

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

January 28, 1983

Nu Concept School Photography, Inc.  
559 Main St.  
New Rochelle, NY 10801

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Steven M. Coren  
485 Madison Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Nu Concept School Photography, 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: :  
12/1/74-5/31/77. :

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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 28th day of January, 1983, he served the within notice of Decision by certified mail upon Nu Concept School Photography, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nu Concept School Photography, Inc.  
559 Main St.  
New Rochelle, NY 10801

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  
28th day of January, 1983.

David Parchuck

Cecile R. Haglund  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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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 28th day of January, 1983, he served the within notice of Decision by certified mail upon Steven M. Coren the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven M. Coren  
485 Madison Ave.  
New York, NY 10022

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  
28th day of January, 1983.

David Parchuck

Carrie P. Hagel

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
NU CONCEPT SCHOOL PHOTOGRAPHY, INC.  
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 December 1, 1974  
through May 31, 1977.

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DECISION

Petitioner, Nu Concept School Photography, Inc., 559 Main Street, New Rochelle, New York 10801, 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 December 1, 1974 through May 31, 1977 (File No. 22727).

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 May 1, 1981 at 9:00 A.M. and continued on June 23, 1981 at 9:30 A.M. Petitioner appeared by Steven M. Coren, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioner.
- II. Whether petitioner is liable for tax on pictures provided free to school principals and faculty.
- III. Whether certain expense purchases and fixed assets are subject to tax.
- IV. Whether the Audit Division properly used a test period as a basis for determining petitioner's sales and use tax liability for the period December 1, 1974 through May 31, 1977.

FINDINGS OF FACT

1. Petitioner, Nu Concept School Photography, Inc., is a photographer engaged exclusively in photographing school students.

2. On January 13, 1978, 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 December 1, 1974 through May 31, 1977 for taxes due of \$8,156.15, plus penalty and interest of \$3,597.47, for a total of \$11,753.62.

3. On audit, the Audit Division analyzed petitioner's sales contracts for the period March 1, 1976 through May 31, 1976. Based on this analysis, the Division accepted the accuracy of taxable sales and taxes paid thereon for the audit period. However, nontaxable sales reported were disallowed in total resulting in additional taxes due of \$6,666.46. Also, based on the test of sales for the above period, the Audit Division asserted use taxes of \$315.49 on pictures furnished free by petitioner to school faculty. (The normal retail selling price was used as the taxable base.) Use taxes of \$1,174.40 were also determined on the following purchases:

a) film, developing proofs, proofing and envelopes	\$7,475.28
b) factory supplies	3,693.13
c) office supplies	2,305.32
d) fixed assets	1,744.55

The purchases in (a) were based on an examination of purchase invoices for twelve months of the audit period which disclosed that 7.167 percent of total purchases examined were subject to tax. The purchases of factory and office supplies were determined from a test for the period March 1, 1976 through May 31, 1976 which revealed that no tax was paid on 55.6 percent and 38.8 percent of purchases in the respective accounts. Fixed asset acquisitions were reviewed for the entire audit period.

4. Petitioner solicited sales directly with parochial and public schools or Parent Teacher Associations (PTA). The sales contract, including the price and type of package and terms are negotiated between petitioner and the school principal or the designated person in charge of the PTA. The photographing takes place at the school on dates arranged by the PTA or school. Petitioner processes the film and delivers proofs to the school or PTA. The school or PTA orders the pictures which when completed are delivered directly to the school or PTA. Petitioner receives payment for the pictures from the school or PTA.

5. Petitioner had exemption certificates on file covering the sales disallowed by the Audit Division. However, said certificates were not recognized by the Division based on its position that the exempt organization was not the purchaser of the pictures but rather was an agent for petitioner.

Petitioner did not solicit sales from students nor did it receive any payments directly from the students, except for orders for additional pictures which are not at issue. The exempt organization was the purchaser and payer of record for all sales disallowed by the Audit Division.<sup>1</sup>

6. Petitioner furnished complimentary pictures to the school principal and faculty. The sales contract specified the type and quantity. Petitioner argued the negotiated sales price of the pictures included a cost for complimentary pictures and were actually a part of the total sale.

7. Petitioner argued that the purchases referred to in Finding of Fact "3.a" were purchased for resale and that factory and office supplies were purchased from local businesses and therefore sales tax was paid to the vendor.

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<sup>1</sup> It is to be noted that sales of pictures by a public school are subject to tax because a governmental entity must collect sales tax whenever it sells tangible personal property or services of a kind ordinarily sold by private persons. Sales of pictures by other qualifying non-profit organizations, such as a PTA, church, or non-public school, are subject to sales tax only when the sales is made through a shop or store. (Advisory Opinion No. S801030A, State Tax Commission, February 27, 1981).

8. Petitioner corporation was formed in January, 1975 by Lawrence Pasini and Michael Amoruso. Upon its organization, Mr. Pasini transferred photographic and office equipment, having a value of \$1,250.00, to petitioner. The following journal entries were recorded in petitioner's books and records to account for the equipment acquisition:

Camera Equipment	\$1,250	
Loan - Larry Pasini		\$1,250
Loan - Larry Pasini	\$2,500	
Capital Stock		\$2,500

The \$2,500 also includes other organizational expenses paid personally by Lawrence Pasini on petitioner's behalf. Petitioner argued that the above transaction constituted equipment transferred to a corporation upon its organization in consideration for stock and therefore was not subject to tax.

Petitioner offered no evidence with respect to the remaining fixed assets it acquired.

9. Petitioner maintained complete and adequate books and records from which the Audit Division could have determined the exact amount of sales and use taxes due.

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

#### CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that:

(I)t shall be presumed that all receipts for property or services... are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable...shall be upon the person required to collect tax. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe..., or (2) the purchaser prior to taking delivery, furnishes to the vendor: any affidavit...demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen.... Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt...is not taxable...shall be solely upon the customer.

That the sales at issue were made directly to organizations exempt from tax under section 1116 of the Tax Law and that said organizations were the payer of record and furnished proper exemption documents to petitioner. Therefore, the additional taxes determined due of \$6,666.46 on disallowed nontaxable sales are cancelled.

B. That the complimentary pictures given to school principals and faculty were used to facilitate a sale and thereby constitutes a taxable use of tangible personal property by petitioner in accordance with the meaning and intent of section 1110(B) of the Tax Law.

C. That the tangible personal property and services set forth in Finding of Fact "3.a" were not purchased for "resale" within the meaning and intent of section 1101(b)(4) of the Tax Law. However, the film constituted equipment used directly and predominantly in the production of tangible personal property for sale and therefore, is exempt from New York State and local sales and use taxes under sections 1115(a)(12) and 1210(a)(1) of the Tax Law.

That the envelopes purchased by petitioner and used for delivery of the product (film, proofs and prints) are also exempt from tax under section 1115(a)(19) of the Tax Law as packaging materials actually transferred to the purchaser.

That petitioner failed to establish by any substantial evidence that sales tax was paid on the purchases of factory and office supplies found subject to tax by the Audit Division.

That in accordance with the foregoing, petitioner is liable for the tax on factory and office supplies, as well as, the purchases of developing proofs and proofing pursuant to section 1133(b) of the Tax Law, however, the taxes asserted on purchases of film and envelopes used for product delivery are cancelled.



D. That the transfer of equipment by Lawrence Pasini to petitioner upon its organization was not in consideration for the issuance of stock as evidenced by the accounting entries referred to in Finding of Fact "8" and therefore, does not qualify for the exclusion provided in section 1101(b)(4)(ii)(D) of the Tax Law and 20 NYCRR 526.6(d)(5). That petitioner initially effectuated a direct sale and subsequently chose to compensate the seller, Lawrence Pasini, by issuing stock. Therefore, the transaction is subject to the tax imposed by section 1105(a) of the Tax Law.

E. 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 A.D.2d 44, 411 N.Y.S.2d 41).

That since petitioner maintained complete and adequate books and records, the Audit Division's use of a test period to determine the tax due on purchases and complimentary pictures was not proper. Accordingly, such taxes due are reduced to the actual amounts found due for the periods examined, based on the following purchases:

developing proofs, proofing	\$783.90
factory supplies	850.04
office supplies	98.25
complimentary pictures	651.40

F. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

G. That the petition of Nu Concept School Photography, Inc. is granted to the extent indicated in Conclusions of Law "A", "C", "D", "E" and "F"; that the

Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 13, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 28 1983

STATE TAX COMMISSION

*Robert A. J. Burdick*  
ACTING PRESIDENT

*Francis Q. Keong*  
COMMISSIONER

*Mark J. [unclear]*  
COMMISSIONER

**P 278 401 728**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

SENT TO		<i>Mr. Concept School Photo</i>	
STREET AND NO.		<i>359 Main St</i>	
P.O. STATE AND ZIP CODE		<i>New Rochelle NY 10801</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

**P 278 401 729**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

SENT TO		<i>Steven M. Ciro</i>	
STREET AND NO.		<i>485 Madison Ave</i>	
P.O. STATE AND ZIP CODE		<i>New York, NY 10022</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976