

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
FLORAFAX INTERNATIONAL, 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 November 30, 1980.

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DECISION

Petitioner, Florafax International, Inc., P.O. Box 45745, Tulsa, Oklahoma 74145, 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 November 30, 1980 (File No. 39428).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1985 at 9:15 A.M., with all briefs to be submitted by July 20, 1985. Petitioner appeared by Arthur Andersen & Co. (David A. Black, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that amounts charged by petitioner to its clients as maintenance fees, management fees, insurance fees and directory fees were subject to sales tax.

FINDINGS OF FACT

1. On December 18, 1981, subsequent to the conduct of a field examination, the Audit Division issued to petitioner, Florafax International, Inc. (hereinafter "Florafax"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Said Notice encompassed the period December 1, 1977 through November 30,

1980 and assessed additional sales and use taxes due of \$12,044.65,<sup>1</sup> plus interest of \$2,376.22, for a total amount due of \$14,420.87. On February 4, 1981, petitioner executed a consent to extend the period of limitations for assessment of sales and use taxes for the period December 1, 1977 through November 30, 1980 to any time on or before December 20, 1981.

2. Florafax is in the business of providing florists with the capability of sending flowers throughout the entire United States. To provide this capability, Florafax leases to its customers computer equipment, specifically a terminal and a modem.

3. Florafax used a standard rental or lease agreement entitled "System XXI Equipment Lease and Subscriber Agreement". Said agreement specifically and separately provided, inter alia, for the following charges:

- (i) a monthly fee of \$39.00 for the rental of the terminal and modem;
- (ii) a monthly maintenance fee of \$29.00;
- (iii) a monthly management fee of \$23.00;
- (iv) a monthly insurance fee of \$5.00; and
- (v) a monthly directory fee of \$3.00.

4. Florafax considered the basic monthly rental fee of \$39.00 as a receipt subject to sales tax. It therefore charged its New York State-based customers sales tax on the \$39.00 basic rental fee and remitted same to the Audit Division. The four remaining elements of the rental or lease agreement enumerated in Finding of Fact "3", supra, were considered by Florafax as exempt

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1 \$1,509.33 of the assessment represents tax due as the result of undercollections. Petitioner does not contest this amount. The balance, i.e. \$10,535.32, represents tax due on maintenance fees, management fees, insurance fees and directory fees and the taxable status of said fees constitute the only items in dispute in this proceeding.

from sales tax. The Audit Division determined that the four remaining elements of the rental or lease agreement constituted taxable receipts and said determination forms the basis for the issuance of the aforementioned Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

5. (a) The monthly maintenance fee is a charge for a repair and maintenance service on the rented computer equipment. All equipment requiring service is shipped to petitioner's warehouse in Oklahoma where necessary repairs are performed. The customer is furnished with a replacement unit and the defective unit, once repaired, is placed in inventory. Petitioner maintains that the maintenance fee is exempt from sales tax since all repair services are performed outside New York and since the repaired unit is not returned to the New York State customer and, in fact, may never return to New York.

(b) The monthly management fee is a charge for bookkeeping services performed by Florafax in Oklahoma. Petitioner maintains that said services do not fall within any of the taxable services enumerated in section 1105(c) of the Tax Law.

(c) The monthly insurance fee is an optional charge for property and casualty insurance on the computer terminal located on the customer's premises. Petitioner asserts that the insurance charge is not taxable since it is not one of the specifically enumerated taxable services under section 1105(c) of the Tax Law.

(d) The monthly directory fee is also an optional charge for listing the customer's name in a directory provided to all Florafax subscribers. Petitioner contends that this is a charge for advertising services and therefore exempt from tax.

6. The monthly invoices issued by Florafax to its customers did not show

an individual charge for each of the items in dispute herein, but rather a combined charge of \$99.00. As previously stated, petitioner collects sales tax from its New York-based customers only on the \$39.00 basic rental charge.

CONCLUSIONS OF LAW

A. That the standard equipment lease and subscriber agreement utilized by Florafax specifically and individually provided for a separate charge for:

- (i) rental of computer equipment;
- (ii) a maintenance fee;
- (iii) a management fee;
- (iv) an insurance fee; and
- (v) a directory fee.

In the instant matter, it is conceded that the charge for the rental or lease of the computer equipment constituted a taxable receipt under section 1105(a) of the Tax Law. The four remaining charges are not expenses incurred by petitioner in making a sale [20 NYCRR 526.5(e)], but instead represent separate and reasonable charges for separate and distinct services. Accordingly, the taxable status of the four remaining elements of the agreement are to be determined individually.

B. That the maintenance fee charged by Florafax constituted a taxable transaction pursuant to section 1105(c)(3) of the Tax Law and 20 NYCRR 527.5(a)(3).

C. That the management fee, insurance fee and directory fee do not fall within any of the taxable services enumerated in section 1105(c) of the Tax Law and were therefore properly considered by petitioner as exempt from tax.

D. That the petition of Florafax International, Inc. is granted to the extent indicated in Conclusion of Law "C", supra; that the Audit Division is

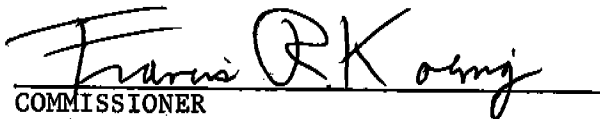
directed to recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 18, 1981 consistent with the conclusions rendered herein; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER