

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Savitt Tobias Balk, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 6/1/82-8/31/82.
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of October, 1986, he/she served the within notice of Decision by certified mail upon Savitt Tobias Balk, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Savitt Tobias Balk, Inc.
c/o Rosenfeld, Sirowitz & Lawson, Inc.
111 Fifth Ave.
New York, NY 10022

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
20th day of October, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Savitt Tobias Balk, Inc. :

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for Redetermination of a Deficiency or Revision :
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under Article(s) 28 & 29 of the Tax Law for the :
Period 6/1/82-8/31/82. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of October, 1986, he served the within notice of Decision by certified mail upon Howard Lerner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard Lerner
3000 Marcus Ave.
Lake Success, NY 11042

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 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
20th day of October, 1986.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

October 20, 1986

Savitt Tobias Balk, Inc.
c/o Rosenfeld, Sirowitz & Lawson, Inc.
111 Fifth Ave.
New York, NY 10022

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Howard Lerner
3000 Marcus Ave.
Lake Success, NY 11042

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SAVITT TOBIAS BALK, 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, 1982
through August 31, 1982. :

Petitioner, Savitt Tobias Balk, Inc., c/o Rosenfeld, Sirowitz & Lawson, Inc., 111 Fifth Avenue, New York, New York 10022, 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, 1982 through August 31, 1982 (File No. 53665).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1986 at 10:45 A.M. Petitioner appeared by Howard Lerner, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether New York State and local sales tax is due on the sale of an asset specifically identified as "advertising and public relations accounts" by Savitt Tobias Balk, Inc. to Rosenfeld, Sirowitz & Lawson, Inc.

FINDINGS OF FACT

1. During the period at issue, Savitt Tobias Balk, Inc. ("STB"), a New York corporation, operated as an advertising agency with offices at 555 Madison

Avenue in New York City. In addition to the placement of advertisements with the media, STB also sold printed material to its clients.

2. By an Agreement of Sale dated June 15, 1982, STB sold its business to another advertising firm, Rosenfeld, Sirowitz & Lawson, Inc. ("RSL"). The fundamental nature of the transaction was that STB was selling its entire advertising business to RSL, while retaining a few selected assets and liabilities such as accounts receivable and payable. The parties bargained at arm's length and elected, for a variety of valid business reasons, to cast the transaction as a sale of assets.

3. Specifically, STB sold the following assets to RSL: (1) all its advertising and public relations accounts as identified in a schedule "A" attached to the Agreement of Sale, and (2) all books, records, files, furniture, fixtures, equipment, etc. associated with the accounts, i.e., physical plant. The total price was \$210,000.00 and, under the Agreement, the parties allocated \$25,000.00 to the furniture and fixtures and \$185,000.00 to STB accounts as set forth in the schedule "A". This schedule identified thirteen STB clients whose accounts were to be transferred to RSL.

4. This list of accounts had no independent significance or value, but was drafted in list form merely to define the ongoing business with some specificity. Otherwise stated, the names of the particular clients per se were unimportant to RSL except insofar as these accounts would continue to enlist or request advertising services of RSL as the successor to STB's business.

5. The parties' objective to ensure the continuity of business was readily apparent in view of the terms of the Agreement. For example, RSL also negotiated for, and received, as a condition precedent to their obligation to purchase these assets, five year employment agreements with the two then-surviving

principals of STB, Harold Balk and Seth Tobias. The obvious intent of these employment agreements was to ensure that these advertising accounts would continue with RSL. Further, STB made various representations and covenants in the Agreement of Sale relating to the continuity and stability of its accounts, for example:

- Page 8, para. 5(f) - Sellers represent that they have no reason to believe any of the accounts listed is contemplating termination or would refuse to request RSL services.
- Page 14, para. 9(a) and (b) - Sellers covenant to use "best efforts" to preserve accounts and conduct business as usual.
- Page 14, para. 9(c) - Sellers will introduce clients to RSL and vice versa.

These provisions were also directed toward ensuring a continuation of the business to the greatest extent possible.

6. Finally, the parties, RSL and STB, negotiated the cash payment based on the projected income that could be generated (1-2 million dollars per year) by such accounts and the parties' estimate of client longevity. The substantial long-term employment agreements given to Messrs. Tobias and Balk would have been pointless and needlessly expensive to the buyer if the object of the purchase was simply to obtain the physical assets and a list of "customers".

7. In addition to Messrs. Tobias and Balk, RSL also retained the services of fourteen other employees of STB.

8. The closing took place on July 1, 1982 and STB's advertising business was terminated on said date in accordance with the terms of the Agreement of Sale.

9. On August 11, 1980, the Audit Division commenced an audit of petitioner's books and records which continued until it was closed on February 17, 1984. During this period of time, the petitioner, by signature of Harold Balk, as president, executed seven consents extending the statute of limitations for issuing an assessment for sales and use taxes.

10. When the audit was finally completed, the Audit Division determined, inter alia, that petitioner was liable for sales taxes due on the sale of its assets, i.e. \$15,262.50 on the sale of the accounts for \$185,000.00 and \$2,062.50 on the sale of the furniture and fixtures for \$25,000.00. On April 20, 1984, the Audit Division issued to STB a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a sales tax due of \$17,325.00, plus interest of \$2,992.20, for a total due of \$20,317.20 for the period June 1, 1982 through August 31, 1982. Petitioner timely protested the above notice on June 18, 1984 and does not contest the taxes due on the furniture and fixtures.

11. It is the position of the Audit Division that the sale of the advertising and public relations accounts as described above represents the sale of a taxable information service pursuant to section 1105(c)(1) of the Tax Law.

12. Contrarily, petitioner contends that the sale in question represents the sale of goodwill and, therefore, is not subject to tax.

CONCLUSIONS OF LAW

A. That section 1105(c)(1) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the service of "furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports

thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons".

B. That the sale of a list of accounts, such as the one involved here, has been held to be taxable under section 1105(c)(1) of the Tax Law (Matter of Long Island Reliable Corp. v. Tax Commission, 72 AD2d 826, lv denied 49 NY2d 707; Matter of Skaggs-Walsh, Inc. v. State Tax Comm., 50 NYS2d 520).

C. That the petition of Savitt Tobias Balk, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 20, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986

Rodwin A. Chen
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER