

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
HEIDELBERG EASTERN, INC.
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 August 31, 1980.

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DECISION

Petitioner, Heidelberg Eastern, Inc., 73-45 Woodhaven Boulevard, Glendale, New York 11385 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 August 31, 1980 (File No. 37802).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1984 at 9:30 a.m., with all briefs to be submitted by May 13, 1985. Petitioner appeared by Larry Abowitz, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anna Collelo, Esq. of counsel).

ISSUE

Whether the Audit Division properly imposed a use tax on equipment purchased by petitioner and loaned to the Rochester Institute of Technology.

FINDINGS OF FACT

1. On March 2, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Heidelberg Eastern, Inc., in the amount of \$37,483.76 plus interest of \$10,988.45 for a total due of \$48,472.21 for the period December 1, 1977 through August 31, 1980.

2. At a prehearing conference, adjustments were made to the original assessment leaving \$7,502.46 in use tax at issue.

3. Petitioner is engaged in the business of selling computerized printing and graphics equipment. Sometime after December 1, 1977, petitioner took a computerized printing press from its stock and loaned it to the Rochester Institute of Technology ("RIT"). RIT used the equipment for the education of students in the use of computerized printing equipment. In addition to expressing its charitable intent, petitioner's purposes in loaning the equipment were to create future favorable impressions of its equipment among the students, to make its trade name more familiar and to use it as a form of advertising. Petitioner retained title to the equipment and it was carried on petitioner's books as "equipment for loan". Petitioner depreciated the equipment on its books. The total value of the equipment loaned was \$104,758.00.

4. On audit, the Audit Division determined that the equipment loaned to RIT was subject to use tax as tangible personal property withdrawn from stock and used for promotional purposes. Petitioner maintains that because the equipment was used by RIT, an exempt organization, there is no use tax due from petitioner.

CONCLUSIONS OF LAW

A. That section 1110 of the Tax Law provides, in pertinent part, that:

"Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one, except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property manufactured, processed or assembled by the user, if items of the same kind of tangible personal property are offered for sale by him in the regular course of business..."

B. That 20 NYCRR 526.9(a) provides:

"The word 'use' means and includes the exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real property, or any consumption of such property."

Withdrawal from storage means to remove from storage any tangible personal property which was so stored for any purpose whatsoever (20 NYCRR 526.9[b][3]).

C. That a purchase for resale is excluded from the definition of retail sale and is not subject to sales and use tax (Tax Law § 1101[b][4]). However, tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof and is not a sale to the recipient of the property (20 NYCRR 526.6 [c][4]; see Waxlife, U.S.A. Inc. v State Tax Commission, 67 A.D. 2d 1040).

D. That, although petitioner may have originally purchased the equipment for resale, when it withdrew the equipment from stock to loan it to RIT the equipment was no longer exclusively for resale and became subject to use tax. The fact that RIT is an exempt organization is irrelevant. The withdrawal of tangible personal property from stock for use as a gift, whether for charitable reasons, promotions, advertising, goodwill or any other reason, subjects such property to use tax.

E. That the petition of Heidelberg Eastern, Inc. is granted to the extent indicated in Finding of Fact "2"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due


issued March 2, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUL 16 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER