

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
PROMENADE MAGAZINES, 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 September 1, 1978 :
through May 31, 1981. :

Petitioner, Promenade Magazines, Inc., 45 East 45th Street, New York, New York 10017, 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 September 1, 1978 through May 31, 1981 (File No. 37495).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 22, 1984 at 1:15 P.M. with all briefs to be filed on or before July 20, 1984. Petitioner appeared by Delson & Gordon (I. Frederick Shotkin, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly assessed use tax upon the expenses incurred in the publication of a magazine on the basis that the magazine was not a periodical within the meaning of Tax Law 1115(a)(5) and 20 NYCRR 528.6(c).

II. Whether the Audit Division properly assessed use tax upon the expenses incurred in publishing a magazine which was produced in New York for sale in Paris, France.

FINDINGS OF FACT

1. Petitioner, Promenade Magazines, Inc., publishes a magazine known as Promenade ("the magazine").

2. On March 19, 1982, the Audit Division, on the basis of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1975 through May 31, 1978. The Notice assessed a tax due of \$47,345.35 plus interest of \$8,549.99 for a total amount due of \$55,895.34.

3. To the extent at issue herein, the Audit Division concluded that the expenses of publishing petitioner's magazines were taxable since the magazines were given away free or for a nominal charge thereby precluding the resale exemption from sales tax. The Audit Division also concluded that petitioner's magazines were not exempt from sales tax since they were published only two times a year. In the course of the audit, the Audit Division reviewed each invoice and found that on some invoices a tax of four percent had been charged. With respect to these invoices, the Audit Division added a tax due of four percent. On the invoices where no tax was charged, the Audit Division computed the tax due at a rate of eight percent.

4. The magazine has been published for fifty years. During the periods in issue, the magazine was published in April and October of each year. Petitioner does not publish more than twice a year because it is not economically feasible to do so.

5. In general, the magazine contains articles by various authors about activities taking place in New York City. The articles in the magazine include such topics as cultural events, shopping and dining.

6. During the periods in issue, the magazine was distributed to fifty-four hotels which, in turn, placed copies in rooms for their guests. A few of the hotels paid five cents a copy for the magazine. The remaining hotels received the magazine without charge. The magazines were delivered to the hotels six or seven times a year. The income petitioner received was primarily dependent upon the sale of advertising space.

7. The front cover of petitioner's magazine contains the instruction:

"This is a room copy. Please leave it for the next guest.
For your own copy, send \$3 to Promenade 45 East 45th
Street, New York 10017."

8. In accordance with the instructions on the front cover of the magazine, individuals regularly mail written requests, with \$3.00, to petitioner for a copy of the magazine.

9. In total, petitioner distributes over two million copies of its magazine every six months.

10. In 1980, petitioner began publishing an annual edition of Promenade for distribution in Paris, France ("Paris edition"). The Paris edition contained the same type of articles as the New York edition except that the articles were concerned with events in Paris.

11. The materials used to produce the Paris edition were delivered to New York where they were processed into the Paris edition. All copies of the Paris edition were shipped to Paris.

12. On or about July 21, 1980 petitioner received an invoice from Baldwin Paper Company for the covers of the Paris edition. The invoice was in the amount of \$7,763.84 with an opportunity of a discount if paid within ten days.

13. During August, 1980, petitioner received an invoice in the amount of \$44,508.48 from Baldwin Paper Company for the purchase of paper for the Paris edition.

14. On or about August 25, 1980 petitioner received an invoice from Fine Arts Reproduction Company, Inc. in the amount of \$13,521.52 for work performed and items purchased in connection with the production of petitioner's Paris edition of August, 1980. After this edition was assembled, it was shipped to Paris, France.

15. On October 25, 1980 petitioner paid \$21,685.00 to Empire Color for the printing of the Paris edition.

16. On November 20, 1980 petitioner paid \$1,825.00 to Empire Color for rate cards for the Paris edition. No evidence was presented as to the use of the rate cards.

CONCLUSIONS OF LAW

A. That section 1105(a) of Article 28 of the Tax Law imposes a tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28]." Section 1115(a)(5) of the Tax Law exempts from tax the sale of newspapers and periodicals.

B. That the term "periodical" is not defined by the New York State Sales Tax Law. Furthermore, for a portion of the period herein, that is, prior to January 31, 1979, the Commission had not promulgated regulations defining said term.

C. That in Matter of Siegfried Lobel d/b/a Government Data Publications, State Tax Commission, October 2, 1981, the State Tax Commission concluded that the proper standard to apply for the period prior to January 31, 1979 was as follows:

"In the absence of a definition of a periodical within the meaning of the sales and use tax exemption statute, resort has to be made to a test of common understanding influenced by authority from collateral sources. (G & B Publishing Co. v. Department of Taxation & Finance, Sales Tax Bureau, 57 A.D.2d 18, 392 N.Y.S.2d 938; Research Institute of America Inc. v. Department of Taxation & Finance, 99 Misc. 2d 243, 415 N.Y.S.2d 928.) A periodical is a vehicle for the transmission of news, opinions, ideas, information and literature. It has the common elements of periodicity, general availability to the public, and continuity as to title and general nature of content from issue to issue. It does not usually possess a substantial and permanent binding and the writings contained therein are customarily the product of an editorial staff rather than a single author. (Business Statistics Organization, Inc. v. Joseph, 299 N.Y.443, 87 N.E.2d 505.)"

D. That in addition to the foregoing, the State Tax Commission required during the period prior to January 31, 1979 that in order for a publication to constitute a periodical, it had to have been published at stated intervals at least as frequent as four times a year (Matter of J. Burr and Sons, State Tax Commission, September 23, 1974).

E. That the regulations of the State Tax Commission, effective January 31, 1979, at 20 NYCRR 528.6(c) provide in relevant part, as follows:

"(c) Definition of a periodical. (1) In order to constitute a periodical, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated intervals, at least as frequently as four times a year;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public;

(iv) it must have continuity as to title and general nature of content from issue to issue; and

(v) each issue must contain a variety of articles by different authors devoted to literature, the sciences or the arts, news, some special industry, profession, sport or other field of endeavor."

F. That each of the criteria in 20 NYCRR 528.6(c) must be satisfied. The term "generally" as used in 20 NYCRR 528.6(c) means that a publication could qualify as a periodical even if it did not satisfy one of the five requirements for a limited period of time. For example, an organization might, given that the other criteria are satisfied, qualify as a periodical even if it did not publish four times in a particular year because of labor strife. Any other interpretation of 20 NYCRR 528.6(c) would be inconsistent with American Theatre Press, Inc. v. Tax Comm. of State of New York (57 NY2d 794) which held that a particular publication did not qualify as an exempt periodical because it did not meet one of the requirements of Article 53 of the New York City Sales Tax Regulations.¹

¹ It is noted that Article 53 of the New York City Sales Tax Regulations which was interpreted by the Court of Appeals in American Theatre Press, Inc., provided, in its entirety, as follows:

"Reg. Art. 53. Newspapers and Periodicals. --In order to constitute a newspaper, a publication must conform generally to the following requirements: a. It must be published at stated short intervals, usually daily or weekly, b. It must not, either singly or, when successive issues are put together, constitute a book, c. It must have the element of general availability to the public, and d. It must contain matters of general interest and reports of current events. Notwithstanding the fact that some publications may be devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious or sporting matters, nevertheless, if, in addition to the special interest it serves, the publication contains general news, and news of current interest to the public, it is entitled to the classification of a newspaper. In order to constitute a periodical, a publication must conform generally to the following requirements: a. It must be published at stated intervals, at least as frequently as four times a year, b. It must have the element of general availability to the public, c. It must have continuity as to title and general nature of content from issue to issue, d. It must not, either singly or, when successive issues are put together, constitute a book, and e. Each number must contain a variety of articles by different authors devoted either to literature, the sciences or the arts, some special industry, profession, sport or other fields of endeavor. 4. Publications which are in fact house organs, and other publications such as theatre programs, shipping and restaurant guides, racing tip and form sheets and similar publications are neither newspapers nor periodicals within the meaning of the law and are subject to tax when sold at retail."

G. That on the basis of the foregoing, petitioner's New York edition of Promenade Magazine is not entitled to an exemption from sales and use tax since it is not published at least four times annually. It is noted that a discussion of the remaining requirements for constituting a periodical which is exempt from sales and use tax by reason of 20 NYCRR 528.6(c) is rendered moot.

H. That Tax Law §1119(a)(4) provides as follows:

"§1119. Refunds or credits based on proof of certain uses--

(a) Refunds or credits based on proof of certain uses. Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten ... (4) on the sale or use within this state of tangible personal property, not purchased for resale, if the use of such property in this state is restricted to fabricating such property (including incorporating it into or assembling it with other tangible personal property), processing, printing or imprinting such property and such property is then shipped to a point outside this state for use outside this state or..."

I. That the only tangible personal property which was purchased for one of the restricted uses and then shipped to a point outside this State was the paper and covers described in Findings of Fact "12" and "13". Similarly, the charge for printing described in Finding of Fact "15" is within the ambit of Tax Law §1119(a)(4). Accordingly, the Audit Division improperly assessed tax upon the purchases described in Findings of Fact "12", "13" and "15" [Tax Law §1119(a)(4)].

J. That the petition of Promenade Magazines, Inc. is granted only to the extent of Conclusion of Law "I" and the Audit Division is directed to modify

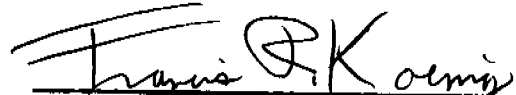
the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 19, 1982 accordingly; the petition is, in all other respects, denied.

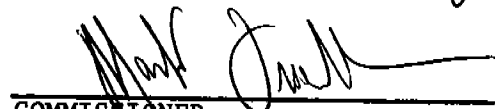
DATED: Albany, New York

APR 15 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER