, therefore, the actual sale takes place outside New York and is not subject to tax. Alternatively, petitioner maintains that the sales on approval which were returned should not be subject to tax since no sale took place.

8. Petitioner argues that all sales where delivery was made at the airports in New York should be considered out-of-state sales not subject to tax because the sales were intended for export and delivery was comparable to other types of airport and seaport deliveries which have been considered out-of-state deliveries by the Audit Division.

9. Petitioner also argues that those transactions whereby delivery was made personally by Mr. Francais or a person acting as petitioner's agent to a customer in an out-of-state location were truly out-of-state deliveries and therefore not subject to tax. Moreover, petitioner maintains that the sale of the bow which involved shipment by commercial carrier was likewise an out-of-state delivery.

10. Finally petitioner contends that the sales to the Vancouver Violin Shop were exempt as sales for resale.

11. Along with its brief, petitioner submitted proposed Findings of Fact all of which have been substantially adopted herein with the exception of Nos.

16 and 19 which were not supported by the evidence and Nos. 20-25 which were conclusory rather than factual in nature.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28. The term sale is defined as "[a]ny transfer of title or possession or both..., conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor,...". The statute specifically provides that a sale occurs when either title or possession is transferred. In a conditional sale transaction, the sale, for tax purposes, occurs upon delivery not upon final payment or completion of contract (see New York World Telegram Corp. v. Mc Goldrick, 298 N.Y. 11 and 20 NYCRR 525.2(a)(2)). In the same fashion, when petitioner delivers the instruments or bows to its customers, a sale, for tax purposes, occurs regardless of whether the customer has the opportunity to return the item at a later date. The passage of title in such a transaction does not control the incidence of tax and the Uniform Commercial Code provisions are immaterial. Therefore, the receipts from petitioner's sales on approval, not otherwise excluded or exempt, are subject to sales tax.

B. That 20 NYCRR 525.2(a)(3) provides that "[t]he 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." In those transactions where petitioner delivers items to its customers at airports in New York, the transfer of possession occurs in New York State. The fact that petitioner's representatives deliver the articles at the farthest point allowed by security personnal is irrelevant; the crucial factor in these transactions is that actual physical possession is transferred

to the customer while such customer is still in New York. This situation differs from those transactions where delivery is made to airline ticket counters and the customer does not take possession until arriving at his or her destination. In such a case there is no tax because the purchaser takes possession outside of New York (Matter of M&B Appliances, Inc., State Tax Commission, April 25, 1984). In petitioner's case, however, the purchaser takes possession within New York and such sales are properly subject to sales tax.

C. That section 1132(c) of the Tax Law provides, in part, that sales will be deemed taxable at retail unless the vendor takes from the purchaser a proper resale certificate. Although this presumption may be overcome by sufficient evidence (see Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983), petitioner has not presented sufficient evidence to meet its burden with respect to the sales of bows to Mr. Gerald Stanick of the Vancouver Violin Shop. No resale certificates, documentation or any other evidence was submitted which shows that the bows were, in fact, resold. In the absence of such proof, therefore, the aforesaid sale must be deemed a sale at retail and subject to tax.

D. That, with respect to the sales made to Geraldo Modern and A. Lindsay Groves where Mr. Francois personally delivered the items to his customers in Zurich, Switzerland and Hackensack, New Jersey, respectively, the point of delivery was outside of New York State and the \$4,240.00 in tax assessed on said sales is cancelled.

E. That, with respect to the sales made to Julio Bredo, Margaret Smith, Walter Levine, Elizabeth Weiss, and Stefan Reuss whereby personal delivery of the purchased articles was made out of state by agents of petitioner, the point

of delivery was outside of New York State and the \$6,556.00 in tax assessed on said sales is cancelled. Likewise, the sale to Kenway Lee, whereby a violin bow was shipped out of state by commercial carrier, also involved an out-of-state delivery and the \$480.00 tax assessed on such sale is cancelled.

F. That, with respect to the sales made to Peter Guth and Herbert Kornfield which sales were later cancelled, the auditor should have allowed a credit on the return of Mr. Kornfield's violin and the \$1,600.00 tax assessed on said sale is cancelled. However, since Mr. Guth was allowed a credit or trade-in, the Audit Division was correct in taxing this purchase (see 20 NYCRR 525.5(b)(2)).

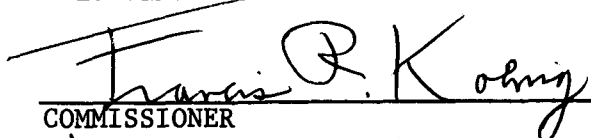
G. That the petition of Jacques Francais Rare Violins, Inc. is granted to the extent indicated in Conclusions of Law "D", "E", and "F"; that the Audit Division is directed to modify the Notice of Determination and Demand For Payment of Sales and Use Taxes Due issued December 19, 1979 accordingly; and that, except as so modified the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 811

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Sent to <i>Jacques Ymarais Rose</i>	
Street and No. <i>Violins, Inc.</i>	
P.O., State and ZIP Code <i>140 W. 57th St.</i>	
Postage <i>New York, NY 10019</i>	\$
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 693 168 812

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Sent to <i>Michael A. Varet</i>	
Street and No. <i>Milgrim, Thompson, Jacobs</i>	
P.O., State and ZIP Code <i>Lee</i>	
Postage <i>405 Lexington Ave</i>	\$
Certified Fee <i>New York, NY 10174</i>	
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	