

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RICHARD L. FEIGEN & COMPANY, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 824996
Use Taxes under Articles 28 and 29 of the Tax Law for :
the period December 1, 2003 through February 29, 2004. :

Petitioner, Richard L. Feigen & Company, Inc., 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, 2003 through February 29, 2004.

On June 18, 2013 and June 25, 2013, respectively, petitioner, appearing by Davidoff Hutcher & Citron LLP (Malcolm S. Taub, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Marvis Warren, Esq., of counsel), waived a hearing and submitted the matter for determination based upon documents and briefs to be submitted by January 10, 2014, which date commenced the six-month period for issuance of this determination. After due consideration of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders this determination.

ISSUES

- I. Whether petitioner's claim for refund was barred by the statute of limitations.
- II. Whether the Division of Tax Appeals has authority to grant petitioner a refund of tax paid on a sale that was rescinded and the property returned where petitioner failed to file a timely refund claim.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been substantially incorporated into the Findings of Fact below.

1. Richard Feigen is the president of petitioner, Richard L. Feigen & Company, Inc., an Illinois corporation with a principal place of business located at New York, New York.
2. Petitioner has been in business since 1959.
3. Petitioner is an art gallery located at New York, New York, and is a registered vendor with New York State for sales tax purposes.
4. On or about September 9, 2003, petitioner acquired what was purported to be a Max Ernst¹ painting, “Forêt,” circa 1926 - 27, (the Painting) from Galerie Daniel Malingue, Paris, France, for the price of \$2,325,000.00. The Painting, an oil on canvass, was purportedly signed in the lower right corner “max ernst.”
5. At the time of petitioner’s acquisition of the Painting from Galerie Daniel Malingue, Mr. Feigen, petitioner’s president, believed the Painting to be a true and authentic original artwork.
6. Petitioner received a Provenance² and Certificate of Authenticity of Werner Spies from its seller, Galerie Daniel Malingue. The Provenance lists Alfred Flechtheim, who was a German gallery owner, and Werner Jaegers, Cologne, private collection.
7. Mr. Feigen, on behalf of petitioner, reviewed documents that purported to substantiate the authenticity of the Painting.
8. According to Wikipedia, an online encyclopedia, Werner Spies is an art historian who

¹ Max Ernst (1891 - 1976), a leading Surrealist, was a German-born painter, sculptor and printmaker.

² A provenance is the history of ownership from the artist to the present owner.

was a personal friend of and the leading expert on Max Ernst. He wrote many books on Ernst's works and also organized major exhibitions of Max Ernst pieces.

9. It was later discovered in or around October 2011, that Werner Spies was fooled by art forger Wolfgang Beltracchi's near-identical forgeries of five works by Max Ernst. He mistakenly issued certificates of authenticity for these fake copies of the surrealist's work.

10. On or about January 14, 2004, petitioner sold the Painting for \$2,500,000.00 to Anna-Marie Kellen. Petitioner collected sales tax in the amount of \$215,625.00 at a rate of 8.625%, on the sale of the Painting. Copies of the Provenance and the Certificate of Authenticity, received from Galerie Daniel Malingue, were given to Ms. Kellen.

11. On February 18, 2004, with its New York State and Local Sales and Use Tax Return for Part-Quarterly Fliers for the period of January 1, 2004 through January 31, 2004, petitioner paid the sales tax in the connection with the Painting in the amount of \$215,625.00 to New York State.

12. At the time of the sale to Ms. Kellen and the subsequent payment of the sales tax to New York State, both petitioner and Ms. Kellen had absolutely no knowledge, suspicion or indication that the Painting was a valueless forgery.

13. Beginning in or around October 2010, news articles surfaced that exposed an art fraud ring that included paintings purportedly painted by Max Ernst. In the same month, three persons were arrested in Germany for their involvement in the frauds. The three conspirators were ultimately convicted and sentenced as a result of their criminal conduct.

14. Beginning on or about December 23, 2010, Mr. Feigen began receiving emails from Daniel Malingue stating that there was the possibility that the Painting might be a fake.

15. Shortly thereafter, issues were raised as to the validity of the Flechtheim label located

on the back of the canvass.

16. On February 5, 2011, Mr. Feigen received an email from Commissioner Rene Allonge (German Department of Art Crime-Berlin Police Department) notifying him of the possibility that the Painting might be a forgery and asking Mr. Feigen to furnish him with certain information regarding the Painting to help in their investigation.

17. On February 7, 2011, Mr. Feigen responded to Commissioner Allonge, providing the requested material with regard to the Painting.

18. On February 9, 2011, Mr. Feigen received an email from CDI Marus Schofelder of the Berlin Police, identifying traits associated with the known, fake paintings discovered thus far. The email requested further information about the Painting from Mr. Feigen and that he furnish the Berlin Police Department with the scientific results of the examination of the Painting once completed.

19. After retrieving the Painting from Ms. Kellen, petitioner shipped it to Orion Analytical, LLC, a materials analysis and consulting firm, for examination. In or about March of 2011, after performing a scientific examination of the Painting, Orion Analytical concluded that “rigorous investigation of such Artwork must at least include a consideration of the possibility that an intentionally misleading object was created.” Such a conclusion would have a significant negative impact to the authenticity of the Artwork. On an unknown date, Orion Analytical shipped the Painting back to petitioner.

20. Based upon the findings of the scientific investigation of the Painting, Mr. Feigen had no other alternative but to conclude that the Painting was not authentic and therefore was valueless.

21. On March 14, 2011, petitioner issued an invoice to Galerie Daniel Malingue

requesting a refund in the amount of \$2,325,000.00 for “non-authenticity” of the Painting, plus examination and shipping expenses in the amount of \$12,200.00. On or about April 28, 2011, Galerie Daniel Malingue reimbursed petitioner for the examination and shipping expenses. On or about May 27, 2011, Galerie Daniel Malingue refunded the purchase price of the Painting in the amount of \$2,325,000.00 to petitioner. Subsequently, in August 2011, petitioner shipped the Painting to Galerie Interart SA, Geneva, Switzerland.

22. On June 20, 2011, petitioner refunded the purchase price of the Painting in the amount of \$2,500,000.00 to Ms. Kellen. On the same date, petitioner refunded the sales tax in the amount of \$215,625.00, which was paid in connection with the purchase price of the Painting to Ms. Kellen.

23. On June 21, 2011, petitioner submitted an Application for Credit or Refund of Sales or Use Tax (Form AU-11) (claim for refund) in the amount of \$215,625.00 for the period December 1, 2003 through February 29, 2004 to the Division of Taxation (Division). In its claim for refund, petitioner explained that the Painting, sold on January 14, 2004 for \$2,500,000.00 on which sales tax in the amount of \$215,625.00 was paid and remitted to New York State, was determined to be a fake in March of 2011, and that it had agreed to refund the full amount paid for the Painting. Petitioner further explained that its claim for refund was based upon 20 NYCRR 534.8 (Tax Law § 1139) “whereas the taxpayer erroneously collected sales tax on the sale of tangible person property fraudulently misrepresented as an original work of art. The taxpayer did not have the proper authority to convey the work of art or to convey proper title.” Petitioner also indicated that it had refunded the sales tax collected on the sale.

24. On July 18, 2011, the Division’s Audit Division - Transaction Desk Audit Division, sent petitioner a letter denying petitioner’s claim for refund in full. The Division explained the

basis for the denial as follows:

The Sales and Use Tax Law requires that a refund application be filed within three years from the date the taxes are payable to the Tax Department. Sales tax is deemed to be payable on the 20th day of the month following the quarter in which the sale/purchase was made. Your claim was filed on 6/21/11. Based on the three year statute of limitations, your claim can include periods beginning on 6/1/08. Tax paid on sales/purchases prior to that date cannot be refunded.

25. Petitioner protested the refund denial by filing a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held on December 6, 2011. Subsequently, on December 29, 2011, BCMS conciliation conferee, Steven Saskin, sent petitioner a letter, in which he stated that he “must sustain the Refund Denial” issued by the Division. Mr. Saskin also requested that petitioner sign and return an enclosed Consent form reflecting that decision. The letter further stated that if the signed Consent form was not returned within 15 days, a Conciliation Order would be issued as required by the Tax Law.

26. On February 10, 2012, BCMS issued a Conciliation Order sustaining the denial of the refund request, and, by letter dated February 10, 2012, provided a copy of that Order to petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 1139(a), in relevant part, provides that:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission

Tax Law § 1139(c) provides that “[a] claim for credit or refund of an overpayment of sales

tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such period expires the later”

Tax Law § 1139(e) provides that:

The provisions of subdivisions (a), (b) and (c) of this section shall be applicable to applications for refund or credit pursuant to section eleven hundred nineteen and subdivision (e) of section eleven hundred thirty-two, except that an application for credit may be made as provided in such section or subdivision and except that no interest shall be allowed or paid upon any refund made or credit allowed pursuant to such section or such subdivision.

B. Tax Law § 1132(e) provides, in relevant part, that:

The commissioner may provide, by regulation, for the exclusion from taxable receipts . . . of amounts representing sales where the contract of sale has been cancelled, the property returned . . . or, in case the tax has been paid upon such receipt . . . for refund of or credit for the tax so paid.

20 NYCRR 534.6(a)(2) provides, in relevant part, that:

Where a contract of sale has been cancelled or the property returned and the tax collected thereon refunded to the customer, and such tax had been paid and reported on a return by the vendor of tangible personal property . . . , an application for refund or credit for the tax paid upon such receipt . . . shall be filed with the Department of Taxation and Finance within three years from the date when the tax was payable by such person to the Department of Taxation and Finance. . . . The application for refund or credit shall be subject to the provisions of subdivisions (a), (b) and (c) of section 1139 of the Tax Law and section 534.2 of this part.

C. It is petitioner’s position that the three-year statute of limitations provided in Tax Law § 1139(a) is not applicable to this matter because the sales tax was not “erroneously, illegally or unconstitutionally” paid at the time of the sale or at the time the sales tax was paid to New York State. Therefore, there is no bar to its claim for refund. In support of this position, petitioner relies upon the plain language of Tax Law § 1139(a) and *Matter of Consolidated Edison Company of New York, Inc. v. State Tax Commn.* (101 Misc 2d 868, 422 NYS2d 294 [1979] [provision does not apply to taxes legally due and owing at the time they were paid]).

D. Petitioner's argument is rejected. While petitioner is correct that the tax was not erroneously, illegally or unconstitutionally collected and paid at the time of the sale of the Painting, the analysis of this transaction does not end there. Petitioner, an art merchant by law (Arts and Cultural Affairs Law § 11.01[2]), collected and paid the tax due on its sale of what both it and the buyer believed to be an authentic Max Ernst painting. At the time of the January 2004 sale, petitioner furnished a certificate of authenticity to the buyer, Ms. Kellen. Because petitioner provided such certificate of authenticity, it formed part of the basis of the bargain and an express warranty as to the material facts as of the date of the sale (*see* Arts and Cultural Affairs Law § 13.01[1]). Seven years later, as a result of scientific examination of the painting, it was determined to be inauthentic and valueless. The sale was immediately rescinded based upon the mutual mistake of fact, and the painting returned to petitioner. Subsequently, both the purchase price of \$2,500,000.00 and the sales tax in the amount of \$215,625.00 were refunded to Ms. Kellen. Where, as in this instance, the sale was rescinded and the property returned, Tax Law § 1132(e) provides that such sale may be excluded, by regulation, from taxable receipts. 20 NYCRR 534.6(a)(2) provides that refunds of taxes paid attributable to cancelled sales and returned property are subject to the provisions of Tax Law § 1139(a), (b), and (c).

