

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

D. L. TERWILLIGER CO., 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 December 1, 1974
through May 31, 1980. :

Petitioner, D. L. Terwilliger Co., Inc., 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 December 1, 1974 through May 31, 1980 (File No. 36528).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 4, 1986 at 9:15 A.M., with all briefs to be filed by April 21, 1986. Petitioner appeared by Raymond Sharenow, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the use of a "test period" audit to determine petitioner's sales and use tax liability was justified.

II. Whether the petitioner's purchases of negatives and plates are exempt from sales and use tax as purchases for resale.

III. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated October 20, 1981 was timely issued or mailed.

FINDINGS OF FACT

1. On October 20, 1981, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for taxes due of \$19,757.82, plus interest of \$7,596.39, for a total amount due of \$27,354.21 for the period December 1, 1974 through May 31, 1978. The notice was mailed by certified mail on October 20, 1981 at a branch of the United States Post Office in Albany, New York and was received by petitioner on October 22, 1981. The envelope bore a metered stamp of October 20, 1981.

2. Between January 16, 1978 and August 25, 1981, the petitioner executed eight (8) consents extending period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law, Form AU-2.10, the last of which extended the period December 1, 1974 through May 31, 1980 to October 20, 1981.

3. On September 20, 1982, the Audit Division, as a result of the same field audit, issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner assessing taxes due of \$26,308.02, plus interest of \$8,681.34, for a total amount due of \$34,989.36 for the period June 1, 1978 through May 31, 1980. At the hearing, the Audit Division agreed that the taxes determined to be due for the period June 1, 1978 through May 31, 1979 totalling \$14,347.58 should be cancelled due to the expiration of the statute of limitations. This second notice has therefore been reduced to \$11,960.44. The total amount at issue herein is \$31,718.26 (\$19,757.82 + \$11,960.44).

4. At all times during the period at issue, the petitioner was a lithographer and created printed material, i.e. folders, brochures, posters and booklets, for

large corporations such as New York Telephone, Union Carbide, American Telephone and Telegraph, General Foods and Winet Advertising.

5. On audit, the Audit Division found that petitioner maintained complete and adequate books and records from which the exact amount of its tax liability could have been determined. Nevertheless, the Division used a test period audit to determine additional taxes of \$37,960.00 on recurring purchases and \$3,639.75 on unsubstantiated exempt sales. The Division also performed a detailed audit to determine additional taxes of \$7,006.89 on fixtures and equipment and \$262.00 on increased gross sales. The Division also computed a credit due petitioner of \$2,802.80 on utilities used in production. The additional taxes are summarized as follows:

Recurring Purchases	\$37,960.00
Fixtures and Equipment	7,006.89
Gross Sales Increased	262.00
Unsubstantiated Exempt Sales	<u>3,639.75</u>
Total Found Due	\$48,868.64
Less: Utility Credit	<u>2,802.80</u>
Total Due	\$46,065.84

Of the amount at issue herein, \$31,718.26 (see Finding of Fact "3" above), \$24,852.44 represents taxes found due on negatives and plates. Except for disagreeing with the use of a test period audit, the petitioner otherwise agrees to the taxes found due on fixtures and equipment, gross sales increased, unsubstantiated exempt sales and recurring purchases (other than negatives and plates).

6. On August 25, 1981, subsequent to completion of the audit, the petitioner submitted the following written statement to the Audit Division:

"I [sic] agree to the use of test periods as being representative of the period under audit, December 1, 1974 thru May 31, 1980, and its projection thereof in fixing the tax due as to categories listed below..."

7. Petitioner briefly described the steps it follows in the making of printed material. Artwork, which is usually furnished by the customer, is delivered to a trade platemaker who creates a film negative of said artwork. Next, the platemaker, presumably through a photographic process, transfers the image on the negative to a printing plate. The negatives and plates are then delivered to petitioner who attaches the plate to a printing press, adds ink, and transfers the image to the paper. The printed material may also be bound and/or laminated depending on the job specifications. The material is then ready for shipment to the customer.

8. The negatives and plates become the property of the customer, i.e. title passes when the particular job is successfully completed and the customer is billed. This is true whether negatives and plates are actually shipped to the customer or retained by petitioner. Petitioner will retain the plates and negatives indefinitely for repeat orders and destroy them only at the customer's direction or if the information thereon renders them useless. The plates and negatives may not be used for any other customer's job. Petitioner emphasized the fact that repeat orders cost less because the plates and/or negatives are already made. The "General Conditions for Purchase Order" of General Foods which was furnished to petitioner contained the following:

"10.0 BUYER'S RIGHTS RESERVED

10.1 Buyer reserves to itself, and Seller shall not acquire, any right, title, or interest in any of Buyer's patents, service marks, trade names, trademarks, copyrights, industrial or intellectual property rights, or in any artwork, type, plates, negatives or positives arising out of or related to this Order."

The purchase orders of petitioner's other customers contained similar language.

9. During the period at issue, petitioner collected sales tax on approximately 53 percent of its sales. Petitioner argued, in the alternative, that

the payment of tax on negatives and plates in such case amounts to double taxation and should not be allowed.

CONCLUSIONS OF LAW

A. That the Audit Division was justified in using a test period audit to determine petitioner's sales and use tax liability for the audit period. Subsequent to the conduct of the audit, when the petitioner presumably knew the audit results, the petitioner executed the statement agreeing to the use of a test period audit. Therefore, we find unpersuasive petitioner's argument at this time against the use of a test period audit.

B. That section 1101(b) of the Tax Law defines retail sale, in part, as follows:

"(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property..." (emphasis added).

C. That the purchases of negatives and plates were used by petitioner in the production of printed material for sale to its customers prior to any transfer of title or possession thereto; therefore, they were not purchased for resale as such or as a physical component part of tangible personal property within the meaning and intent of section 1101(b)(4) of the Tax Law (Matter of Baronet Lithograph Co., State Tax Commission., August 25, 1978; Matter of Harrison Services, Inc., State Tax Commission., January 16, 1981; Laux Advertising, Inc. v. State Tax Commission, 67 A.D.2d 1066).

D. That Tax Law section 1147(a)(1) provides as follows:

"Notices and limitations of time

(a)(1) Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no

return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

E. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated October 20, 1981, was properly issued as required by section 1147(a)(1) of the Tax Law (see Finding of Fact "1").

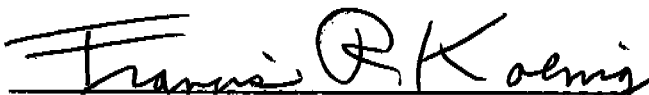
F. That the petition of D. L. Terwilliger Co., Inc. is denied and the notices of determination and demands for payment of sales and use taxes due, issued October 20, 1981 and September 20, 1982 and modified by the Audit Division (see Finding of Fact "3"), are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER