

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
T. K. DESIGN, 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 August 31, 1981.	:	

Petitioner, T. K. Design, Inc., 251 Park Avenue, Rochester, New York 14607, 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 August 31, 1981 (File No. 38407).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on December 6, 1984 at 9:15 A.M., with all briefs to be submitted by March 6, 1985. Petitioner appeared by Davidson, Fink, Cook & Gates, Esqs. (Stuart Cook, Esq., of counsel), and by James R. Perry, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether certain fees charged by petitioner to its clients constituted receipts from sales of tangible personal property and thus were properly subject to tax.

FINDINGS OF FACT

1. On March 20, 1982, following a field audit, the Audit Division issued to petitioner, T. K. Design, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1978 through

August 31, 1981 in the amount of \$8,611.49, plus simple interest. This assessment consisted of three parts, as follows:

- a) Use tax of \$230.38 based on miscellaneous purchases;
- b) Use tax of \$4,088.22 based on materials incorporated into capital construction;
- c) Sales tax of \$4,292.89 based on petitioner's 25 percent charge associated with supplying tangible personal property to its customers.

2. On December 18, 1981, petitioner had executed a validated consent allowing assessment of sales and use taxes for the period September 1, 1978 through November 30, 1978 to be made on or before March 20, 1982.

3. Prior to the hearing, the parties reached agreement regarding the first two items noted above,¹ thus leaving only the amount specified in Finding of Fact "1-c" at issue.

4. Petitioner is a New York corporation, located in Rochester, New York, and is engaged in the business of providing architectural and interior design services. Petitioner's president, director and sole shareholder is Ms. Toby Kath.

5. The remaining item at issue involves a 25 percent fee charged by petitioner and calculated upon the cost of certain items of tangible personal property purchased for use by petitioner's customers. Such items of tangible personal property included, inter alia, computer consoles, moveable wall

1 More specifically, petitioner conceded liability for the amount specified in Finding of Fact "1-a", while the Audit Division withdrew its assessment for the amount specified in Finding of Fact "1-b".

partitions (dividers or acoustic panels), files, work stations, etc., called "major moveables" by petitioner.

6. The purchase of the major moveables was initiated after the layout and specifications for a particular customer's installation had been determined.

7. Petitioner was, as a "dealer", able to obtain very substantial discounts on major moveables, which discounts were not available to petitioner's customers on a direct order basis. Accordingly, after determining the major moveables needed, petitioner would submit a request for a purchase order to its customer. The customer would in turn approve the request for a purchase order (in many cases there had been previous oral approval by the customer) and return a purchase order to petitioner with a purchase order number thereon. This purchase order number was then added to petitioner's own purchase order, which order was submitted to the manufacturer of the major moveables.

8. The major moveables were shipped directly from the manufacturer to the customer's place of business per the "ship to" instructions on petitioner's purchase order to the manufacturer. The order numbers used on the customer's purchase orders to petitioner and on the petitioner's purchase orders to the manufacturer were the same, and were checked when the major moveables were received at the customer's place of business (shipping/receiving dock). The term "agent" did not appear on the petitioner's purchase orders to the manufacturer. One of petitioner's employees would check the merchandise for quality and completeness at the customer's receiving dock when the merchandise was received.

9. Except for a retainage amount of 10 percent of the cost of the major moveables ordered, which amount was withheld by petitioner until the merchandise was fully installed and inspected, payment was made to the manufacturer within

thirty days of receipt of its invoice therefor. Payment was made through petitioner, with petitioner billing the customer for the manufacturer's invoice cost of the major moveables plus tax. Upon final installation and inspection of the merchandise, the retainage amount was paid to the manufacturer.

10. In addition to billing its customers for the manufacturers' invoice cost of the major moveables, petitioner also bills and receives from its customers an amount equal to 25% of such cost. Such fee was denominated "profit and overhead". This fee was billed by petitioner on a monthly basis, with initial billings based on estimates of ultimate costs, followed by a later reconcilliation of amounts as actual firm costs were determined.

11. The 25 percent fee was only part of petitioner's receipts from its customers. In addition to such amount based on major moveables, petitioner also received compensation under its contracts for services rendered to its customers, based on a multiple of (petitioner's) direct personnel expenses and on a percentage of a project's cost (see Petitioner's Exhibit "1"; Articles "7", "11", and "12"). The 25 percent payment with respect to major moveables was calculated and paid separately from petitioner's other compensation (see Petitioner's Exhibit "1", Articles "7", "12" and "13").

CONCLUSIONS OF LAW

A. That Tax Law section 1105(a) imposes sales tax upon the receipts from every retail sale of tangible personal property. Receipts are defined by Tax Law section 1101(b)(3), in part, as "...the amount of the sale price of any property."

B. That petitioner purchased the major moveables and then resold such items to its customers at cost plus 25 percent for "profit and overhead" (refer


Petitioner's Exhibit "1", Articles "7", "12" and "13"). The sole apparent reason that petitioner rather than its customers purchased these items was to enable the customers to realize a significant purchase price discount not available on a direct purchase basis. The 25 percent fee added by petitioner was, in essence, a profit or commission on petitioner's sales of the major moveables and, as such, constituted a part of the selling price of tangible personal property subject to tax. Accordingly, the portion of the deficiency pertaining to the 25 percent fee is sustained.

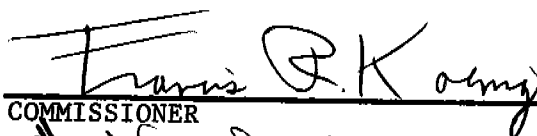
C. That the petition of T. K. Design, Inc. is granted to the extent indicated by the Audit Division's concession specified in Finding of Fact "3", footnote "1", but is in all other respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1982, as reduced in accordance herewith, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 28 1985


PRESIDENT


COMMISSIONER


COMMISSIONER