

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSEPH E. SEAGRAM & SONS, 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 March 1, 1975	:	
through May 31, 1982.	:	

Petitioner, Joseph E. Seagram & Sons, Inc., c/o Anthony J. Quinn, 800 Third Avenue, New York, New York 10022, 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 March 1, 1975 through May 31, 1982 (File No. 42539).

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 5, 1984 at 2:15 P.M., with all briefs to be submitted by April 11, 1985. Petitioner appeared by Simpson, Thacher & Bartlett (Richard Meade, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Alcoholic Beverage Executives' Newsletter is a periodical, subscriptions to which are exempt from sales and use tax under section 1115(a)(5) of the Tax Law.

II. Whether petitioner is entitled to a waiver of interest charged for the late payment of New York City sales tax on artwork incorporated into finished goods for sale where a credit for such tax is allowed against New York City general corporation tax.

III. Whether certain aircraft purchased by petitioner out of state and used exclusively in interstate commerce but hangared in New York State are subject to use tax.

IV. Whether the purchase of an instruction sheet by petitioner for subsequent copying and distribution in connection with a sales promotion campaign was subject to sales tax.

FINDINGS OF FACT

1. On November 30, 1982, as the result of a field audit, the Audit Division issued three notices of determination and demands for payment of sales and use taxes due against petitioner Joseph E. Seagram & Sons, Inc. as follows:

<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Total Due</u>
3/1/75-8/31/78	\$ 108,263.24	\$ 60,731.70	\$ 168,994.94
9/1/78-2/28/82	1,308,665.20	225,948.31	1,534,613.51
3/1/82-5/31/82	17,862.26	1,076.91	18,939.17

2. Petitioner had executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1975 through November 30, 1979 to December 20, 1982.

3. Petitioner produces and markets distilled spirits and wines; it makes no retail sales. Petitioner contested the following findings of the Audit Division made on audit:

(a) Sales tax in the amount of \$9,050.00 on a subscription to the Alcoholic Beverage Executives' Newsletter.

(b) Interest in the amount of \$13,407.00 on New York City sales tax assessed on artwork incorporated into goods for sale.

(c) Use tax in the amount of \$1,059,815.00 on airplanes hangared in New York which are engaged in interstate commerce.

(d) Sales tax in the amount of \$184,259.00 on artwork which was incorporated into sales promotion materials.

4. The Alcoholic Beverage Executives' Newsletter ("the Newsletter") has been published for approximately 45 years and is printed and distributed on a weekly basis. The Newsletter is available to the general public on a subscription basis, without limitation. Each issue contains news articles or editorials devoted to topics of interest to the beer, wine and spirits industry. Most of the articles are written by the editor and publisher of the Newsletter, although the Newsletter often publishes articles of interest drawn from other publications as well as guest editorials. As a result, many but not all issues of the Newsletter each year contain articles or editorials by authors other than the editor and publisher. The Newsletter does not, either singly or by the combination of successive issues, constitute a book.

5. On audit, the Audit Division characterized the Newsletter as an information service subject to sales tax. Petitioner maintains that the Newsletter is a periodical and thus exempt from tax.

6. Petitioner was assessed \$13,407.00 in interest on a New York City sales tax assessment of \$36,343.00 on artwork commissioned by petitioner for incorporation into finished goods for sale. Receipts from the sale of such artwork is exempt from New York State sales tax, but is subject to New York City sales tax. A taxpayer may take a credit for such sales taxes paid on its New York City General Corporation Tax Return. No corresponding credit is allowed to offset the interest charge. Petitioner maintains that the net result of the credit is that there is no tax and that it is inequitable to assess an interest charge on a tax for which there is intended to be no net tax liability.

7. Petitioner purchased three aircraft during the period in issue, a "Saberliner", a "Gulfstream III" and a "Falcon 50". The Audit Division assessed use tax on the "Saberliner" in the amount of \$41,792.00, on the "Gulfstream III" in the amount of \$442,392.00, and on the "Falcon 50" in the amount of \$565,632.00. Prior to the hearing, petitioner conceded the taxability of the "Saberliner".

8. Petitioner purchased the "Gulfstream III" on August 5, 1980. Delivery was taken in Savannah, Georgia. The "Gulfstream III" first entered New York on February 12, 1981 on a flight originating in Florida, with a stopover in Georgia. The flight to New York was made to deliver one of petitioner's executives to New York for a business meeting. Between February 12, 1981 and May 31, 1982, the aircraft took 220 flights, 218 of which were interstate or international flights. The two remaining flights were local flights for maintenance purposes.

9. Petitioner purchased the "Falcon 50" on January 22, 1982. Delivery was taken in Portland, Oregon. The "Falcon 50" entered New York State on the same date. After a brief series of training flights, petitioner put the aircraft in use on February 2, 1982 for a flight to return petitioner's executives to New York from a business meeting in Montreal, Canada. Between January 22, 1982 and May 31, 1982, the "Falcon 50" took 97 flights. With the exception of the training flights, all of the flights were interstate or international flights.

10. During the period in issue, both aircraft were hangared in White Plains, New York when not in use. A review of the flight logs of both aircraft reveals that at the completion of each trip, whether interstate or international, the aircraft returned to White Plains. No evidence was offered indicating that

either aircraft was ever hangared on a regular basis anywhere other than White Plains.

11. Petitioner argues that the hangaring of the aircraft in New York for use exclusively in interstate commerce is not a taxable event giving rise to imposition of the use tax.

12. In 1977, petitioner launched a campaign to promote the sales of Seagram's "VO". As a part of that sales promotion, floor displays were created and sent to a number of states, including New York, for installation. Accompanying the floor displays were instruction sheets describing the manner in which the displays were to be assembled and mounted. On August 17, 1977, Mr. Thomas Pollutri sent petitioner an invoice in the amount of \$240.00 representing his charge for the creation, in New York, of the original instruction sheet, which was subsequently copied and distributed to display and merchandising personnel within and without New York State. Petitioner allocated the cost of the Pollutri invoice to the entire promotion project and paid taxes to each of the states to which the displays were sent according to the number of units sent to each state and the portion of the total cost of the sales promotion thus allocated to each state.

13. On audit, the auditor reviewed a large number of invoices for artwork, drawings and other graphics materials used in sales promotion materials. Eight invoices were determined to be subject to sales tax. The eight invoices included the following:

<u>Supplier</u>	<u>Invoice Amount</u>
Kramer Printing Co.	\$ 250.00
Larstan Processing Co.	920.00
Frederick Seibel Associates	125.00
Thomas Pollutri	240.00
Olympus Graphics, Inc.	175.00
Frederick Seibel Associates	85.00
Spectrum Associates	1,050.00
Sam Parkola	250.00
Total	<u>\$3,095.00</u>

The auditor then divided the cost of the taxable invoices by \$104,830.99 which was the total cost of all artwork invoices sampled. The result was a margin of error of .029524. The auditor multiplied total expenses for artwork for the entire period by the margin of error resulting in additional taxable purchases of \$2,295,882.00. The taxable purchases were multiplied by the appropriate sales tax for each quarter resulting in additional tax due on purchases of \$184,258.41.

14. Prior to the hearing, petitioner conceded that six of the eight invoices tested were properly subject to sales tax, leaving only the Larstan Processing Co. and Thomas Pollutri invoices in issue. The Audit Division conceded that the Larstan invoice was incorrectly determined to be subject to tax. Moreover, the Audit Division acknowledged that in calculating the margin of error, the auditor did not calculate any credit for sales tax already paid by petitioner on the Pollutri invoice which petitioner had allocated to New York as discussed in Finding of Fact "12", supra. The Audit Division stipulated that its concessions result in a lower margin of error of .020290 yielding a revised sales tax due on artwork purchases of \$126,629.32.

15. Petitioner maintains that it properly allocated the cost of the preparation of the instruction sheet by Thomas Pollutri to the total cost of the sales promotion campaign, that the instruction sheet has no value apart from its use in connection with the assembly of the sales promotion materials by the retailers in the several states, and that no further sales tax is owed to the State of New York beyond that already allocated and paid to the State in connection with its share of the distribution of the sales promotion materials. The Audit Division maintains that the full \$240.00 cost of the Thomas Pollutri

instruction sheet should have been allocated to the State of New York because the original instruction sheet was created within the State of New York.

16. Along with its brief, petitioner submitted proposed findings of fact, all of which have been adopted and incorporated herein with the exception of proposed findings 9, 14, 21, 22 and 26 which were conclusory in nature and not supported by the record.

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 (Matter of Promenade Magazines, Inc., State Tax Commission, April 15, 1985).

G. That the Newsletter meets generally all of the criteria set forth in 20 NYCRR 528.6(c). Although there may not be a different author in every issue, many issues over the course of the year contain articles or editorials by different authors. Therefore, the Newsletter is entitled to an exemption under section 1115(a)(5) of the Tax Law and the \$9,050.00 in tax assessed on petitioner's subscription to the Newsletter is cancelled.

H. That section 1145(a)(1) of the Tax Law provides for the imposition of penalties and interest for failure to file returns or pay the tax on time. If the Tax Commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it may remit penalties and interest in excess of the minimum statutory rate of one percent per month. There is no provision for waiver of the minimum interest for any reason. The fact that a credit is allowed against New York City corporation tax for certain sales taxes paid does not render the sales tax a "non-tax" as petitioner argues. If such a result were desired, it would be up to the appropriate legislative body to eliminate the particular tax. Without such legislation, the tax must be paid in a timely fashion with interest imposed for failure to do so. Therefore, the interest imposed on petitioner's New York City sales tax assessment must be sustained.

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

"[e]xcept to the extent that property or services have already been or will be subject to the sales tax...there is hereby imposed...a use tax for the use within this state...except as otherwise exempted...
(A) of any tangible personal property purchased at retail."

"Use" is defined as "The exercise of any right or power over tangible personal property by the purchaser thereof" (Tax Law §1101[b][7]). Petitioner's aircraft are used solely for its benefit and they are subject to its direction and control in this state. There is no evidence that the aircraft are hangared anywhere other than in New York on a regular basis. The aircraft may be temporarily hangared during individual legs of long trips, but the planes always return to White Plains following the trip. Petitioner's argument that the aircraft are not based anywhere because they are used exclusively in interstate commerce is not supported by the record. In addition to being primarily hangared in New York, most maintenance and training flights for the

aircraft occur in New York. There are, therefore, taxable events which occur within New York which subject the aircraft to the use tax (Pepsico, Inc. v. Bouchard, 102 A.D.2d 1000; International Telephone and Telegraph Corporation v. State Tax Commission, 70 A.D.2d 700; accord, Sundstrand Corp. v. Department of Revenue, 34 Ill. App. 3d 694).

J. That section 1119(a)(4) of the Tax Law provides for a refund or credit of sales tax paid on the sale or use within New York of tangible personal property, not purchased for resale, if the use in New York is restricted to fabricating such property (including incorporating it into, or assembling it with, other tangible personal property), processing, printing or imprinting such property if the property is then shipped outside New York for out-of-state use.

K. That, in this case, petitioner ordered and paid for the creation of one instruction sheet at a price of \$240.00. The entire transaction occurred in New York and petitioner took delivery of the finished product in this state. The primary use for which this initial instruction sheet was intended was to make copies which would be enclosed with the promotional displays. This use was accomplished within New York; the original instruction sheet was not sent out of state for duplication. Whether the original instruction sheet was ever actually shipped out of state as part of a promotional display is irrelevant since it had already been used in New York for its intended purpose, as a prototype for making copies. The statute requires that the use of exempt property be restricted to the exempt purpose (assembling it with other property). The use of the original instruction sheet was not so restricted. Section 1119(a)(4), therefore, does not apply. Additionally, section 1115(a)(12), cited by petitioner, is inapplicable to this matter. That section provides an

exemption for equipment (including artwork and typography) used in the production of tangible personal property for sale. The promotional displays in this case were not for sale but were given out to retailers for store displays.

L. That, in view of the foregoing, it was proper for the Audit Division to include the Pollutri invoice in computing the margin of error on taxable purchases of artwork for use in promotions. However, pursuant to the concessions made by the Audit Division, as discussed in Finding of Fact "14", supra, the additional sales tax due on purchases of artwork is to be reduced from \$184,258.41 to \$126,629.32.


M. That the petition of Joseph E. Seagram & Sons, Inc. is granted to the extent indicated in Conclusions of Law "G" and "L"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due issued November 30, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER