

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FILM FACTORY, 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 March 1, 1976	:	
through May 31, 1979.	:	

Petitioner, Film Factory, Inc., c/o Churchill Films, 151 East 50th Street, New York, New York 10022, 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, 1976 through May 31, 1979 (File No. 30361).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 10, 1985 at 2:45 P.M., with all briefs to be submitted by November 11, 1985. Petitioner appeared by its Vice-President, Robert Troy. The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether certain personal property was in fact delivered to a point outside of New York State so as to be exempt from sales and use tax.

FINDINGS OF FACT

1. On March 20, 1980, the Audit Division issued to petitioner, Film Factory, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1976 through May 31, 1978 in the amount of \$57,512.17, plus penalty and interest. A verified consent, previously

executed by petitioner's president, allowed assessment for the above-noted period to be made on or before December 20, 1980.

2. The above-noted assessment, issued as the result of a field audit, consists of tax due in three different areas of examination as follows:

- a) \$1,178.72 due on fixtures and equipment;
- b) \$3,402.24 due on recurring purchases¹;
- c) \$52,931.21 due on unsubstantiated exempt sales.

Petitioner does not contest the tax assessed with respect to items "a" and "b" (as reduced) above, nor is the audit methodology employed at issue. Petitioner does, however, contest the tax assessed per item "c" above, on the claim that the sales giving rise to such assessed tax were exempt out-of-state sales.

3. During the period in issue, petitioner was located in New York City and was engaged in the business of producing films for television commercials. Petitioner's customers were generally advertising agencies also located in New York City.

4. Petitioner's work of producing a given television commercial was generally performed under contract with an advertising agency after petitioner's bid price to perform the work had been accepted. In general, petitioner received payment for its work under its contracts in three intervals, as follows:

- a) upon signing the contract;
- b) upon completion of filming and delivery of all materials (raw film footage, etc.) to an editing service;

1 At the hearing, the Audit Division conceded to a reduction of the tax assessed on recurring purchases (from \$3,402.24 to \$1,701.12), based on a 4 percent rather than 8 percent tax rate.

c) upon delivery of the printing element (optical negative) to the advertising agency for its use in printing and distributing the television commercial.

5. Submitted in evidence by petitioner were contracts and invoices pertaining to some, but not all, of the sales which were disallowed by the Audit Division. A few of these contracts specify that delivery of the printing element is to be made in New York, with the balance of the material used in making the commercial to be shipped out of state (generally to New Jersey). Other contracts call for delivery of items other than the printing element to be made at such place as is designated by the advertising agency.

6. In most of the contracts, the advertising agency specifies the editing service to be used (i.e. to whom petitioner delivers the raw film footage and from whom the advertising agency receives the final printing element). Although the use of a particular editing service is generally dictated to petitioner by the advertising agency, petitioner receives funds from the advertising agency to pay such service and acts as a conduit (without markup or profit) in making such payment.

7. Petitioner did not submit and apparently did not maintain shipping logs or files during the period in question regarding deliveries of raw footage to the editing services or, subsequently, delivery of items to the out-of-state locations or delivery of the printing element to the advertising agencies. No actual delivery receipts or invoices evidencing out-of-state (or other) delivery were submitted in evidence.

8. Petitioner claims that the disallowed sales were properly claimed as exempt sales based upon out-of-state delivery of items relating thereto. Petitioner asserts that such out-of-state delivery of all items but the printing

element is standard practice in the industry, so that sales tax is due only on the printing element. Petitioner notes that its final payment is not received until the advertising agency receives the printing element and proof of delivery of the other elements as described. Finally, petitioner notes that such delivery is carried out by the editing service and is beyond petitioner's control.

9. Petitioner timely filed its returns during the period in question and has never before been audited. Petitioner has requested abatement of the penalty imposed and reduction of interest to simple interest, asserting there was a good faith belief that materials essentially beyond petitioner's control were properly delivered.

CONCLUSIONS OF LAW

A. That the evidence submitted does not verify petitioner's assertion with regard to out-of-state deliveries. Petitioner's representative could not testify as to specific knowledge of actual out-of-state deliveries, nor was any objective proof of out-of-state deliveries offered in evidence. Although some of the contracts do call for delivery in New Jersey, there has been no specific evidence that delivery, even in these instances, was actually made to any out-of-state location(s). In sum, petitioner has failed to sustain the burden of proving out-of-state delivery, as opposed to delivery at any other given location, and thus the Audit Division's disallowance of entitlement to exemption from tax was proper (see Matter of Muyskens Madison, Inc. and Bill Muyskens, Individually and as an Officer, State Tax Comm., March 12, 1981).

B. That given the nature of petitioner's situation and noting that all returns were timely filed and that petitioner has never before been audited it

is appropriate that the penalty imposed is abated and interest is reduced to the minimum statutory rate [20 NYCRR 536.5(6)].

C. That the petition of Film Factory, Inc. is granted to the extent indicated in Footnote "1" and Conclusion of Law "B", but is otherwise denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1980, as reduced in accordance herewith, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986

Raduich W. Allen
PRESIDENT

Francis R. Kaemig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER