

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
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N.B.E. PRODUCTIONS, LTD.	:	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 December 1, 1976	:	
through February 29, 1980.	:	

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Petitioner, N.B.E. Productions, Ltd., 202 East 35th 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 December 1, 1976 through February 29, 1980 (File No. 35125).

On December 12, 1983, petitioner, by its representative, Robert Stillman, C.P.A., requested submission of this matter to the State Tax Commission thereby waiving an oral hearing. Petitioner was given until February 14, 1984 to submit further written argument and counsel for the Audit Division was given until May 22, 1984 to reply. After due consideration of the entire file and the arguments submitted, the State Tax Commission renders the following decision.

ISSUE

Whether the purchases by petitioner of the services of a hairstylist and make up artist are taxable as the services of "beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services..." [Tax Law §1212-A(b)(1); N.Y.C. Admin. Code §A46-2.0(h)].

FINDINGS OF FACT

1. On June 10, 1981, subsequent to the conduct of a field audit, the Audit Division issued to petitioner, N.B.E. Productions, Ltd., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1976 through February 29, 1980, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX DUE</u>	<u>SIMPLE INTEREST</u>	
02/28/77	\$ 25,665.48	\$ 9,214.93	
05/31/77	14,187.86	4,792.51	
08/31/77	18,556.42	5,873.84	
11/30/77	22,376.69	6,607.61	
02/28/78	18,720.66	5,130.20	
05/31/78	30,101.42	7,609.33	
08/31/78	15,864.21	3,673.19	
11/30/78	19,729.17	4,148.84	
02/28/79	13,405.61	2,534.19	
05/31/79	24,507.37	4,112.09	
08/31/79	20,414.30	2,991.51	
11/30/79	26,050.67	3,263.88	
02/29/80	17,736.90	1,845.34	
	<u>\$267,316.76</u>	<u>\$61,797.46</u>	\$329,114.22

2. Petitioner, N.B.E. Products, Ltd., by signature of its president, Nat B. Eisenberg, executed consents extending the period of limitations for assessment of sales and use taxes for the period December 1, 1976 through November 30, 1979 to June 20, 1981.

3. During the years in issue, N.B.E. Productions, Ltd. was retained by advertising agencies to produce film and tape television commercials. Taxable sales reported on petitioner's sales and use tax returns resulted from sales of raw film stock and film duplications.

4. On audit, the examiner for the Audit Division disallowed \$3,090,744.38 in sales which were claimed as non-taxable by the petitioner as they were not

substantiated by Resale Certificates, Exempt Use Certificates, or shipping receipts, and determined a sales tax deficiency of \$247,259.55.

The auditor reconciled the sales tax charged per sales invoices with the tax reported on the sales and use tax returns filed for the audit period and determined a sales tax deficiency of \$160.80.

The auditor examined petitioner's recorded fixed asset acquisitions for the audit period and determined a use tax deficiency of \$176.83 on those purchases for which no invoice was made available for examination.

Finally, after numerous futile attempts were made to conduct a detailed examination of the petitioner's production and other expense purchase invoices, the auditor determined a use tax deficiency of \$19,719.58 attributable to a test of the records for the month of November, 1979.

Total sales and use taxes due from petitioner as a result of the audit were \$267,316.76.

5. At a pre-hearing conference on April 28, 1982, petitioner presented documentation which resulted in the cancellation of that portion of the deficiency attributable to disallowed non-taxable sales, thus reducing the deficiency to a revised tax due of \$20,057.41.

6. A meeting was held between the petitioner and the Audit Division on December 12, 1983 in an attempt to further reduce the deficiency. As the result of said meeting, the parties agreed to a revised deficiency of \$8,199.20. The petitioner agreed to and paid \$4,499.77 of the deficiency. The balance (\$3,699.43) which is disputed by the petitioner represents tax due on purchases of the services of a hairstylist and make up artist.

7. In the course of production of a commercial, N.B.E. Productions, Ltd. uses a crew of sound, camera and other union personnel required to produce a

successful product. In addition, in order to obtain the proper tones of human skin for the television shot, a make up artist is needed to adjust the skin coloring of the actors and actresses so that a television viewing of the skin of the actors and actresses appears "natural". Occasionally, other individuals are required to style the hair of the actors or actresses in order to present a "natural" appearance before the television lights. These individuals are all part of a television commercial film crew. When a day's shooting is complete, the actors and actresses will wash their faces, remove the makeup, recomb their hair and leave the studio.

8. The purpose of the make up is to obtain a temporary cosmetic change for a television shot by altering the skin tones to the camera lighting. The use of a hairstylist is to aid in the technical aspects giving an individual a "natural" appearance. An individual would look gaunt and sickly if he were photographed under the hot television lights without the use of the services of a make up artist and hairstylist.

9. The petitioner contends that the intent of the tax imposed on beauty, barbering, hair restoring, manicuring and similar services was for an establishment performing barbering and other procedures in such a manner that an individual leaving a shop would look and feel better.

#### CONCLUSIONS OF LAW

A. That pursuant to section 1212-A(b)(1) of Article 29 of the Tax Law, any city in this State having a population of one million or more, acting through its local legislative body, is authorized and empowered to impose a tax at a rate not to exceed four percent on the following:

"(R)eceipts from every sale of the following services: beauty, barbering, hair restoring, manicuring, pedicuring, electrolysis, massage services and similar services, and every sale of services by weight control salons, health salons, gymnasiums, turkish and sauna

bath and similar establishments and every charge for the use of such facilities, whether or not any tangible personal property is transferred in conjunction therewith...".

B. That effective March 1, 1976, the City of New York imposed a tax on the above services at the rate of four percent pursuant to the authority contained in section 1212-A(b)(1) of the Tax Law [N.Y.C. Admin. Code §A46-2.0(h)].

C. That the services of a hairstylist and make up artist purchased by the petitioner constitute "beauty, barbering...and similar services" within the meaning and intent of section 1212-A(b)(1) of the Tax Law and are therefore subject to tax.

D. That the petition of N.B.E. Productions, Ltd. is denied.

DATED: Albany, New York

STATE TAX COMMISSION

**FEB 06 1985**

  
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PRESIDENT

  
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COMMISSIONER

  
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COMMISSIONER