

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JACK and BENEK GEIZHALS D/B/A	:	DECISION
EXPRESS PRINTING CO.	:	
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, 1975	:	
through May 31, 1980.	:	

Petitioners, Jack and Benek Geizhals d/b/a Express Printing Co., 237 Lafayette Street, New York, New York 10012, 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, 1975 through May 31, 1980 (File No. 35952).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 7, 1984 at 10:00 A.M. and was continued to conclusion at the same location on March 18, 1986 at 9:15 A.M., with all briefs to be submitted by July 30, 1986. Petitioner appeared by Lawrence Zucker, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

I. Whether plates and negatives purchased by petitioners were for resale to customers.

II. Whether the Audit Division properly determined petitioners' tax liability based on a one month analysis of sales and purchase invoices.

III. Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioners.

FINDINGS OF FACT

1. Petitioners, Jack and Benek Geizhals d/b/a Express Printing Co., were engaged in the printing and sale of advertising brochures and instruction booklets.

2. On October 2, 1981, as the result of an audit, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against Jack and Benek Geizhals d/b/a Express Printing Co. covering the periods March 1, 1975 through August 31, 1978 and September 1, 1978 through May 31, 1980 for taxes due of \$11,302.76 and \$7,162.33, respectively, plus accrued interest.

3. Benek Geizhals, as partner of Express Printing Co., executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1975 through May 31, 1980 to September 30, 1981. Counsel for the Audit Division conceded at the hearing that the notice dated October 2, 1981 with respect to the period March 1, 1975 through August 31, 1978 was issued beyond the period so extended by the consents and therefore, should be cancelled.

4. An audit of petitioners' books and records for the period March 1, 1975 through February 28, 1978 commenced in March 1978. The audit, however, was suspended approximately six months thereafter at the direction of the Department of Taxation and Finance until such time as new guidelines with respect to the application of the Sales and Use Tax Law to the printing industry were finalized. Before the audit was suspended, the Audit Division reviewed sales and purchase invoices for May 1977. The audit was resumed in June 1980. The auditor requested sales and purchase invoices for the entire audit period which was updated to include the period March 1, 1978 through May 31, 1980.

Petitioners did not make available the records requested by the Audit Division and as a result petitioners' liability was determined based on the prior analysis of May 1977. A review of the sales invoices for the month disclosed that sales of \$699.00 or 1.598 percent of reported nontaxable sales were not substantiated by an exemption certificate and thus were disallowed. This percentage was applied to nontaxable sales of \$3,369,761.00 for the audit period to arrive at additional taxable sales of \$53,848.00 and tax due thereon of \$4,307.84. The examination of purchase invoices revealed that petitioners failed to pay sales or use tax on purchases of plates and negatives amounting to \$6,181.00. In addition, no tax was paid on machinery parts of \$72.00. These purchases represented 15.081 percent and .176 percent, respectively, of total purchases of production elements for the month. These percentages were applied to purchases of \$2,459,456.00 to determine taxable purchases of \$329,377.00 for the audit period and additional tax due of \$13,175.08. Tax due on the acquisition of fixed assets totalled \$982.17. The purchases of plates, negatives and machinery parts were held subject only to the New York City local tax so as to conform with the new guidelines for the printing industry which listed such items as machinery and equipment exempt from statewide and local sales and use taxes (except in New York City). Petitioner took the position that the plates and negatives were sold to customers and thus exempt from tax as purchases for resale.

5. The amount of taxes due on the notice issued for the the period September 1, 1978 through May 31, 1980 of \$7,162.33 consists of the following areas of deficiency: plates - \$5,474.96; disallowed nontaxable sales - \$1,503.28; fixed assets - \$184.09.

6. Petitioner purchased artwork, paste-ups, stock, plates, binding and any other items or services required to produce the printed material. Petitioner owned limited printing equipment. Only thirty-five percent of the printing was performed in-house. In those instances where the printing was contracted to an outside printer, petitioner furnished the plates. The typical plate was smooth, flat and made of a thin metallic material. On the plate was embellished, encrusted or surmounted type, photos or engravings, as the situation required, to make the final finished plate. The final plate was then mounted on the press and used to produce the printed product.

7. Petitioners had their customers execute a written understanding which stated as follows:

"As has been our practice in the past, it is agreed that you (Express Printing Company) will purchase, on our behalf, whatever plates, negatives, and/or positives are necessary for the printing of jobs ordered by us. These plates, negatives and/or positives are, and shall remain, our property and shall be held by you solely for use on our behalf in connection with printing ordered by us. For our convenience, you are requested to retain these plates, negatives, and/or positives at your premises until such time as we direct delivery otherwise."

Petitioners' sales invoices stated "included in this bill type, plates and negatives will be stored by us for one year without any liability".

8. Petitioners' total price to the customer either included a charge for plates or such charge was separately stated on the invoice. There was no charge to the customer for plates on reorders. Petitioner collected sales tax where applicable from the customer on the total amount of the invoice.

9. Petitioners offered no evidence with respect to the unsubstantiated nontaxable sales disallowed by the Audit Division or the tax found due on fixed assets.

10. Petitioners maintained complete and adequate books and records for the audit period. Petitioners did not agree to the use of a test period for determining any tax liability for the entire period under audit.

CONCLUSIONS OF LAW

A. That the plates and negatives were used by petitioners in their printing process prior to any transfer of title or possession thereto and that such use precluded petitioners from purchasing plates for resale as such or as a physical component part of tangible personal property in accordance with section 1101(b)(4) of the Tax Law. The primary purpose of the plates was not for reselling them to customers but rather for petitioners' use in producing the final printed product and resale thereof was purely incidental (Matter of Laux Advertising, Inc. v. State Tax Commission, 67 AD2d 1066; Matter of Cut-Outs, Inc. v. State Tax Commission, 85 AD2d 838). Moreover, the plates were purchased by petitioners on their own behalf and not as agents for customers.

B. That plates and negatives used to produce printed material for sale constitute equipment exempt from the imposition of New York State sales and use tax under section 1115(a)(12) of the Tax Law. Said plates however, are subject to the New York City local tax rate. Petitioners were also required to collect the tax imposed under section 1105(a) of the Tax Law on the total amount of the invoice, including any separately stated charge for plates.

C. That since petitioners did not provide complete books and records to the Audit Division for examination, the Audit Division's use of a one month test of sales and purchases as a basis for estimating petitioners' liability for the entire audit period was proper pursuant to section 1138(a) of the Tax

Law (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD2d 858).


D. That section 1132(c) of the Tax Law specifically provides that "it shall be presumed that all receipts for property or services... are subject to tax until the contrary is established, and the burden of proving that any receipt... is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe..., or (2) the purchaser prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail." Petitioners did not have proper exemption certificates from customers for the sales disallowed by the Audit Division. Accordingly, petitioner was required to collect tax on said transactions pursuant to section 1132(c) of the Tax Law.

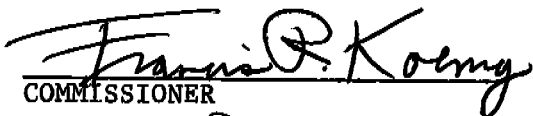
E. That the petition of Jack and Benek Geizhals d/b/a Express Printing Co., is granted to the extent that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 2, 1981 for the period March 1, 1975 through August 31, 1978 is cancelled; that in all other respects, the petition is denied and the notice issued for the period September 1, 1978 through May 31, 1980 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986


PRESIDENT


COMMISSIONER


COMMISSIONER