

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Utopia Productions, Inc.

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Periods 9/1/69 - 11/30/69 & 9/1/72 - 8/31/75.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of June, 1981, he served the within notice of Decision by mail upon Utopia Productions, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Utopia Productions, Inc.
ATTN: Jeffrey Kanew
45 East 89th St., Apt. 22D
New York, NY 10028

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
19th day of June, 1981.

Annie R. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

June 19, 1981

Utopia Productions, Inc.
ATTN: Jeffrey Kanew
45 East 89th St., Apt. 22D
New York, NY 10028

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

UTOPIA PRODUCTIONS, 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 Periods September 1,
1969 through November 30, 1969 and September 1,
1972 through August 31, 1975.

Petitioner, Utopia Productions, Inc., 45 East 89th Street, Apt. 22D, New York, New York 10028, 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 periods September 1, 1969 through November 30, 1969 and September 1, 1972 through August 31, 1975 (File No. 17666).

A small claims 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 September 17, 1979 at 1:15 P.M. and continued on January 20, 1981 at 9:15 A.M. Petitioner appeared by S. Zachery Sheer, CPA on September 17, 1979 and by its President, Jeffrey Kanew on January 20, 1981. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt and Angelo Scopellito, Esqs., of counsel).

ISSUES

I. Whether petitioner is liable for sales taxes it failed to collect from certain of its customers.

II. Whether petitioner's purchases of tangible personal property and services used in the production of advertising films constituted purchases for resale to its customers.

III. Whether the Audit Division timely assessed additional taxes for the period September 1, 1969 through November 30, 1969.

FINDINGS OF FACT

1. Petitioner, Utopia Productions, Inc., is a film editor. It produces coming attractions (trailers) and radio and television commercials for motion picture studios.

2. On November 30, 1976, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period September 1, 1969 through November 30, 1969 and September 1, 1972 through August 31, 1975 for taxes due of \$20,500.39, plus penalty and interest of \$10,279.93, for a total of \$30,780.32.

3. Petitioner executed a consent dated December 12, 1975 extending the period of limitation for assessment of sales and use taxes for the periods at issue, to December 19, 1976.

4. On audit, the Audit Division, based on its examination of sales invoices for the entire audit period, determined additional taxable sales of \$77,197.24 and tax due thereon of \$5,621.67. Such sales represented sales of film delivered within New York City on which no sales tax was collected. The Audit Division also examined expense purchases for the period January 1, 1974 through December 31, 1974. Petitioner was held liable for use tax on purchases of \$68,484.65 for the test year. Said amount was related to gross sales for the same year to determine an error factor of 5.477 percent which was applied to gross sales for the audit period to arrive at total taxable expense

purchases of \$189,348.99 and tax due thereon of \$13,877.95. Use taxes of \$1,000.77 were asserted on fixed assets acquired during the audit period, however, at the hearing petitioner conceded that such taxes were due.

5. The additional taxable sales of \$77,197.24 found by the Audit Division were comprised of the following:

United Artists Corp.	\$70,113.50
Bing Crosby Productions	4,415.20
Avco Embassy	2,668.54

United Artists Corp. advised petitioner on its purchase orders not to collect sales tax on certain films which it indicated were for export to foreign countries. Subsequent to the audit period, United Artists notified petitioner that its previous determination that film received in New York for reshipment to foreign countries was erroneous and requested petitioner to collect tax on all such sales in the future.

United Artists' books and records were subject to a sales and use tax audit for the period June 1, 1972 through May 31, 1976. The resulting deficiency was paid by United Artists.

6. In the process of producing advertising films petitioner is supplied with a motion picture and various materials relating to the motion picture by the customer. Petitioner selects certain sections from the film, re-edits, adds titles, narration, music and combines all such elements into a finished advertising film. Petitioner purchases or rents the necessary tangible personal property and engages the suppliers of necessary services required to produce the completed film.

7. The purchases of tangible personal property and services at issue consist of the following:

- a) equipment repairs, parts and supplies
- b) props and set materials used in filming certain scenes of a film
- c) rental of stock footage from a film library which is duplicated and incorporated into the film being produced
- d) rental of a studio and equipment
- e) set designer and construction drawings
- f) music production for the Joseph E. Levine screen logo
- g) services of an animation studio which created and performed the original photography and produced the optical negative for segments of the coming attraction for the "Man with the Golden Gun"
- h) video tape studios that made video tape copies of a completed commercial
- i) film laboratories that produced duplicate exhibition prints of a commercial
- j) 8-track tape recording of a radio commercial
- k) recording, narration and sound mixing services
- l) film tape on which copies are made
- m) check prints of the final optical work
- n) multiple copies of a soundtrack

Petitioner conceded that tax was due on the purchases referred to in (a) above. Such purchases totaled \$1,225.00. With the exception of the purchases indicated in (a), (b), (c), (d) and (e), the tangible personal property purchased as such and any tangible personal property it received in connection with the purchase of a service are transferred to petitioner's customer.

8. Petitioner's invoices itemized the specific expenses incurred in the production of the completed film. The amount the customer was charged reflected petitioner's cost plus a markup and sales tax was charged on the total invoice.

9. The Audit Division failed to establish that petitioner's books and records were inadequate to conduct a complete audit of expense purchases and determine the exact amount of tax due on such purchases for the audit period.

10. Reasonable cause existed for petitioner's failure to collect or pay the taxes at issue.

CONCLUSIONS OF LAW

A. That petitioner failed to establish that the sales set forth in Finding of Fact "5" were not subject to tax as required by section 1132(c) of the Tax Law and therefore is personally liable for tax required to be collected pursuant to section 1133(a) of the Tax Law. However, although petitioner is personally liable for the tax it was responsible for collecting, the sales tax is a "consumer tax" and the consumer cannot shift liability for payment of the tax to another person nor otherwise relieve himself of such liability in accordance with 20 NYCRR 525.2(a)(4). That in the instant case, one of petitioner's customers, United Artists Corp., was audited for periods that correspond with the period at issue herein. Consequently, the Audit Division held United Artists Corp. for the tax which it failed to pay on purchases of advertising films from petitioner. Accordingly, the taxes asserted against petitioner on sales to United Artists Corp. are cancelled.

B. That although there is statutory authority for the use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit Matter of Chartair, Inc. v. State Tax Commission, 65 AD 2d 44. That since the Audit Division failed to establish such a foundation, petitioner's tax liability on expense purchases is limited to the actual amount found due for the period January 1, 1974 through December 31, 1974.

That the purchases enumerated in Finding of Fact "7(a) through 7(e)" constituted "purchases at retail" within the meaning and intent of section

1101(b)(1) of the Tax Law and therefore are subject to the tax imposed under section 1105(a) of the Tax Law.

That the purchases enumerated in Finding of Fact "7(f) through 7(n)" were purchased for "resale" within the meaning and intent of section 1101(b)(4) of the Tax Law and therefore, petitioner is not liable for the tax on such purchases.

That based on the foregoing, the taxable expense purchases are adjusted to \$4,140.42 for the entire period at issue.

C. That since the taxes asserted for the period September 1, 1969 through November 30, 1969 were based entirely on expense purchases, the issue regarding the timeliness of the assessment of said taxes, is moot.

D. That the penalty and interest in excess of the minimum statutory rate are cancelled.

E. That the petition of Utopia Productions, Inc. is granted to the extent indicated in Conclusions of Law "A", "B", "C" and "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 30, 1976; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUN 19 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER