

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

October 21, 1983

The Whitlock Press, Inc.
c/o Arthur English
18 Montgomery St.
Middletown, NY 10940

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
The Whitlock Press, 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 6/1/77-5/31/80. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon The Whitlock Press, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Whitlock Press, Inc.
c/o Arthur English
18 Montgomery St.
Middletown, NY 10940

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
21st day of October, 1983.

Connie A. Hagelund

Patricia Kupscheni

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THE WHITLOCK PRESS, 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, 1977	:	
through May 31, 1980.	:	

Petitioner, The Whitlock Press, Inc., 18 Montgomery Street, Middletown, New York 10940, 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, 1977 through May 31, 1980 (File No. 34688).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 9, 1983 at 10:45 A.M. Petitioner appeared by Arthur R. English, President. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional tax due on the use of electricity.

II. Whether the Audit Division is precluded from assessing the additional tax described in Issue I above based on the results of a prior field audit.

III. Whether the Audit Division properly determined additional local tax due on petitioner's purchases of gas used for heating purposes.

FINDINGS OF FACT

1. On June 19, 1981, as a result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Whitlock Press, Inc. [sic] covering the period June 1, 1977 through May 31, 1980. The Notice asserted additional tax due of \$1,035.89, plus interest of \$201.88, for a total of \$1,237.77.

2. Petitioner, by signature of its president, Arthur R. English, executed a consent to extend the period of limitation for the issuance of an assessment for the period June 1, 1977 through May 31, 1980 to June 20, 1981.

3. Petitioner's business activity involves the printing and binding of educational books and booklets for publishing companies and governmental agencies.

4. On audit, the Audit Division found that petitioner reported 15 percent of its total electricity purchased as subject to tax on sales and use tax returns filed. Since no backup computations were available to support the percentage reported, the Audit Division requested that petitioner make an electrical usage survey to determine the percentage of taxable electricity not used directly and exclusively in production. Three individual surveys were completed by the plant manager and verified by the Audit Division. Based on the surveys, the Audit Division determined the taxable percentages of total electrical usage as follows:

Prep Room	19.7 %
Press Room	21.85%
Bindery	29.6 %

The above percentages were derived from consumption by general lighting and non-production equipment. The Audit Division determined additional tax due of \$518.28 on electricity consumed in that manner.

The Audit Division also found that petitioner reported and paid tax at the rate of only 4 percent on its sales and use tax returns filed for purchases of gas used for heating purposes. The Audit Division held these purchases subject to the Middletown School District tax of 3 percent and determined additional tax due of \$517.61 on such purchases. The total additional tax of \$1,035.89 was thereby determined due.

5. Petitioner argued that the printing industry requires a higher level of lighting than would ordinarily be considered "general lighting" and which is considered a cost of manufacturing. Petitioner therefore contended that this electricity should not be fully taxable as general lighting because of that need.

6. Petitioner further argued that 15 percent of its electrical usage, which it had been reporting as subject to use tax on its sales and use tax returns, was determined as a result of a prior field audit and that it had in good faith reported the predetermined percentage. Petitioner therefore questioned the legality of the Audit Division determining a higher rate and assessing the additional tax due thereon. Petitioner offered no evidence of any agreement between the Audit Division and itself for tax reporting purposes. No evidence was submitted to show the type of equipment or lighting used during the prior audit period for comparison.

7. Petitioner contended that it was unaware of the 3 percent tax on gas imposed by the Middletown School District and therefore reported only the state tax of 4 percent.

In addition, petitioner contended that heat is required in the plant to keep production equipment and paper at a room temperature of 75-80° for ideal running conditions. Petitioner therefore argued that if it were able to

turn down its thermostat, the manufacturing cost savings derived therefrom would not be subject to tax.

CONCLUSIONS OF LAW

A. That section 1115(c) of the Tax Law exempts from tax gas and electricity for use or consumption directly and exclusively in the production of tangible personal property for sale by manufacturing.

That 20 NYCRR 528.22(c) provides that, (1) "directly" means the gas and electricity must, during the production phase of a process, either:

- (i) operate exempt production machinery or equipment, or
- (ii) create conditions necessary for production, or
- (iii) perform an actual part of the production process.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

Pursuant to 20 NYCRR 528.22(a)(2), gas and electricity used or consumed in the heating, cooling or lighting of buildings is subject to the sales tax.

B. That the Audit Division properly determined petitioner's taxable electrical usage for lighting and non-production equipment based on the survey made by petitioner's plant manager.

That tax assessments are to be viewed for each year and may be decided differently than in previous years. (Marx v. Goodrich, 286 A.D. 913, 142 N.Y.S.2d 28.) The Audit Division was therefore not required to accept or use the rate of electricity which was taxable under section 1105(b) of the Tax Law as determined by a prior field audit.

C. That petitioner's purchases of gas were taxable under section 1105(b) of the Tax Law. That the Audit Division properly determined the additional tax authorized under the provisions of Tax Law §1212.

D. That the petition of The Whitlock Press, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 19, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 21 1983

Rodolph A. Chin
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

P 481 208 439

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
THE WHITELOCK PRESS, INC.	
Street and No.	
18 MONTGOMERY ST.	
P.O., State and ZIP Code	
MIDDLETOWN, NY 10940	
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