

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
MARTIN LITHOGRAPHERS, INC.
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 December 1, 1974
through November 30, 1980.

DECISION

In the Matter of the Petition
of
COSMOS COMMUNICATIONS, INC.
(COSMOS PRESS/WEISS BROS.)
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 June 1, 1975
through May 31, 1980.

Petitioner, Martin Lithographers, Inc., 10 Skyline Drive, Plainview, New York 11803, 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 December 1, 1974 through November 30, 1980 (File No. 33942).

Petitioner, Cosmos Communications, Inc. (Cosmos Press/Weiss Bros.), 141 East 25th Street, New York, New York 10010, 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 June 1, 1975 through May 31, 1980 (File No. 42155).

On July 26, 1985, petitioners, by their representative, Stephen L. Solomon, Esq., filed a waiver of hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record.

For purposes of this proceeding, the petitions of ten (10) similarly situated petitioners, whose names are set forth in Appendix A to this decision, have been consolidated with the petitions of the above-named petitioners, and by agreement of the parties' representatives, this decision will be binding upon all petitioners.

ISSUES

I. Whether artwork, illustrations, layouts and other similar equipment used in the printing industry should be given the same sales tax treatment as offset plates, lithographic positives and negatives and other similar printing equipment when all of the aforementioned equipment is considered to be machinery and equipment for purposes of the exemption provided for in section 1115(a)(12) of the Tax Law.

II. Whether petitioners are entitled to a waiver or limitation of interest charged for the late payment of New York City sales tax on artwork incorporated into finished goods for sale where a credit for such tax is allowed against New York City general corporation tax and unincorporated business tax.

FINDINGS OF FACT

1. On July 13, 1981, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Martin Lithographers, Inc. ("Martin"), in the amount of \$20,796.22, plus interest of \$7,242.69, for a total due of \$28,038.91 for the period December 1, 1974 through May 31, 1978. On the same date, a second notice was issued against Martin in the amount of \$6,205.48, plus interest of \$1,454.44, for a total due of \$7,659.92 for the period June 1, 1978 through November 30, 1980.

2. On November 19, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Cosmos Communications, Inc. (Cosmos Press/Weiss Bros.) ("Cosmos"), in the amount of \$33,008.53, plus interest of \$17,126.39, for a total due of \$50,134.92 for the period June 1, 1975 through November 30, 1978. On the same date, a second notice was issued against Cosmos in the amount of \$18,501.01, plus interest of \$6,007.82, for a total due of \$24,508.83 for the period December 1, 1978 through May 31, 1980.

3. Both Martin and Cosmos had executed consents extending the period of limitation for assessment of sales and use taxes for the periods in issue to a date on or after the dates when the respective notices of determination were issued.

4. Petitioners are wholesale printers who use various types of printing machinery and equipment in the production process. The only portion of the audit to which petitioners have objected is the tax due on the purchase of such machinery and equipment and the resulting interest charged.

5. In May, 1980, the State Tax Commission instituted a policy which accorded equal treatment to all items used 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, film (exposed and unexposed).

(c) Composition, typography and progressive proofs.

(d) Artwork, illustrations, layouts, drawings, paintings, mechanicals, overlays, designs, photographs, pasteups.

Such machinery and equipment, when used in the production of property for sale, is not subject to New York State sales tax but is 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.

6. 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.

7. The items in category (d), although deemed to be machinery and equipment in May, 1980, were not included in the assessment limitation period established by the policy adopted in January, 1979. Petitioners maintain that the failure to include category (d) items in the period of assessment limitation results in an inconsistency of treatment which could cause possible sales tax liability for category (d) item purchases dating to 1965. Petitioners suggest that, to provide equal treatment to those printers who are presently being audited for earlier years, their liabilities for sales tax due on category (d) item purchases be equated to the same periods for which the tax was imposed under the policy with respect to items in categories (a) and (b). Petitioners suggest that

liability for category (d) purchases be limited to 13 percent. This figure was determined by dividing the number of months of liability without a credit available for category (a) and (b) items (19) by the total number of months between the date of the imposition of the sales tax and June 30, 1977 (143). Admittedly, however, not all printers under audit have liabilities for the same number of periods prior to and after December 1, 1975, the assessment limitation date for category (a) and (b) items.

8. Petitioners were assessed interest on the New York City sales tax due on purchases of category (d) items. Petitioners maintain that, since they were not informed until May, 1980 that the purchase of items in category (d) would qualify as machinery and equipment and as such be eligible for the City general business tax credit, they were given no opportunity to avoid the interest imposed on the assessments. No corresponding credit is allowed against City business taxes to offset the interest charges. Petitioners argue that it is inequitable to assess an interest charge on a tax for which there is intended to be no net tax liability.

CONCLUSIONS OF LAW

A. That the policy adopted by the State Tax Commission on January 18, 1979 limiting the assessment periods of printing industry audits involving the four percent New York City sales and use tax as it applies to category (a) and (b) items used in production was addressed only to those categories but the policy enunciated was not, necessarily, intended to be limited exclusively to the items in those categories. The policy was intended to provide clarification and tax relief to the printing industry with respect to items used in production. Further clarification was provided by the Commission in May, 1980 when it categorically set forth items considered to be machinery and equipment used in

the printing industry. Included in that list were the items in category (d). These items were thus given the same status as those items in categories (a) and (b). Therefore, to prevent inconsistency of treatment, the following items will be accorded the same limitation of assessment periods as those in categories (a) and (b): artwork, illustrations, layouts, drawings, paintings, mechanicals, overlays, designs, photographs and pasteups. Where it is determined that the four percent New York City sales and use tax is due on the aforesaid items, the assessment of tax on those items will be limited to the periods beginning on or after December 1, 1975. Since each taxpayer's liability encompasses different periods, petitioners' recommendation of a flat 13 percent limit on liability would not accurately and fairly determine liability among individual taxpayers and, therefore, each taxpayer's liability must be determined on an individual basis. That Conclusion of Law "A" in Matter of B & B Enterprises, Inc., State Tax Commission, February 6, 1985, is overruled to the extent that it may be inconsistent with this decision.

B. That section 1145(a)(1) of the Tax Law provides for the imposition of penalties and interest for failure to file returns or pay the tax on time. If the Tax Commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it may remit penalties and interest in excess of the minimum statutory rate of one percent per month. There is no provision for waiver of the minimum interest for any reason. The fact that a credit is allowed against New York City corporation tax for certain sales taxes paid does not render purchases of certain items exempt from tax as petitioners argue. If such a result were desired, it would be up to the appropriate legislative body to create such an exemption. Without such legislation, the tax must be paid in a timely fashion with interest imposed for failure to do

so. Therefore, the interest imposed on petitioner's New York City sales tax assessment must be sustained. See Matter of Joseph E. Seagram & Sons, Inc., State Tax Commission, July 16, 1985. Petitioners' argument that they were given no opportunity to avoid the interest imposed is without merit in that had petitioners properly paid the tax in the first instance, there would have been no interest charged.

C. That the petitions of Martin Lithographers, Inc. and Cosmos Communications, Inc. (Cosmos Press/Weiss Bros.) are granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due issued July 13, 1981 and November 19, 1982 accordingly; and that, except as so granted, the petitions are in all other respects denied.

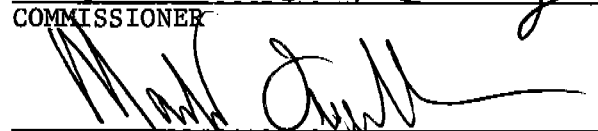
DATED: Albany, New York

STATE TAX COMMISSION

DEC 02 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

APPENDIX A

PETITIONERS

| <u>NAME</u> | <u>FILE NO.</u> |
|-------------------------------------|-----------------|
| Candid Litho, Inc. | 36369 |
| Danperan Litho, Inc. | 38560 |
| Peter F. Mallon, Inc. | 35966 |
| Pilgrim Press Corp. | 32690 |
| TMQ, Limited | 38562 |
| TMQ Lithographers, Inc. | 37646 |
| Typographic Images, Inc. | 35285 |
| Albert H. Vela C  ., Inc. | 34466 |
| Kenneth D. MacDonald | 34467 |
| Officer of Albert H. Vela Co., Inc. | |
| Lloyd Vela | 34468 |
| Officer of Albert H. Vela Co., Inc. | |