

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
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of	:	
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B & B ENTERPRISES, 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 September 1, 1975	:	
through February 28, 1979.	:	

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Petitioner, B & B Enterprises, Inc., c/o Joseph Barbieri, President, 10 East 40th Street, New York, New York 10016, 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 September 1, 1975 through February 28, 1979 (File No. 28439).

A formal hearing was commenced before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 12, 1983 at 1:15 P.M. and continued to completion before Frank W. Barrie, Hearing Officer, at the same location on February 8, 1984 at 1:15 P.M., with all briefs to be filed by April 27, 1984. Petitioner appeared at all times by Lutz & Carr, C.P.A.'s (Douglas Burack, C.P.A.) and by Breed, Abbott & Morgan, Esqs. (C. MacNeil Mitchell, Esq., of counsel). The Audit Division appeared at all times by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner's "cost of sales" incurred in publishing "Stagebill" theater programs for Lincoln Center and Carnegie Hall were purchases for resale excluded from sales and use taxes.

II. Whether the determination of a conferee, favorable to petitioner, may be negated by the conferee's supervisor three months after petitioner's submission of a Withdrawal of Petition.

III. Whether petitioner's publication, "Stagebill", is a periodical.<sup>1</sup>

FINDINGS OF FACT

1. On December 13, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, B & B Enterprises, Inc., alleging sales and use taxes due of \$187,407.50 plus interest for the period September 1, 1975 through February 28, 1979. Such determination was based upon an audit of petitioner's records.

2. According to the Audit Report, "It was determined that a use tax is due on all production elements, such as printing, paper, typography, etc." The Audit Division audited petitioner's records and calculated that it incurred, for the period at issue, a total "cost of sales" (including expenses for engraving, printing, paper, typography/typesetting, color separations, and artwork) of \$6,372,808.00. It then allocated 36.6 percent<sup>2</sup> of this amount (or \$2,332,448.00) to New York and imposed use tax of \$186,595.84 on such allocated amount. The parties subsequently stipulated that the cost of purchases of production elements used by petitioner in the publication of "Stagebill" for (i) The Carnegie Hall Corporation (hereinafter, "Carnegie Hall") and (ii)

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<sup>1</sup> According to the Audit Division's representative and the petitioner, one of the issues herein is whether petitioner's "Stagebill" is a periodical exempt from sales and use tax under Tax Law §1115(a)(5). However, the Audit Division is not seeking to impose sales and use tax on the sales of petitioner's publications, and this section of the Tax Law is irrelevant to the resolution of this matter. However, if "Stagebill" is a periodical, the use of paper in its publication is exempt from use tax under Tax Law §1118(5).

<sup>2</sup> The Audit Division calculated this allocation percentage by comparing petitioner's New York source advertising revenues to its total advertising revenues.

Lincoln Center For the Performing Arts, Inc. (hereinafter, "Lincoln Center") and its constituent groups, The Philharmonic-Symphony Society of New York, Inc. (hereinafter, "New York Philharmonic") and The Metropolitan Opera Association, Inc. (hereinafter, "Metropolitan Opera") was \$1,811,152.00 based on an analysis of actual costs and that sales and use taxes on such purchases would be \$144,892.16, a reduction from the \$186,595.84 alleged in the Audit Report.

In addition, the Audit Division also determined that sales and use taxes of \$245.26 and \$566.40 were due on petitioner's purchases of (i) furniture and fixtures and (ii) sundry taxable expenses, respectively, which are not at issue herein.

3. Petitioner provides theater program magazines to various performing arts facilities. In New York, petitioner has arrangements, pursuant to detailed written agreements, to provide theater program magazines to (i) Carnegie Hall and (ii) Lincoln Center and its constituent groups, the New York Philharmonic and the Metropolitan Opera.

4. Petitioner publishes all of its theater program magazines under the name "Stagebill." The magazines consist of the following: (1) an editorial wrap, which changes monthly, containing articles generally related to culture and the arts, (2) program notes pertaining to the particular performance, (3) advertising and (4) a cover.

5. The "Stagebills" provided by petitioner to Carnegie Hall and Lincoln Center and its constituents are custom-tailored to suit the needs of the respective institutions which use the magazines as their primary means of communicating with their audiences and as a means of soliciting donations from members of the public. As a result, the form and content of the editorial wrap is controlled by (i) Carnegie Hall and (ii) Lincoln Center and its constituents,

the Metropolitan Opera and the New York Philharmonic, with respect to the particular "Stagebills" published by petitioner for them. In the case of Carnegie Hall, the editorial wrap must consist of at least eight pages monthly and is subject to Carnegie Hall's prior approval. In addition, the following material furnished by Carnegie Hall must be included: calendar of coming events, information to patrons, and a list of board of trustees, officers and staff. In the case of Lincoln Center and its constituents, the Metropolitan Opera and the New York Philharmonic, the editorial wrap must consist of an article relating to (1) the Metropolitan Opera or opera in general, (2) the New York Philharmonic or symphony music in general, (3) activities or productions being undertaken at Lincoln Center, and (4) a Lincoln Center notes column. In addition, the editorial wrap must contain a directory of services and facilities at Lincoln Center. Editorial material concerning the Metropolitan Opera and the New York Philharmonic must be approved by such organizations.

Carnegie Hall and Lincoln Center (and its constituent groups, the New York Philharmonic and the Metropolitan Opera) also have the authority to limit the amount of advertising in their respective Stagebills and to prevent petitioner from including any advertising which they believe is distasteful or contrary to the image they wish to project.

6. All of the theater program magazines which petitioner publishes on behalf of Carnegie Hall and Lincoln Center and its constituents contain a "Stagebill" masthead. The "Stagebills" published for Lincoln Center and its constituents note that "The Lincoln Center 'Stagebill' is published by B & B Enterprises, Inc." The "Stagebills" published for Carnegie Hall note that "The Carnegie Hall 'Stagebill' is published by B & B Enterprises, Inc."

7. Although the editorial wrap changes on a monthly basis, the program notes vary with each performance (unless the performance is a repeat performance of the same work). Pursuant to petitioner's agreement with Lincoln Center, the Metropolitan Opera and the New York Philharmonic, it must deliver "Stagebills", with appropriate program notes, for approximately 1,200 performances. Pursuant to its agreement with Carnegie Hall, petitioner must deliver "Stagebills" for all events in the main hall of Carnegie Hall.

8. Petitioner must deliver the "Stagebills" to Lincoln Center, the Metropolitan Opera and the New York Philharmonic at least six hours in advance of performance. "Stagebills" must be delivered to Carnegie Hall by 10:00 A.M. for a matinee performance and by 3:00 P.M. for an evening performance. Sufficient programs must be provided to enable the performing arts facilities to furnish a copy to each member of the audience. After taking possession of the programs, Carnegie Hall and Lincoln Center (and its constituents) are responsible for distributing them to their audiences. They bear the risk of loss for the programs upon their receipt. They also dispose of any undistributed programs. None are returned to petitioner.

9. In exchange for the "Stagebills", Carnegie Hall and Lincoln Center permit petitioner to solicit, sell and retain all revenue from advertising appearing in the programs. Because the audiences at Carnegie Hall and Lincoln Center represent a very "up-scale" market, this is a very valuable right. (In soliciting and selling ads, petitioner's salespersons frequently refer to themselves as representatives of the Lincoln Center house program magazine.) With respect to Lincoln Center, petitioner was required to pay \$3,000.00 per year to Lincoln Center as a royalty, in addition to furnishing the programs which was defined as "an additional royalty" in the written agreement between

petitioner and Lincoln Center.<sup>3</sup> With respect to Carnegie Hall, if petitioner incurred a net loss (i.e., if its expenses in providing the Stagebill programs to Carnegie Hall exceeded its advertising revenue from such programs) during the first year that it provided "Stagebills" to Carnegie Hall, Carnegie Hall was required to reimburse petitioner for the net loss but not exceeding \$22,000.00. In subsequent years, Carnegie Hall was not obligated to reimburse petitioner for any portion of a net loss. However, petitioner was required to pay Carnegie Hall an amount equal to twenty-five percent of any net profits for the first contract year and in subsequent years.

