

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Todd Equipment Leasing Co., 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 6/1/71-5/31/76. :
_____ :

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 6th day of April, 1984, he served the within notice of Decision by certified mail upon Todd Equipment Leasing Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Todd Equipment Leasing Co., Inc.
350 5th Ave. #628
New York, NY 10118

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
6th day of April, 1984.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

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

Archibald Patterson
350 Fifth Avenue
New York, NY 10118

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.

Daniel Archambault

Ernie C. Hapstead
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 6, 1984

Todd Equipment Leasing Co., Inc.
350 5th Ave. #628
New York, NY 10118

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
Archibald Patterson
350 Fifth Avenue
New York, NY 10118
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
TODD EQUIPMENT LEASING CO., 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, 1971	:	
through May 31, 1976.	:	

Petitioner, Todd Equipment Leasing Co., Inc., 350 Fifth Avenue, #628, New York, New York 10118, 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, 1971 through May 31, 1976 (File No. 20203).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 16, 1983 at 9:30 A.M. Petitioner appeared by Archibald A. Patterson, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the amount of sales and use taxes due based upon an examination of petitioner's purchases.

FINDINGS OF FACT

1. On August 10, 1977, the Audit Division issued to petitioner, Todd Equipment Leasing Co., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1971 through May 31, 1976. The Notice assessed a tax due of \$73,140.88, plus penalty and interest of \$37,278.28, for a total amount due of \$110,419.16.

2. Following the issuance of the foregoing Notice, a conference was held wherein certain adjustments were agreed upon by petitioner and the Audit Division. Based upon documents submitted by petitioner at the conference, the Audit Division agreed to reduce the assessment by \$31,119.79 and petitioner agreed that tax in the amount of \$15,970.13 was due, resulting in a disagreed amount of tax of \$26,050.96. The disagreed amount arose from purchases made by petitioner upon which the Audit Division concluded that either no sales tax was paid or that the payment of tax was unsubstantiated.

3. In order to determine the amount of tax allegedly due, the auditor examined petitioner's purchases for the month of May, 1975 as reflected in petitioner's purchase journal. This examination revealed that petitioner made purchases of \$8,185.42 upon which either no sales tax had been paid or the payment of sales tax had not been substantiated. The expenses upon which the auditor concluded that sales tax had not been paid or that the payment of sales tax had not been substantiated during May, 1975 were as follows:

Selling and Promotion		
The Powell Monetary Analyst	\$ 594.31	
Lifetime Studios, Inc.	481.50	
Allume Handprints, Inc. ¹	298.69	
TV and Appliance Store	<u>5,250.00</u>	\$6,624.50
Travel		
Sanford Hills		\$1,102.72
Stationery and Printing		
South Side Carting	\$ 55.00	
Denny's, Inc.	<u>403.20</u>	\$ 458.20
		<u>\$8,185.42</u>

The foregoing amount of expenses was divided by one-third of petitioner's total taxable sales for the three month period ended May 31, 1975 resulting in a percentage of purchases subject to sales or use tax of 4.68807 percent. This

¹ The name of the store has been omitted from the decision.

percentage was then multiplied by petitioner's total taxable sales during the audit period on a monthly basis and further multiplied by the applicable tax rate to arrive at the tax allegedly due on petitioner's purchases of \$26,050.96.

4. At the hearing, petitioner's representative acquiesced in the use of a test period, but argued the amount used by the Audit Division in the numerator of the fraction, i.e. \$8,185.42 in Finding of Fact "3", was too great.

5. Petitioner purchases equipment meeting each customer's specifications and then leases the equipment to the customer. The equipment is purchased with borrowed funds and petitioner earns a profit on the difference between the rental income and the interest expense it is paying.

6. During the period at issue it was petitioner's practice that, as invoices were received, they would be transmitted for approval to the people who made the purchase. Thereafter, the invoice would be forwarded to the accounts payable bookkeeper who, on a periodic basis, would prepare checks. The checks would then go to Mr. Gronbach, the controller, for signature and mailing. However, before the checks were mailed, they would be reviewed by Mr. Gronbach.

7. With respect to the purchases from the TV and Appliance Store ("appliance store"), the invoice would go directly from, Mr. Orner, the treasurer, to the bookkeeper who would immediately write out a check and return it to the treasurer for disposition. Thus, the check would bypass the controller's office and the controller would not have any opportunity to review these purchases. This procedure was only followed with respect to items purchased from the appliance store.

8. The appliance store sold items such as televisions, radios, small appliances, washing machines and dryers.

9. From September 20, 1974 through July 1, 1975 petitioner made purchases of \$90,563.50 from the appliance store.

10. The first time petitioner's comptroller became aware of possible problems with the purchases from the appliance store was during the course of the sales tax audit. At that time, the sales tax auditor asked Mr. Gronbach for invoices documenting the purchases. Mr. Gronbach, in turn, asked Mr. Orner for the invoices documenting the purchases from the appliance store. Although Mr. Orner indicated he would provide the requested invoices, he never did so.

11. Mr. Gronbach also attempted to obtain the invoices directly from the appliance store. Initially, the appliance store indicated that it would send the invoices requested. Subsequently, however, it refused to provide any invoices and told Mr. Gronbach to speak to Mr. Orner if he wanted any information.

12. On April 13, 1981, a Grand Jury sitting in the Eastern District of New York returned indictments against an Elliot S. Kahn and Harvey L. Orner based upon an allegation that Mr. Orner assisted in the preparation of Mr. Kahn's false and fraudulent income tax return for 1974. During this year, Mr. Kahn was petitioner's president. The basis of the allegation that Mr. Kahn's return was false and fraudulent arose from the charge that Mr. Kahn failed to report, as taxable income, money appropriated for his personal benefit and use from petitioner. On October 5, 1981, Mr. Kahn pled guilty to the indictment. At the hearing, petitioner's representative stated that the criminal indictment of Mr. Orner was dismissed.

13. Petitioner and one other party filed a civil complaint against Mr. Kahn. The complaint alleged, inter alia, that Mr. Kahn and Mr. Orner engaged in a scheme to obtain funds for their own benefit without benefit to Todd and without regard to Todd's best interests. One portion of the complaint alleged

that Mr. Kahn prepared false documents that reflected payments by Todd to purported vendors for goods that were never delivered to or for the benefit of petitioner. No evidence was presented as to the disposition of the complaint. Petitioner's representative believed, however, that the complaint was not prosecuted.

14. It was petitioner's practice to make purchases from the appliance store as gifts at Christmas time each year.

15. On May 21, 1975, petitioner drafted a check to Allume Handprints, Inc. for the purchase of ten items described as "Blakely on silver mirror mylar". Although the invoice only listed the items for \$275.00, plus handling and shipping charges, petitioner paid \$298.69 which represented the foregoing items plus sales tax. Petitioner paid the sales tax because the accounts payable bookkeeper knew that if sales tax was not included on the invoice, it was to be paid where applicable.

16. On May 14, 1975, petitioner drafted a check to Denny's Tots to Teens, Inc. in the amount of \$403.20. The amount of the check included sales tax.

17. On May 1, 1975, petitioner drafted a check in the amount of \$101.65 to The Powell Monetary Analyst. The check was in payment of a subscription for \$95.00 plus sales tax of \$6.65.

18. On May 6, 1975, petitioner paid Lifetime Studios, Inc. \$450.00, plus sales tax of \$31.50, for a total amount of \$481.50. The check was in payment of photographic copy enlargements.

CONCLUSIONS OF LAW

A. That except to the extent that property or services have been or will be subject to sales tax, section 1110 of the Tax Law generally imposes a use

tax upon the user for the use of tangible personal property purchased at retail.

B. That a "use" is defined by section 1101(b)(7) of the Tax Law as:

"The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property."

C. That, in general, the term purchaser, for purposes of sales and use tax, is defined by Tax Law §1101(b)(2) as follows:

"A person who purchases property or to whom are rendered services, the receipts from which are taxable under this article."

D. That, in view of the fact that the purchases from the appliance store were reflected on petitioner's records and the lack of any specific evidence that the purchases in issue were not made from the appliance store, petitioner must be considered the purchaser from the appliance store within the meaning of Tax Law §1101(b)(2). Accordingly, the Audit Division properly included the purchases from the appliance store in determining the sales and use taxes due.

E. That in view of the fact that sales tax was paid on the purchases discussed in Findings of Fact "15", "16", "17" and "18", these purchases should also be omitted from the calculation used to determine the percentage of petitioner's purchases subject to sales and use tax.


F. That the petition of Todd Equipment Leasing Co., Inc. is granted to the extent of Conclusion of Law "E" and the Audit Division is directed to

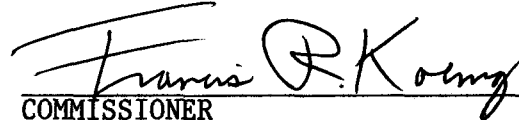
recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due accordingly. The Notice is, in all other respects, sustained.

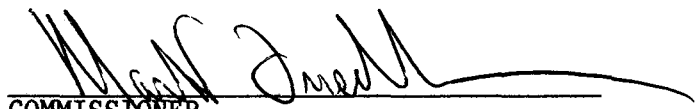
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 822

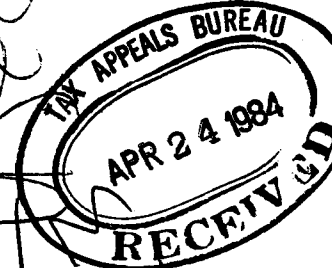
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Michael Patterson</i>	
Street and No. <i>350 5th Ave.</i>	
P.O., State and ZIP Code <i>NY, NY 10118</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



clt
262
Todd Equipment Leasing Co., Inc.
350 5th Ave. #628
New York, NY 10118

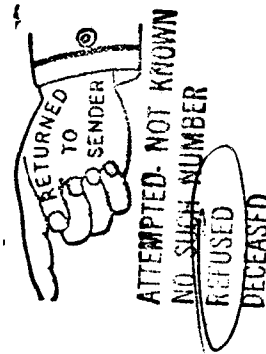
P 440 976 821

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Sent to <i>Todd Equipment Leasing Co., Inc.</i>	
Street and No. <i>350 5th Ave. #628</i>	
P.O., State and ZIP Code <i>NY, NY 10118</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
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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	

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R/E. # CARR. INTS

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED

P 440 976 821

MAIL

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

RETURNED TO
SENDER

ATTEMPTED, NOT KNOWN

NO NUMBER

REFUSED

RELEASED

RUE. # CARR. UNITS

Todd Equipment Leasing Co., Inc.

~~350~~ 5th Ave. #628

New York, NY 10118

TAX APPEALS BUREAU
APR 24 1984
RECEIVED

CERTIFIED

P 440 976 821

MAIL

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

April 6, 1984

Todd Equipment Leasing Co., Inc.
350 5th Ave. #628
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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
Archibald Patterson
350 Fifth Avenue
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STATE OF NEW YORK

STATE TAX COMMISSION

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C. That, in general, the term purchaser, for purposes of sales and use tax, is defined by Tax Law §1101(b)(2) as follows:

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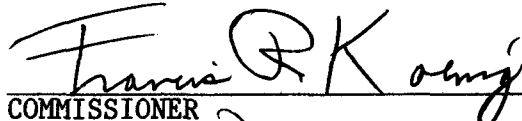
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984



PRESIDENT



COMMISSIONER



COMMISSIONER