

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
STERLING ROMAN PRESS, INC.	:	DETERMINATION
AND KENNETH ROMAN, AS OFFICER	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1977	:	
through November 30, 1980.	:	

Petitioners, Sterling Roman Press, Inc. and Kenneth Roman, as Officer, 75 Varick Street, New York, New York 10013, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1977 through November 30, 1980 (File Nos. 800181 and 800184).

On May 5, 1987, petitioners, through their duly authorized representative, waived a hearing and agreed to submit the case for determination based on the Division of Taxation file and a memorandum of law to be submitted by petitioner by July 24, 1987. After due consideration of the record, Daniel J. Ranalli, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether the Audit Division's treatment of certain purchases made by the corporate petitioner as machinery and equipment used in its printing business, as opposed to purchases for resale, was a violation of the equal protection clauses of the New York State and United States Constitutions.

FINDINGS OF FACT

1. Petitioner Sterling Roman Press, Inc. ("the corporation") was engaged in a printing business located at 75 Varick Street, New York, New York. Kenneth Roman was president of the corporation.

2. On August 27, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the corporation covering the period December 1, 1977 through November 30, 1980 for taxes due of \$1,151,160.27, plus penalty and interest of \$526,674.23 for a total amount due of \$1,677,834.50. On the same date, a notice was also issued to petitioner Kenneth Roman, as officer, for taxes due of \$903,856.66, plus penalty and interest of \$413,528.90, for a total due of \$1,317,385.56. Mr. Roman was not held personally liable for use taxes of \$247,303.60 assessed against the corporation.

3. The corporation executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1977 through November 30, 1980 to September 20, 1981.

4. The corporation provided no books and records to the Audit Division for examination. Therefore, based on available information, the Audit Division determined the following areas of deficiency:

(a) disallowed nontaxable sales	\$ 903,856.66
(b) fixed asset acquisitions	70,273.05
(c) expense purchases	<u>177,030.55</u>
Total	\$1,151,160.26

5. Following a prehearing conference, the tax due on the notice issued to the corporation was revised to \$78,160.96 plus minimum interest. Expense purchases which were deemed production machinery and equipment and subject to the four percent New York City tax imposed under section 1107 of the Tax Law amounted to \$634,950.75 with tax due thereon of \$25,398.09. The file does not indicate, and no evidence was presented, with respect to the items which comprise the balance of the revised assessment. The tax due on the notice issued to Kenneth Roman was reduced to \$16,992.47 plus minimum interest. There was no explanation as to the items included in the officer assessment. The Audit Division agreed with the above revisions made at conference.

6. In May 1980 the State Tax Commission instituted a policy which accorded equal treatment to all items purchased for use in production by printers. The following categories were

deemed to be machinery and equipment:

- (a) Offset plates, photoengraving plates (aluminum, bimetal, trimetal, deep etch, paper, photopolymer, plastic, rubber, zinc) and glass screens.
- (b) Lithographic positives, negatives, color separations and film (exposed and unexposed).
- (c) Composition, typography and progressive proofs.
- (d) Artwork, illustrations, layouts, drawings, paintings, mechanicals, overlays, designs, photographs and pasteups.

Such machinery and equipment, when used in the production of property for resale, are not subject to New York State sales tax but are subject to New York City sales tax. Since July 1, 1977, however, New York City has allowed a credit against the City corporation tax and unincorporated business tax for the City sales tax paid on the purchases of such machinery and equipment.

7. On January 18, 1979, the State Tax Commission adopted a policy limiting the assessment periods of printing industry audits involving the City sales tax on items included in categories (a) and (b), supra, to those periods beginning on or after December 1, 1975. Since the sales tax paid on purchases of machinery and equipment is eligible for a credit against City general business taxes with respect to purchases made on or after July 1, 1977, printers were subject to City sales tax, for which there was no corresponding general business tax credit, on purchases of items in categories (a) and (b) during the period from December 1, 1975 to July 1, 1977. Prior to the establishment of the May 1980 policy, purchases of items in category (c) had been excluded from tax as purchases for resale and, therefore, there was no tax impact on such purchases.

8. In Matter of B & B Enterprises, Inc. (State Tax Commission, February 6, 1985), it was held that purchases of printing, paper, typography etc. used to produce "Stagebills" were for resale and therefore not subject to sales and use taxes. This holding was overruled in Matter of Martin Lithographers, Inc. (State Tax Commission, December 1, 1985) which held

that, in order to prevent inconsistency of sales tax treatment, the policy of limiting the assessment periods of printing industry audits would be extended to all the items considered to be machinery and equipment set forth in Finding of Fact "6", including items in category (d). The Audit Division followed this holding with respect to all printing industry audits.

SUMMARY OF PETITIONERS' POSITION

9. Petitioners argued that the corporation received inequitable treatment compared to that given B & B Enterprises, Inc. and as a result incurred the expense of unpaid sales tax and interest charges not borne by B & B Enterprises, Inc. Petitioners alleged that such unequal treatment is unjust and unlawful discrimination and a violation of the New York State and United States Constitutions, specifically the equal protection clauses.

CONCLUSIONS OF LAW

A. That there was no unjust and unlawful discrimination against the corporate petitioner which would violate the equal protection clauses of the United States or New York State Constitutions. Administrative agencies are free to correct a prior erroneous interpretation of the law by overruling a past decision. (Matter of Charles A. Field Delivery Service, Inc., 66 NY2d 516.) A specific conclusion in Matter of B & B Enterprises, Inc. (State Tax Commission, February 6, 1985) was found to be erroneous and was clearly overruled in Matter of Martin Lithographers, Inc. (State Tax Commission, December 2, 1985). The Commission explained in Martin Lithographers that it was extending a longstanding policy so as to prevent inconsistency in tax treatment. It further explained that to the extent such holding was inconsistent with its decision in B & B Enterprises, such decision was overruled. This the Commission was entitled to do and petitioners' arguments to the contrary are without merit.

B. That the petitions of Sterling Roman Press, Inc. and Kenneth Roman, as officer, are granted to the extent that the taxes due are reduced to \$78,160.96 and \$16,992.47, respectively, in accordance with Finding of Fact "5"; the Audit Division is hereby directed to modify the

notices of determination and demands for payment of sales and use taxes due issued August 27, 1981; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
April 17, 1991

ADMINISTRATIVE LAW JUDGE