10. The "Stagebills" are offered to every person who attends a performance at Carnegie Hall or Lincoln Center. The programs are also available to viewers of televised "Live from Lincoln Center" broadcasts by mail. There have been approximately six "Live from Lincoln Center" broadcasts per year since the mid-1970's, and approximately 55,000 to 75,000 viewers request Stagebill programs for each broadcast.

11. On May 7, 1980, a Tax Appeals Bureau conferee proposed a resolution in favor of petitioner, cancelling the assessment alleged herein. The conferee's resolution was based on his determination that "Stagebill" is a periodical. The petitioner immediately executed and delivered a "Withdrawal of Petition and Discontinuance of Case." Approximately three months later, petitioner received a letter from the Tax Appeals Bureau Supervisor of Tax Conferences negating the petitioner's "Withdrawal of Petition and Discontinuance of Case" because "'Stagebill' does not meet the criteria for a periodical as it is not available to the general public."

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<sup>3</sup> In addition, the agreement describes the arrangement between Lincoln Center and petitioner as the granting of a "license" by Lincoln Center to petitioner to publish the house programs for Lincoln Center.

12. Included in petitioner's brief dated March 16, 1984 are proposed findings of fact, numbered one through thirty-two. All are incorporated into and made a part of this decision except for proposed findings of fact sixteen, the part of twenty which states that petitioner transferred title to the issues of "Stagebill" to Carnegie Hall and Lincoln Center, and twenty-seven. These proposed findings are more in the nature of conclusions of law. The State Administrative Procedure Act §307 requires a ruling upon each proposed finding of fact only. Therefore, no ruling is made concerning such proposed findings of fact which are more in the nature of conclusions of law, and no ruling is made concerning petitioner's proposed conclusions of law (although they were carefully considered in rendering the Conclusions of Law, infra).

#### CONCLUSIONS OF LAW

A. That the Audit Division may not impose sales and use taxes on petitioner's purchases of printing, paper, typography, etc. if such purchases were for purposes of resale. See 20 NYCRR 526.6(c) (effective September 1, 1976). Therefore, if petitioner "sold" "Stagebills" to Carnegie Hall and Lincoln Center and its constituents, the Metropolitan Opera and the New York York Philharmonic, it would be entitled to the resale exclusion from sales and use taxes.

B. That Tax Law §1101(b)(5) defines "sale, selling or purchase" as follows:

"Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

C. That petitioner transferred possession of the "Stagebills" to the performing arts facilities. Carnegie Hall and Lincoln Center and its constituents,

the Metropolitan Opera and New York Philharmonic, were not merely distribution mechanisms for a magazine on the performing arts published by petitioner. Rather, the "Stagebills" were custom-tailored theater programs which suited the expressed needs of the particular facility which bore the risk of loss or damage to the programs upon delivery. In addition, any "Stagebills", not distributed to the audiences, belonged to the respective performing arts facility.

D. That "consideration" is defined in the tax regulations with respect to sales and use taxes as follows:

"Consideration includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. Monetary consideration includes assumption of liabilities, fees, rentals, royalties, or any other charges that a purchaser, lessee or licensee is required to pay." 20 NYCRR 526.7(b).

E. That petitioner transferred possession of the "Stagebills" to Carnegie Hall and Lincoln Center and its constituents, the Metropolitan Opera and the New York Philharmonic, in exchange for the right to solicit, sell and retain all revenue from advertising appearing in the "Stagebills." This right, resulting from the transaction which was described as a "license", as noted in footnote "3" of Finding of Fact "9", supra, constituted "consideration" under the regulatory definition noted supra. Therefore, the transfers of the "Stagebills" to the performing arts facilities were sales. Cf. Matter of National Fuel Gas Supply Corporation and National Fuel Gas Distribution Corporation As Successors to Iroquois Gas Corporation and Matter of National Fuel Gas Distribution Corporation, State Tax Commission, April 6, 1984, where it was determined that the deliveries of gas, free of cost, by fuel gas retailers were "sales" under Tax Law § 1101(b)(5). It was noted in such matter that "The consideration for the transfer was the granting by the lessors to



petitioners of the right to go on the lessors' land and drill for gas and the granting of the exclusive rights to any gas found thereon."

F. That the issues numbered two and three, supra, are rendered moot.

G. That the petition of B & B Enterprises, Inc. is granted.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER