

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
LEN PATLEN STORE DESIGN AND CONSTRUCTION
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, 1977
through February 29, 1980.

DECISION

Petitioner, Len Patlen Store Design and Construction, 45 Manning Boulevard, Albany, New York 12203, 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, 1977 through February 29, 1980 (File No. 36232).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on June 27, 1984 at 9:00 A.M., with all briefs to be submitted by October 1, 1984. Petitioner appeared by Mark L. Koblenz, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner was required to collect sales tax on items of movable fixtures sold in conjunction with capital improvements to real property.

II. Whether the Audit Division is estopped from assessing sales tax due against petitioner.

FINDINGS OF FACT

1. Petitioner, Len Patlen Store Design and Construction, is in the business of designing retail store and business interiors, including the implementation and construction of the design scheme. Typically, petitioner

creates and engineers a design concept unique to its client. Thereafter, petitioner supervises the implementation of the design concept, procuring supplies and materials, performing construction work, and employing subcontractors. Periodically, petitioner purchases movable fixtures in connection with design concepts. Some of the fixtures were fastened to the framework on the walls prior to the installation of the wallboard and were not movable. The removal of these fixtures would cause material damage to the walls. The petitioner has offered no proof as to which items of tangible personal property were installed in the specific manner described by the petitioner or the dollar value related to those specific items.

2. On August 31, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner assessing a tax due of \$6,605.75 plus interest for the period December 1, 1978 through February 29, 1980. The Audit Division subsequently reissued this notice on September 18, 1981 and petitioner timely filed a protest requesting a hearing.

3. On audit, the auditor reviewed worksheets which petitioner prepared for the purpose of determining the cost of each contract entered into during the audit period. Resort to this method of audit was due to the failure on the part of petitioner to maintain a formal set of books. Based on review of the worksheets and an on-site examination of some projects of petitioner, the auditor determined that the movable fixtures procured by petitioner and furnished as a part of its design concepts were not part of a capital improvement to the real property. The auditor computed a tax on the movable fixtures consisting of such items as shelving, desks, showcases, mannequins, display stools, raised platforms, display stands and cash counters, in the amount of \$6,605.75.

4. Petitioner's principal officer, Philip L. Patlen, testified that when it became apparent that he was going to commence activities in the fields of design and construction, a meeting was arranged with representatives of the Tax Department. At that time petitioner was allegedly informed that no tax was to be collected from clients as the overall work performed for them resulted in a capital improvement, but that petitioner was to pay sales tax on the materials purchased for use in the conduct of its business. At the hearing, petitioner introduced into evidence several invoices showing tax charged by its suppliers. The purpose of introducing said invoices was to establish a record of petitioner's compliance in respect to instructions furnished it. Review of the invoices indicates they represent purchases of materials used primarily in construction, not movable fixtures of the type in question.

5. Petitioner contends that the fixtures were purchased in its capacity as an agent for the client. However, petitioner has offered no proof as to the existence of a principal-agent relationship. The invoices introduced into evidence by the petitioner did not clearly disclose to the supplier the name of the client for whom the petitioner was allegedly acting as an agent. In the instances where the petitioner arranged for the purchase of the fixtures, only the name of the petitioner appeared on the invoice of the supplier as the purchaser of the fixtures.

6. Petitioner made no profit on the transactions since it was reimbursed for just the cost of the fixtures. In addition, petitioner completed some contracts where the movable fixtures were furnished by the client who had acquired them himself from the manufacturer or supply house.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides that:

"(f)or the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five...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."

B. That petitioner has failed to show that the receipts received for movable fixtures were not receipts from the retail sale of tangible personal property which are subject to sales tax under subdivision (a) of section eleven hundred five.

C. That the doctrine of estoppel sought to be enforced by the petitioner is not applicable. Exceptional facts did not exist as would require its application in order to avoid manifest injustices. Matter of Sheppard-Pollack, Inc. v. Tully, 64 A.D.2d 296, 298 (1978). Public policy favors full and uninhibited enforcement of the Tax Law, and the general rule that estoppel cannot be employed against the State or governmental subdivision is particularly applicable with respect to the Tax Commission. Matter of Turner Constr. Co. v. State Tax Comm., 57 A.D.2d 201, 203 (1977).

D. That the petition of Len Patlen Store Design and Construction is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 18, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985

Robert A. Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Jurek
COMMISSIONER