

STATE TAX COMMISSION

A small claims 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 July 20, 1983 at 1:15 P.M., with all briefs to be submitted by September 20, 1983. Petitioner appeared by George L. Robbins, P.A. The Audit Division appeared by John P. Dugan, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether film which is used in the manufacture of typography may be purchased for resale pursuant to section 1101(b)(4)(i) of the Tax Law.

FINDINGS OF FACT

1. On January 10, 1978, the Audit Division, as the result of a field audit, issued to petitioner, Empire Typographers, Inc., a Notice and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law for the period December 1, 1974 through August 31, 1977 in the amount of \$466.63, plus penalty and interest of \$99.52, for a total of \$566.15.

2. Also on January 10, 1978, the Audit Division, as the result of a field audit, issued to the petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law for the period December 1, 1974 through August 31, 1977 in the amount of \$4,833.80, plus penalty and interest of \$1,903.14, for a total due of \$6,736.94.

3. Petitioner, Empire Typographers, Inc., by signature of its president, Harry Blumenthal, executed a consent extending the period of limitation for assessing sales and use taxes for the period at issue to September 20, 1978.

4. The aforementioned Notice and Demand represents additional taxes found to be due on expense purchases and fixed asset purchases. Said amount has been agreed to by petitioner and is not at issue in this proceeding. The aforementioned Notice of Determination represents additional taxes found due on petitioner's purchases of film. The petitioner timely filed a petition to review said determination.

5. Petitioner, Empire Typographers, Inc., is engaged in the manufacture of typography which is used in the fabrication of printing plates. Petitioner's customers were mostly advertising agencies; however, petitioner also created typography for magazine and newspaper publishers, printers and other companies in the graphic arts industry. The typography is transferred to the customer either as a negative image on film (typographic film) or as a positive image on photographic paper (positive photograph).

6. In the manufacture of typography, the petitioner takes film and, through a photographic and chemical process, develops thereon an image pursuant to the customer's requirements. The image may be words (type) or pictures which the customer wishes to convey. In the graphic arts industry, typography

is considered an art form in view of the hundreds of different styles of faces or type which the typographers are required to produce.

After the typographic film has been developed, the petitioner creates a proof which is the first view of the image on white photographic paper. Proofs are used for author's alterations which are changes or corrections the customer desires to make.

After the modifications have been made and the customer has given final approval to the typography, the petitioner's work is completed. The petitioner forwards either the typographic film or the positive photograph (which is created from the typographic film) on to the printer for fabrication of the printing plates.

7. In those cases where the positive photograph is sent to the printer, the petitioner retains the typographic film as custodian for its customer. All title and rights to the film are vested in the customer from the moment the first image is generated thereon. The petitioner can in no way utilize the film for its own purpose. The petitioner cannot use it to proclaim the quality of its work to attract new customers, cannot change it and cannot destroy it. If the petitioner was to cease operations, the typographic film in its possession would be returned to its customers.

8. Petitioner's invoice to its customers included charges for typography, author's alterations and proofs.

9. On audit, the Audit Division determined that the petitioner purchased film in the amount of \$120,845.00. The Division considered the film to be equipment and subject to the 4 percent New York City sales and use tax, but exempt from the New York State sales and use tax. The tax due thereon amounted

to \$4,833.80. The audit method and computation of additional taxes were not contested by the petitioner.

10. The petitioner contended that the film was purchased for resale to its customers. The petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1101(b) of the Tax Law defines retail sales, in part, as follows:

"(4) Retail sales. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property..." (emphasis added).

B. That the film which was merely developed and transferred to petitioner's customers as typographic film was purchased "for resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law and is therefore not subject to the sales and use tax.

C. That the film, which was developed and used by petitioner in the creation of a positive photograph prior to any transfer of title or possession of said photograph, was not purchased "for resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law. Since the film was used by petitioner in its production process, it is subject to the sales and use tax (see Matter of Saphar & Associates, Inc., State Tax Commission, February 11, 1983).

D. That the penalty is cancelled and interest is reduced to the minimum statutory rate.

E. That the petition of Empire Typographers, Inc. is granted to the extent indicated in Conclusions of Law "B" and "D" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand

for Payment of Sales and Use Taxes Due issued January 10, 1978; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984


Roderick W. Clem
PRESIDENT

Francis R. Koening
COMMISSIONER

Mark J. Smith
COMMISSIONER