Tax Law § 1139(c) provides that a claim for refund must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever of the periods expires the later. Petitioner filed its part-quarterly return for the period January 1, 2004 through January 31, 2004 on February 18, 2004 and its refund claim was filed on June 21, 2011, the refund claim clearly does not meet the requirement that it be filed within three years from the date the return was filed. The return for the quarter December 1, 2003 through February 29,

2004 was due by March 20, 2004 (Tax Law § 1136[b]). The latest date that the tax became payable was at the time the returns were due (Tax Law § 1137[a]). Therefore, the refund claim was not filed within the alternative two-year period of Tax Law § 1139(c). Under either period of limitation of the Tax Law cited above, petitioner's refund claim for the quarter December 1, 2013 through February 29, 2004 was untimely.

E. Petitioner asserts that the statute of limitations should have been tolled until, at the earliest, March 1, 2011, as a result of fraud. It further asserts that Civil Practice Law and Rules § 213 should be applied to this matter. CPLR 213 provides that a civil action based upon fraud must be commenced by the later of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it. Petitioner's argument is without merit. Tax Law § 1139(c) specifically disallows the granting of refunds after a certain period of time has passed. Second, public policy does not favor the granting of refunds beyond the allowed period of time. In *Matter of Renaud* (Tax Appeal Tribunal, October 13, 2011), the Tribunal explained the policy considerations for enacting a statute of limitations as follows:

The statute of limitations here is clearly set forth in the Tax Law. Its purpose is to allow a reasonable time for taxpayers who have erroneously filed or paid taxes to realize their error and make an application for refund. The State is thus put on notice that there is a specific statutory period during which it may be liable for such claims. At the end of the period, the matter is settled. Anything less than this degree of certainty would make the financial operation of government difficult, if not impossible. In short, the statute of limitations at issue here is a balance between the needs of the State with regard to the protection of its financial resources and the rights of taxpayers to correct their errors.

F. Petitioner contends that equity dictates it is entitled to a refund of the sales tax paid because the contract for the sale of the Painting was based upon a mutual mistake of fact and therefore was void ab initio and was rescinded. This contention is rejected. The Division of Tax

Appeals is an adjudicative body with limited jurisdiction granted by statute. Its jurisdiction is derived from Tax Law §§ 2000 through 2026. Upon review of those sections, it is clear that the Division of Tax Appeals does not have authority to determine matters equitably.

G. Petitioner next contends that the special refund authority provisions of Tax Law § 697(d) and § 1096(d) provide guidance to determine that the general powers of the tax commissioner found in Tax Law § 1142(6), “[t]o assess, determine, revise and readjust the taxes imposed by this article,” create discretionary authority for the tax commissioner to refund the sales tax in the interest of fairness and justice where taxes are being erroneously or illegally held, irrespective of the expiration of the statute of limitations. This argument is rejected. In *Matter of Kimberly Hotel* (Tax Appeals Tribunal, May 4, 2006), petitioner sought a refund of erroneously paid taxes and relied upon *Matter of Mobil Oil Corp. v. Commissioner of Fin.* (101 AD2d 723, 475 NYS2d 32 [1984]) to support an interpretation of the special refund authority found in the New York City general corporation tax that is similar to the one provided in Tax Law § 697(d) and § 1096(d). The Tribunal concluded that there is no similar provision in the law governing sales and use taxes and therefore the *Mobil* case was irrelevant. The same considerations that led the Tribunal to conclude that the special refund authority could not be judicially imposed upon the sales tax provisions of the Administrative Code of the City of New York in *Kimberly Hotel* support the position that New York State sales tax law may not be construed to include the special refund authority found in Tax Law § 697(d) and § 1096(d).

H. Petitioner claims that to permit a refund to be paid regardless of limitations periods with respect to personal income tax and corporation franchise tax, respectively, but not to sales tax results in a violation of its right to Equal Protection under the Fourteenth Amendment to the United States Constitution. In addition, petitioner contends that it is being treated differently

than other persons similarly situated within the class of sales tax payers. Petitioner points out that within that class, each entity is to pay an equal percentage of their sales revenue to New York State. It further points out that in the instant matter, as with all businesses operating within New York City, that sales tax percentage is 8.625%. Petitioner argues that if its refund is denied because of the expiration of the three-year statute of limitations, a situation would be created where it would pay New York State an additional \$215,625.00 even though it did not retain any sale proceeds. Petitioner further argues that if its claim for refund was denied because of the expiration of the statute of limitations, the result would be a wrongful tax paid by petitioner far in excess of the 8.625% sales tax paid by all other entities operating within the class of sales tax payers.

I. Petitioner's equal protection claims must be rejected. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Similarly, New York's Constitution provides that "no person shall be denied the equal protection of the laws of this state or any subdivision thereof" (NY Const, art 1, § 11).

The Equal Protection clauses of the State Constitution and Federal Constitution do not forbid classifications, but simply prohibit governmental decision makers from treating differently persons who are in all relevant respects alike. Petitioner is not in all relevant respects like taxpayers subject to personal income tax or corporation franchise tax. Both personal income tax and corporation franchise tax impose tax based upon income earned by a taxpayer. Sales tax is imposed upon retail sales. It is a trust fund tax, and is collected by the seller on behalf of the state. The seller reports the amount of tax collected on the sales tax returns filed, and remits same with such returns. The Legislature has explicitly barred the granting of refund claims that are

filed the later of more than three years after the sales tax returns were filed or two years from the time the tax was paid (Tax Law § 1139[c]).

Petitioner is treated no differently than any other vendor whose receipts are subject to sales tax and who had a sale cancelled or the property returned. Each such vendor is subject to the three-year statute of limitations for filing a claim for refund for overpayment of the tax due to the cancelled sale or the return of property. The nature of the cancelled sale or the merchandise returned does not matter. In the instant matter, the determination of the Painting's inauthenticity, the resulting rescission of the sale, and the return of the property occurred seven years after the sale took place, long after the statute of limitations for filing a claim for refund had expired. It is unfortunate that it took so long for the Painting to be determined to be inauthentic, but that is a risk petitioner assumes every time it makes a sale.

J. Petitioner argues that the failure to refund the tax because the three-year statute of limitations had expired results in a violation of its due process rights. This argument is also without merit. As explained earlier, the statute of limitations allows a reasonable time for taxpayers who paid more than they should have to find their error and file a claim for refund. In turn, the State is aware that there is a three-year period wherein it may have to pay claims. Thereafter, the matters are settled and balance is established between the needs of the State to protect its financial resources and the right of taxpayers to correct their errors. Here, the requirements of due process are satisfied. Without this level of certainty, it would be difficult or impossible to maintain financial operation of government (*Matter of Nierenstein*, Tax Appeals Tribunal, April 21, 1988).

K. Lastly, petitioner claims that Tax Law § 1139(c) should be construed to facilitate petitioner's refund application and avoid a forfeiture in the interest of equity and justice,

notwithstanding any statute of limitations time bar. This claim is rejected. Tax Law § 1139(c) is clear and unequivocal, the claim for refund must be filed within the later of three years from the time the return was filed or two years from the time the tax was paid. The Division of Tax Appeals does not have the authority to grant a claim for refund of sales tax filed after the expiration of the statute of limitations.

L. The petition of Richard L. Feigen & Company, Inc., is denied and the denial of the claim for refund is sustained.

DATED: Albany, New York
July 10, 2014

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE