

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
EFX UNLIMITED, 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, 1979	:	
through February 28, 1982.	:	

Petitioner, EFX Unlimited, Inc., 321 West 44th Street, New York, New York 10036, 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, 1979 through February 28, 1982 (File No. 43015).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1984 at 9:15 A.M. Petitioner appeared by Marvin A. Katz, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's purchases of artwork used in the operation of its optical effects and animation photography business are subject to sales and use taxes.

FINDINGS OF FACT

1. On February 10, 1983, the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, EFX Unlimited, Inc., assessing tax due of \$4,822.31 plus interest for the period March 1, 1979 through February 28, 1982.

2. The Audit Division secured from petitioner signed consents that extended the statute of limitations for assessment of sales and use taxes for the period March 1, 1979 through November 30, 1979 to March 20, 1983.

3. Petitioner timely protested the issuance of the aforesaid notice of determination and demand. The amount of tax due disputed is \$3,546.83 which represents the tax assessed on artwork purchases.

4. On audit, the Audit Division determined that petitioner's purchases of artwork amounted to \$88,671.07 over the audit period. Due to the fact that the Audit Division considered artwork as equipment used in the production of tangible personal property for sale and since New York City law did not exempt equipment used in production, as did the State Tax Law, the auditor applied the 4 percent New York City tax rate to the \$88,671.07 purchase price resulting in tax due of \$3,546.83.

5. Petitioner purchased the artwork to fulfill contracts with its clients for title work. Said work entailed purchasing artwork, photographing the artwork and superimposing the photograph over an art background or live action background for the purpose of producing a film with a title.

6. During the period under review, the artwork used in the optical effects and animation business of the petitioner was normally ordered from a wholly-owned subsidiary. No tax was charged by the subsidiary because petitioner furnished the subsidiary with an executed resale certificate.

7. Petitioner argued that the artwork was resold as an integral part of the finished product. Petitioner's majority stockholder and chairman of the board, James Gillissie, testified that the artwork went to the client along with the film, that often the artwork was used for promotional purposes by the

client and that sales tax had been charged the client on the marked up cost of the artwork.

8. Petitioner alternatively argued that it was an industry practice for the title company to purchase as an agent for the client. Mr. Gillissie testified that the client could demand the artwork at any time because ownership of the artwork is vested in the client in accordance with industry practice.

9. Petitioner failed to introduce samples of the contracts negotiated within the optical effects and animation photography industry. Admittedly, the agreements which petitioner negotiated within the audit period contained no provision for the passage of ownership of the artwork to the client at the time of petitioner's purchase.

CONCLUSIONS OF LAW

A. That petitioner has failed to show that an agency relationship existed with its various clients in regard to the purchases of artwork for the period March, 1979 through February, 1982.

B. That the artwork was used by petitioner in its manufacturing process prior to any transfer of title or possession thereto and that such use precluded petitioner from purchasing said items for resale within the meaning and intent of section 1101(b)(4)(i) of the Tax Law. The primary purpose of the purchase of artwork was not for resale to clients but rather for petitioner's use as a manufacturer and any resale thereof was purely incidental (Matter of Laux Advertising, Inc. v. State Tax Commission, 67 A.D.2d 1066; Matter of Cut-Outs, Inc. v. State Tax Commission, 85 A.D.2d 838).

C. That the Audit Division correctly assessed the New York City 4 percent sales and use tax on petitioner's retail purchase of artwork.

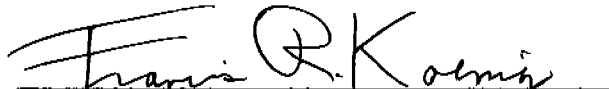
D. That the petition of EFX Unlimited, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 10, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER