

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Naum Bros., Inc. :
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 9/1/74-8/31/779. :
_____ :

AFFIDAVIT OF MAILING

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 29th day of February, 1984, he served the within notice of Decision by certified mail upon Naum Bros., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Naum Bros., Inc.
2320 Euclid Ave.
Des Moines, IA 50310

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
29th day of February, 1984.

David Parchuck

James A. Haplin
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 29, 1984

Naum Bros., Inc.
2320 Euclid Ave.
Des Moines, IA 50310

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
Garry S. Hanlon
Suite 122, Plymouth Park W., 55 Troup St.
Rochester, NY 14608
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
NAUM BROTHERS, 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 September 1, 1974	:	
through August 31, 1977.	:	

Petitioner, Naum Brothers, Inc., 2320 Euclid Avenue, Des Moines, Iowa 50310, 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 August 31, 1977 (File No. 24839).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on December 6, 1982 at 1:15 P.M., with all briefs to be submitted by May 18, 1983. Petitioner appeared by Garry S. Hanlon, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner's purchases of fixtures and equipment were solely for the purpose of resale and therefore exempt from sales and use tax.

FINDINGS OF FACT

1. On November 20, 1978, 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, Naum Brothers, Inc., in the amount of \$103,501.82, plus interest of \$23,906.89, for a total due of \$127,408.71 for the period September 1, 1974 through August 31, 1977.

2. The Audit Division agreed to a cancellation of \$76,574.68 of the assessment at a pre-hearing conference leaving \$26,927.14 in issue. The latter amount resulted from purchases of equipment made on various dates in 1976.

3. Petitioner operates a catalog showroom business with stores located in Rochester, Buffalo, Syracuse, and in the State of Michigan. Petitioner advertises its merchandise primarily by catalog; however, sales of non-catalog merchandise are made from the showrooms occasionally. To finance the purchase of its merchandise for sale, petitioner would enter into loan agreements with financial institutions. The loans would provide the funds for the purchase of inventory in anticipation of the selling seasons. The agreements provided that petitioner was to pay back the loans within one year within which time petitioner hoped the merchandise would be sold. The merchandise loans could not be used for equipment purchases or capital improvements thus, petitioner had to seek other means of funding equipment purchases. One such plan was to purchase equipment, sell it to a finance company and lease it back.

4. In July or August, 1976, petitioner entered into a lease agreement with Western New York Industrial Park, Inc. for the lease of premises for use as a showroom at the Clarence Mall in Clarence, New York, a suburb of Buffalo. During the summer of 1976, following the signing of the aforesaid lease, petitioner began contracting for the purchase of equipment for the Clarence store and also searching for a finance company to arrange a sale and leaseback plan for the equipment. The equipment was purchased from various suppliers. On October 1, 1976, the Clarence store opened and the equipment purchased during the summer was put into use. Between October, 1976 and March 31, 1977, petitioner continued to negotiate with various finance companies for a satisfactory sale and leaseback arrangement for the equipment previously purchased for use in the Clarence store. Throughout this period, petitioner used said

equipment at the store. On March 31, 1977, petitioner entered into a sale and leaseback agreement with FCB Leasing, Ltd. ("FCB"). The lease was for a term of seven years with an option to repurchase at the end of that time or continue the lease at fair market rental value. Petitioner's bank, which financed the inventory purchases, was aware of petitioner's intentions with respect to the sale and leaseback of the equipment and supplied written approval of the agreement. Petitioner paid sales and use tax on the rental of the equipment from FCB.

5. On audit, the Audit Division determined that the equipment purchases in issue were not for resale since said equipment was used by petitioner in its showroom operation prior to the sale and leaseback agreement with FCB. Petitioner maintains that, since its intent at the time of purchase was to resell the equipment to a finance company, the fact that the equipment was not actually resold until six months or more after purchase should not be a controlling factor in deciding whether there was a purchase for resale.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax upon the receipts from every retail sale of tangible personal property. Section 1101(b)(5) defines the term sale as being any transfer of title or possession for a consideration, including a lease. Section 1101(b)(4)(i)(A) defines retail sale as a sale of tangible personal property for any purpose, other than for resale as such or as a physical component part of tangible personal property.

B. That the language of section 1101(b)(4)(i)(A) exempting sales for resale from sales and use tax "makes the legislative purpose reasonably clear to exempt only property then solely used for resale because 'any purpose' would include all purposes generally. The words 'other than' narrow the exempted purpose down to the singular. It would seem reasonable to think that using the

property for resale and some other purpose or purposes would not carry with it the singular exemption created by the statute" (Jacobs v. Joseph, 282 A.D. 622, 625).

C. That, although the original intent of petitioner was to resell the equipment in issue to a finance company, the resale did not occur for six months after the Clarence Mall store opened for business, during which time petitioner utilized the equipment. The language of section 1101(b)(4)(i)(A) with respect to sales for resale must be interpreted narrowly and once petitioner began using the equipment in its operations, the equipment could no longer be considered to have been purchased solely for resale. Nowhere does the aforesaid statute either express or imply, that the intent of the purchaser at the time of purchase shall govern with respect to whether a purchase is for resale; rather, the actual disposition or use of the property is the controlling factor. Therefore, petitioner did not purchase the showroom equipment for resale within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law (see Matter of Airco Alloys, State Tax Commission, February 28, 1977).

D. That the petition of Naum Brothers, Inc. is granted to the extent indicated in Finding of Fact "2"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 20, 1978 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1984

Richard A. Clev
PRESIDENT

Francis Q. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Naum Bros. Inc</i>	
Street and No. <i>2320 Euclid Ave.</i>	
P.O., State and ZIP Code <i>West Morris, NJ 07093</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	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 315 239

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Garry S. Harlow</i>	
Street and No. <i>Suite 122 Plymouth</i>	
P.O., State and ZIP Code <i>Box 85 Troy St. Rochester, NY 14608</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	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982