

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

May 20, 1983

Fannon/Osmond, Inc.
1071 Avenue of the Americas
New York, NY 10018

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 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 Law 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gerard A. Navagh
420 Lexington Ave.
New York, NY 10170
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Fannon/Osmond, Inc. :
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 :
Period 6/1/76 - 5/31/79. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Fannon/Osmond, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fannon/Osmond, Inc.
1071 Avenue of the Americas
New York, NY 10018

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
20th day of May, 1983.

David Parchuck

William P. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Fannon/Osmond, 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 :
Period 6/1/76 - 5/31/79. :
:

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Gerard A. Navagh the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerard A. Navagh
420 Lexington Ave.
New York, NY 10170

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
20th day of May, 1983.

David Parchuck

James R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FANNON/OSMOND, 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, 1976	:	
through May 31, 1979	:	

Petitioner, Fannon/Osmond, Inc., 1071 Avenue of the Americas, New York, New York 10018, 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, 1976 through May 31, 1979 (File No. 33480).

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 November 18, 1982, at 10:00 A.M., with all briefs to be submitted by January 24, 1983. Petitioner appeared by Gerard A. Navagh, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether purchases of art supplies, photostats and prints, typography, and artwork by petitioner were purchases for resale and not subject to sales and use tax.

II. Whether the aforesaid purchases constitute tax exempt purchases of equipment for use directly and predominantly in the production of tangible personal property.

III. Whether the Audit Division properly used a test period to determine petitioner's sales and use tax liability.

FINDINGS OF FACT

1. On December 19, 1980, as the 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, Fannon/Osmond, Inc., in the amount of \$45,527.00 plus interest of \$10,395.18 for a total due of \$55,922.18 for the period June 1, 1976 through May 31, 1979.

2. Petitioner, by James Fannon, president, executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1976 through May 31, 1979 to December 20, 1980.

3. Petitioner is an audio-visual production company which specializes in producing filmed written communications for use primarily between corporate management and sales forces in the field. Petitioner has a complete facility for creation and production of audio-visual communications. These productions consist mainly of multi-image slides with use of film, video tape and sound. Petitioner employs a variety of specialists including artists, designers, illustrators, and mechanical specialists. The specialists are independent contractors who work for petitioner at an hourly rate on a per job basis.

4. As part of its production costs, petitioner must purchase art supplies, photostats and prints, typography, and artwork. Petitioner did not show what part of its production costs included materials which became part of the final product and were passed along to the customer and what part was equipment used in the production of its product. Testimony indicated that in some of petitioner's contracts the customer took title to the production materials at the beginning of production. However, a sample contract which petitioner offered in evidence merely stated that all ideas and creative materials prepared by petitioner became the sole and exclusive property of the customer. Petitioner retained

possession of these materials throughout the production process and when such materials were no longer needed, asked each customer whether the materials should be destroyed or turned over to the customer. Petitioner's vice president estimated that in 50 percent of the cases customers request parts of the production materials.

5. On audit, the Audit Division examined petitioner's non-taxable sales for the audit period and determined that \$568.69 tax was due on additional taxable sales. The Audit Division further determined that \$839.19 tax was due on fixed asset purchases and \$1,111.04 tax was due on stationery and repair expenses on which tax had been unpaid. The aforementioned amounts are not in issue herein.

6. The Audit Division also examined petitioner's production costs for the period in issue. Despite the fact that petitioner maintained a complete and adequate set of books and records from which total purchases for the audit period could be determined, the auditor chose to utilize a test period to determine tax due on purchases. The auditor testified that he conducted a test period examination because "at that time, that was the procedure" of the Audit Division.

7. The auditor tested purchases for the quarter ending May 31, 1977 and found that purchases on which no tax had been paid amounted to \$31,333.58 which represented 93.6 percent of the purchases for the test period. The aforesaid percentage was applied to the appropriate production costs for the entire audit period and resulted in total purchases of \$537,601.00 on which tax was unpaid. Tax due on the aforesaid figure was determined to be \$43,008.08. Petitioner argued that since it maintained a complete set of books and records and had not

agreed to a test period, the use of such a test period was improper and tax on purchases could not be assessed on purchases outside of the quarter tested.

8. Petitioner also argued that since its purchase expenses were itemized and charged to its customers, its purchases were purchases for resale and thus not subject to tax because tax was collected on the sale to its customers and could not be collected a second time on the original purchase by petitioner. Alternatively, petitioner argued that, if the purchases were not for resale, they were purchases of equipment for use directly and predominantly in the production of tangible personal property and exempt from New York State sales and use tax and thus, only taxable at the four percent New York City rate.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i)(A) of the Tax Law excludes sales for resale from the tax on receipts from every retail sale of tangible personal property imposed by section 1105(a). Inasmuch as petitioner produced no evidence showing to what extent the purchases in issue were passed along to its customers as physical component parts of its finished audio-visual products, it has failed to prove that such purchases were for resale. Moreover, although petitioner transferred some of the materials purchased to its customers, petitioner used said purchases in the preparation of its audio-visual products; therefore, such purchases were not for resale within the meaning and intent of section 1101(b)(4) (see Laux Advertising, Inc. v. Tully, 67 A.D. 2d 1066; Matter of Parenti Studio, Inc., State Tax Commission, October 9, 1981).

B. That section 1115(a)(12) of the Tax Law exempts from sales and use taxes receipts from the sale of machinery or equipment used directly and predominantly in the production of tangible personal property. The photostats and prints, artwork and typography purchased by petitioner constitute equipment

used directly and predominantly in the production of its audio-visual products within the meaning and intent of section 1115(a)(12) and are, therefore, exempt from New York State sales and use tax. The aforesaid purchases are subject to the New York City local sales tax pursuant to section 1210(a)(1) of the Tax Law (see Matter of Parenti Studio, Inc., supra).

C. That petitioner failed to prove that the art supplies it purchased constitute equipment used directly and predominantly in the production of tangible personal property within the meaning and intent of section 1115(a)(12) and are, therefore, subject to New York State sales and use tax as well as the New York City local sales tax.


D. That in view of the fact that petitioner maintained a complete and adequate set of books and records, the Audit Division's resort to a one-quarter test period in computing unpaid sales tax on purchases was unwarranted (Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44). Therefore, the tax due on purchases is reduced to the amount due on purchases for the test quarter ending May 31, 1977.

E. That the petition of Fannon/Osmond, Inc. is granted to the extent indicated in Conclusions of Law "B" 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 December 19, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 20 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 512

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Fannon/Osmond Inc.</i>	
Street and No. <i>1071 Ave. of the Americas</i>	
P.O., State and ZIP Code <i>New York, NY 10018</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 207 513

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Gerard A. Navagh</i>	
Street and No. <i>420 Lexington Ave.</i>	
P.O., State and ZIP Code <i>New York, NY 10170</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982