STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of HUDSON SHERATON CORPORATION D/B/A SHERATON CENTRE HOTEL 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 March 1, 1979 through February 28, 1982.	:	DETERMINATION

Petitioner, Hudson Sheraton Corporation d/b/a Sheraton Centre Hotel, 811 Seventh Avenue, New York, New York 10019, 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 March 1, 1979 through February 28, 1982 (File No. 47205).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 22, 1986 at 1:15 P.M., with all briefs to be submitted by February 15, 1987. Petitioner appeared by William D. Maroney, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether separately-stated advertising commissions billed to petitioner by Needham & Grohmann, Inc. are exempt from the imposition of sales taxes by virtue of the fact that a principal-agent relationship existed between petitioner and Needham & Grohmann, Inc.

II. Whether fees for the services of Needham & Grohmann, Inc. for petitioner are exempt from the imposition of sales taxes pursuant to section 1105(c)(1) of the Tax Law, the provisions of which exempt the services of advertising agents or, in the alternative, are exempt information services which are personal or individual in nature and which are not or may not be substantially incorporated in reports furnished to others.

FINDINGS OF FACT

1. In April of 1982, an audit of the Hudson Sheraton Corporation d/b/a Sheraton Centre Hotel (hereinafter "petitioner") was commenced by the Audit Division. On June 10, 1983, a representative of petitioner, John D. Gillis, Manager, State Taxes, executed Form AU-377.12, Audit Method Election, whereby he agreed on behalf of petitioner that, despite being advised that records available for audit were adequate and sufficient to warrant an audit method utilizing all records within the period, a representative test period audit method would be used for purposes of auditing recurring expense purchases.

2. On June 14, 1982, Peter O. Johnson, Assistant Secretary of petitioner, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through August 31, 1979 whereby he agreed that taxes for said period could be determined at any time on or before December 20, 1982. On December 2, 1982, Mr. Johnson executed an additional consent, agreeing that taxes for the period March 1, 1979 through February 29, 1980 could be determined at any time on or before June 20, 1983.

3. Based upon a test period audit of petitioner's expense purchases, fixed assets, food and beverages and advertising purchases, total tax liability in the amount of $154,474.14 was determined by the Audit Division. On April 25, 1983, Mr. Gillis, on behalf of petitioner, executed a Statement of Proposed Audit Adjustment wherein he agreed to tax liability in the amount of $81,478.65 which represented tax due on expense purchases, fixed assets and food and beverages. Petitioner's representative disagreed with the balance ($72,995.49) which represented the Audit Division's determination of petitioner's tax liability on advertising purchases.

4. On June 20, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $72,995.49, plus interest of $22,111.06, for a total amount due of $95,106.55. The entire amount of tax due represented certain purchases made by petitioner from Needham & Grohmann, Inc. (hereinafter "N & G").

5. For purposes of the audit of petitioner's advertising purchases, invoices relative to purchases of advertising artwork and of brochures, signs and other tangible personal property for the year 1981 were analyzed. Total purchases for 1981 were found to be in the amount of

$297,208.54. A taxable percentage of .84 percent was determined. The auditor then applied this percentage to the total advertising purchases for the audit period of $907,888.00. The appropriate sales tax rate was then applied, resulting in tax due in the amount of $72,995.49.

6. Petitioner does not contest the method of computing the amount of tax due which was employed by the Audit Division, but contends that fees charged by N & G are exempt pursuant to section 1105(c)(1) of the Tax Law which excludes certain advertising services and information services or, in the alternative, are exempt because petitioner and N & G have established a principal-agent relationship.

7. With respect to petitioner's contention that it established a principal-agent relationship with N & G, it is the Audit Division's position that such relationship did not qualify as a principal-agent relationship because it did not satisfy Department requirements as outlined in memoranda of the Technical Services Bureau of the Department of Taxation and Finance's Taxpayer Services Division (TSB-M-78[3]S and TSB-M-83[16]S).

8. For approximately 22 years, N & G had been performing services for petitioner's parent corporation, The Sheraton Corporation, and certain affiliates thereof. When petitioner purchased what was formerly the Americana Hotel in New York City in 1978, renovated the hotel and changed the name to the Sheraton Centre, N & G immediately became involved in the advertising campaign relative thereto.

9. When N & G, in the course of the performance of its services, was required to engage the services of outside suppliers such as photographers or typesetters, such services or supplies were purchased from said suppliers by N & G through the use of a purchase order or art purchase order form on which the name of the client, i.e., petitioner, was included and on which form, under "Terms and Conditions", the following clause was contained:

> "This order is placed by us in our capacity as advertising agency --not as principal -- for the advertiser whose name appears on the face of this order, its subsidiaries, affiliated and controlled companies."

N & G paid sales tax to these suppliers and when N & G billed petitioner, petitioner was billed at the same amount as paid by N & G to the supplier. A separately-stated fee of N & G was also included on the bill, said fee having been calculated at approximately 15 percent of the total bill.

10. On March 24, 1978, the Technical Services Bureau of the Department of Taxation and Finance's Taxpayer Services Division issued guidelines (TSB-M-78[3]S) relative to principal-agent relationships which provided, in pertinent part, as follows:

> "Recent inquiries as to whether an advertising agency may act as an agent for a disclosed principal and if it can, what elements would constitute a principal-agency relationship, resulted in the following guidelines.
>
> Generally speaking, an agent is one who represents another, called the principal, in dealings with third persons. It has been concluded through departmental correspondence that an advertising agency can act as agent on behalf of its clients in dealings with third persons.
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> To establish that a particular requisition was made by an advertising agency acting as agent for his client, the following conditions must be met:
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> 1. The advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent, and
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> 2. The advertising agency must obtain, prior to the acquisition, and retain written evidence of agent status with the client, and
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> 3. The price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may make no use of the property for its own account, such as charging the item to the account of more than one client.
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> * * *
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> If an advertising agency has established a principal-agency relationship, meeting all of the criteria listed above, all sales of tangible personal property such as catalogs, mailing devices or promotional handouts, tapes or films by that advertising agency to its client are subject to appropriate New York State and Local Tax on the total charge, excluding any separately stated agency commissions" (emphasis added).

The relationship between petitioner and N & G meets conditions 1 and 3 above.

11. On June 10, 1983, the Technical Services Bureau issued additional guidelines (TSB-M-83[16]S) to clarify the conditions set forth in TSB-M-78(3)S. As to condition 2, TSB-M-83(16)S stated as follows:

> "Condition 2 above will be met only where there exists a properly executed written agency agreement which clearly sets forth that the advertising agency is appointed to act as agent for and on behalf of the client with respect to making purchases."

No written agency agreement was ever executed between petitioner and N & G.

CONCLUSIONS OF LAW

A. That creation of the agency relationship arises from the consent of the parties. It is not essential that any actual contract should exist. An agency relationship is created as the result of conduct by the parties manifesting that one is willing to act for the other subject to his control and that the other consents to so act (2 NY Jur 2d, Agency, § 18).

B. That the credible testimony of representatives of petitioner and N & G, taken together with correspondence between the parties relative to the services being performed, clearly indicate that a principal-agent relationship existed between petitioner and N & G during the period at issue.

C. That nowhere in the Tax Law or in the regulations promulgated thereunder is it required that a written agency agreement be executed in order for a principal-agent relationship to exist. TSB-M-78(3)S required only that written evidence of agent status be obtained and retained. Correspondence in the form of letters and memoranda between the parties along with the fact that N & G's purchase orders relating to Sheraton Centre contained the name of petitioner thereon constitute written evidence of the relationship. TSB-M-83(16)S, requiring a written agency agreement, was not effective until June 10, 1983, a date which was after the period at issue herein. Even assuming, arguendo, that TSB-M-83(16)S was a clarification of the conditions previously set forth in TSB-M-78(3)S which were in effect for the audit period, such Technical Services Bureau memoranda are declarations of audit policy only and, in the absence of authority by statute or regulation, are not controlling but are merely advisory.

D. That, for the period at issue, petitioner and N & G had established a principal-agent relationship and, as a result thereof, N & G's separately-stated agency commissions are not subject to sales taxes.

E. That 20 NYCRR 527.3(b)(5) provides, in pertinent part, as follows:

> "Fees for the services of advertising agencies or other persons acting in a representative capacity are excluded from the tax. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property."

With the exception of N & G's separately-stated commissions, petitioner has failed to show that, for the period at issue, additional charges billed to petitioner by N & G constituted "advertising

services" as the term is defined in 20 NYCRR 527.3(b)(5) hereinabove, since petitioner has not sustained its burden of demonstrating by clear and convincing evidence that these charges were solely for placement of advertisements with the media without the transfer of tangible personal property. Therefore, all of N & G's charges to petitioner on its invoices for the period at issue are subject to sales taxes with the exception of its separately-stated commissions as indicated in Conclusion of Law "D".

F. That N & G did not furnish information services to petitioner and, as such, the services rendered are not exempt from sales taxes pursuant to section 1105(c)(1) of the Tax Law which exempts the furnishing of information which is personal or individual in nature and which is or may not be substantially incorporated in reports furnished to other persons.

G. That the petition of Hudson Sheraton Corporation d/b/a Sheraton Centre Hotel is granted only to the extent indicated in Conclusions of Law "D" and "E"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1983 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
September 29, 1988

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ADMINISTRATIVE LAW JUDGE