

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

GELMART INDUSTRIES, 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 June 1, 1975  
through August 31, 1980.

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Petitioner, Gelmart Industries, Inc., 20-29 129th Street, College Point, New York 11356, 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, 1975 through August 31, 1980 (File No. 45155).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 16, 1986 at 1:15 P.H., with all briefs to be submitted by October 15, 1986. Petitioner appeared by Joseph Corben, CPA. The Audit Division appeared by John P. Dugan, Esq. (Laura M. Nath, Esq., of counsel).

#### ISSUES

I. Whether petitioner is liable for sales and/or compensating use taxes, pursuant to the provisions of section 1107(b)(1) of the Tax Law, on the purchase of certain manufacturing machinery and equipment where petitioner has taken delivery and possession of said machinery and equipment in New York City for the purpose of transshipment to a subsidiary corporation in the Philippines.

11. If so, whether the imposition of sales and/or compensating use taxes on such receipts is violative of Article I, Section 10, Clause 2 of the Constitution of the United States.

111. Whether the purchase by petitioner of computers, typewriters and certain other office equipment is exempt from New York State sales and compensating use taxes pursuant to the provisions of section 1115(a)(12) of the Tax Law on the basis that said equipment was purchased for use or consumption directly and predominantly in the production of tangible personal property by manufacturing.

FINDINGS OF FACT

1. Pursuant to a field audit of Gelmart Industries, Inc. (hereinafter "petitioner"), the Audit Division, on March 15, 1983, issued to petitioner four notices of determination and demands for payment of sales and use taxes due for the period June 1, 1975 through August 31, 1980, to wit:

<u>Notice Number</u>	<u>Total Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>
S830315001Q	\$22,407.76	\$ 5,601.94	\$ 9,731.03	\$37,740.73
S830315002Q	46,259.93	11,564.98	37,446.47	95,271.38
S830315003Q	15,431.05	3,857.77	10,950.68	30,239.50
S830315004Q	13,687.40	3,421.86	5,613.62	22,722.88

Petitioner executed consents extending the period for assessment of sales and use taxes for the period at issue to any time on or before March 20, 1983.

2. Prior to the hearing held herein, petitioner executed a consent to the fixing of tax and, on June 8, 1983, paid the sum of \$103,007.00, said amount representing the total tax and interest due on the assessments issued pursuant to Notice Numbers S830315002Q and S830315004Q. The Audit Division conceded that all penalties imposed upon the agreed assessments and upon those remaining in issue should be abated.

3. At the hearing, petitioner conceded liability for that portion of the sales tax attributable to petitioner's purchase and sale of certain trucks and automobiles upon which the Audit Division had determined that proper sales tax

had not been paid and/or collected. The total amount of tax assessed by the Audit Division on these transactions is \$1,582.45. Therefore, the total amount remaining at issue is \$36,256.36, plus applicable interest.

4. Petitioner is an import manufacturer of brassieres, gloves and infantwear, with offices and a wholesale/retail outlet in College Point, New York. Gelmart Industries Philippines, Inc. is a subsidiary of petitioner which manufactures these items. Upon the audit of petitioner, the Audit Division determined that petitioner's books and records were adequate and sufficient to warrant an audit method utilizing all records. However, petitioner's Controller, Harvey L. Orner, consented to a test period audit of sales and recurring expense purchases. The audit did not result in an assessment of additional tax due on sales. Petitioner's fixed assets were audited on an item-by-item basis for the entire audit period. The only remaining issue is the taxability of production machinery and equipment and certain computer and office equipment purchased by petitioner for consignment to its subsidiary in the Philippines.

5. When petitioner purchased the machinery and equipment, it would instruct the vendor to pack said items for overseas shipment. The vendor would then deliver the sealed crates containing petitioner's purchases to petitioner's offices in College Point, to the pier in New York or to a trucker for delivery to the pier for shipment. The machinery and equipment would remain in the sealed crates for a period of from one to five days, or until the next ship was departing from New York to the Philippines. Upon arrival in New York, petitioner's shipping and receiving clerks would inspect the crates to see that they were correctly packed. If they were not correctly packed and not readily repairable by the clerks, petitioner would ask the vendor to repack, since packing charges were part of the purchase price. When purchasing smaller items, employees of

petitioner would load said items into shipping containers, usually by means of a forklift truck.

6. When the machinery and equipment were delivered to New York, they were carried by petitioner in its fixed assets account. After consignment to its subsidiary in the Philippines, petitioner took the depreciation on the machinery and equipment. In all cases, petitioner was the purchaser of the machinery and equipment.

7. Petitioner contends that certain computers, typewriters and other office equipment were used directly **in** production and should, therefore, be exempt from the imposition of New York State sales and compensating use taxes. It **is** petitioner's position that such equipment performs factory functions by generating hard copy as to what the factory produces.

#### CONCLUSIONS OF LAW

A. That 20 NYCRR 525.2(a)(3) provides that the "sales tax **is** a 'destination tax,' that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser **or** designee controls both the tax incident and the tax rate."

B. That title to the machinery and equipment passed to petitioner in New York. While in New York, petitioner carried the machinery and equipment in its fixed assets account and, even after shipment to the Philippines, petitioner continued to take the depreciation. Petitioner **was** the purchaser of the machinery and equipment and, even though physical possession was transferred to Gelmart Industries Philippines, Inc., title remained with petitioner. Petitioner performed no manufacturing function; the subsidiary in the Philippines used the machinery and equipment to manufacture the items which were sent back for sale

by petitioner in New York. Therefore, petitioner is liable for tax on the purchase of the machinery and equipment.

C. That section 1115(a)(12) of the Tax Law exempts from the imposition of sales and use tax, machinery and equipment for use or consumption directly and predominantly in the production of tangible personal property for sale by manufacturing. Section 1107(b)(1) of the Tax Law provides that the exemption provided for in section 1115(a)(12) of the Tax Law shall not apply to the temporary municipal assistance sales and compensating use taxes imposed by the City of New York, which taxes are imposed at the rate of four percent.

D. That 20 NYCRR 528.13(c)(2) provides that "[u]sage in activities collateral to the actual production process is not deemed to be used directly in production." Petitioner did not submit sufficient evidence to carry forward its burden of proof to show that the computers, typewriters and other office equipment were used directly and predominantly in the production of tangible personal property for sale by manufacturing. Purchase of said equipment cannot be exempted from State sales and use taxes as provided in section 1115(a)(12) and is, therefore, subject to the taxes imposed pursuant to sections 1105(a) and 1110 of the Tax Law as well as the City taxes imposed pursuant to section 1107(a) of the Tax Law.

E. That the laws of New York State are presumed to be constitutionally valid at the administrative level of the Tax Commission.


F. That, as indicated in Finding of Fact "2", supra, petitioner is to receive credit for payment of total tax and interest due on the assessments issued pursuant to Notice Numbers S830315002Q and S830315004Q and all penalties imposed upon these assessments and upon those remaining at issue is abated.

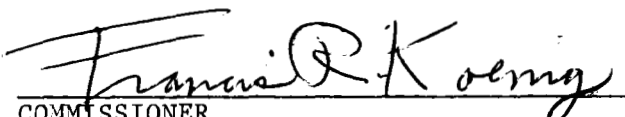
G. That the petition of Gelmart Industries, Inc. is granted to the extent indicated in Conclusion of Law "F"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due bearing Notice Numbers S830315001Q and S830315003Q issued to said petitioner on March 15, 1983; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1987.

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER