

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CO MARCO DATA SERVICES, 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 June 1, 1978
through November 30, 1981.

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DECISION

Petitioner, Co Marco Data Services, Inc., 119 North 24th Street, New York, New York 10011, 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 June 1, 1978 through November 30, 1981 (File No. 40096).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on Tuesday, July 23, 1985 at 1:15 P.M., with all briefs to be submitted by September 23, 1985. Petitioner appeared by Louis Engelmayer, Esq. and Michael C. Lesser, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether keypunch services purchased by petitioner from independent contractors were purchased for resale and thereby excluded from the tax imposed under section 1105(c) of the Tax Law.

II. Whether double taxation will exist if petitioner is held liable for tax on its purchases of keypunch services.

FINDINGS OF FACT

1. On August 27, 1982, as a 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, Co Marco Data Services, Inc., for the period June 1, 1978 through November 30, 1981 in the amount of \$10,283.87, together with interest of \$2,594.84, for a total amount due of \$12,878.71. The assessment represented taxes due on purchases of keypunch services.

2. Petitioner, by its president, Jonathan Mack, executed three consents extending the period of limitation for assessment of sales and use taxes for the period September 1, 1978 through May 31, 1981 to December 20, 1982.

3. Petitioner was engaged in the business of processing, updating and maintaining mailing lists and supplying mailing labels and reports to its customers, the majority of which were publishers of magazines and periodicals.

4. Petitioner received data from its customers stored either on magnetic computer tape or as hard copy. This data was then converted to a format that was compatible with petitioner's computer system. The information maintained and updated by petitioner was the exclusive property of the customer. Petitioner provided its services under contracts with its customers. If a contract was terminated, the tape with all of its changes and modifications was returned to the customer.

5. Under a typical contract, petitioner updated the information, usually on a monthly or quarterly basis. Petitioner added new names, changed addresses, deleted non-deliverable names and produced address renewal notices and credit invoices. Petitioner also produced circulation data reports and mailing labels.

6. Petitioner's fee for its services was set by contract. Petitioner collected sales tax from its customers based upon the total price charged under each contract.

7. The customer provided petitioner with hard copy of the information to be added to the master file. Petitioner purchased keypunch services from independent contractors to convert the hard copy to computer readable punch cards. Petitioner provided the outside contractors with blank punch cards. The punch cards were fed into the computer and the data contained thereon was transferred onto magnetic tape. After this process was completed, the punch cards were destroyed.

8. Petitioner did not pay sales tax to the independent keypunch operators it contracted with during the audit period, nor did the independent keypunchers collect sales tax from petitioner for the services rendered.

9. Petitioner took the position that the keypunching services were purchased for resale since the data on the punch cards was transferred to a magnetic tape which was the property of the customer. Petitioner claimed that the punch card was merely the medium used to rearrange the data on the tape and that the cost for such services was reflected in the charge to the customer on which sales tax was collected. Petitioner further maintained that if tax was imposed on its purchases of keypunching services, it would result in double taxation since tax was collected from the customer on the same services.

CONCLUSIONS OF LAW

A. That section 1105(c)(2) of the Tax Law provides, in pertinent part:

"...[T]here is hereby imposed and there shall be paid a tax...upon:

* * *

(c) The receipts from every sale, except for resale of the following services:

* * *

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed."

B. That the independent keypunch operators were performing services under section 1105(c)(2) of the Tax Law. However, the purchase of such services was not for resale within the meaning and intent of section 1105(c) of the Tax Law. The keypunch services were purchased by petitioner for use in providing to its customers the services set forth in Finding of Fact "3". Cf. Matter of Cut-Outs, Inc. v. State Tax Commission, 85 A.D.2d 838 (3rd Dept. 1981).

C. That inasmuch as the services at issue are taxable under section 1105(c)(2) of the Tax Law, the fact that petitioner may pass the cost of such taxation onto its customers is irrelevant. The provisions of the Tax Law authorize the imposition of tax both upon the keypunch services and upon the services petitioner furnishes its customers.

D. That the petition of Co Marco Data Services, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 27, 1982, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 25 1986

Roderick W. Olson
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER