

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
L & M Graphics, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 3/1/76 - 5/31/80. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of March, 1984, he served the within notice of Decision by certified mail upon L & M Graphics, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

L & M Graphics, Inc.
19 West 24th Street
New York, NY 10011

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 March, 1984.

David Parchuck

James R. H. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

State of New York }
County of Albany } ss.:

George L. Robbins
87 Newkirk Rd.
Yonkers, NY 10710

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.

Daniol Paruchuk

James P. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 21, 1984

L & M Graphics, Inc.
19 West 24th Street
New York, NY 10011

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
George L. Robbins
87 Newkirk Rd.
Yonkers, NY 10710
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
L & M GRAPHICS, 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 March 1, 1976	:	
through May 31, 1980.	:	

Petitioner, L & M Graphics, Inc., 19 West 24th Street, New York, New York 10011, 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 March 1, 1976 through May 31, 1980 (File No. 33557).

A small claims hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 20, 1983 at 2:45 P.M., with all briefs to be submitted by September 20, 1983. Petitioner appeared by George L. Robbins, P.A. The Audit Division appeared by John P. Dugan, Esq. (Anna D. Colello, Esq., of counsel).

ISSUES

I. Whether the petitioner's purchases of chemicals, which were used in the processing of film and the manufacture of printing plates, were made for resale pursuant to section 1101(b)(4)(i) of the Tax Law.

II. Whether the petitioner's purchases of film were made for resale pursuant to section 1101(b)(4)(i) of the Tax Law.

FINDINGS OF FACT

1. On March 2, 1981 the Audit Division, as the result of a field audit, issued two notices of determination and demand for payment of sales and use

taxes due against the petitioner, L & M Graphics, Inc., assessing additional sales and use taxes under Articles 28 and 29 of the Tax Law.

The first notice covered the period March 1, 1976 through August 31, 1979 and assessed additional sales and use taxes of \$4,169.02, plus interest of \$986.66, for a total amount due of \$5,155.68.

The second notice covered the period September 1, 1979 through May 31, 1980 and assessed additional sales and use taxes of \$1,202.04, plus interest of \$92.46, for a total amount due of \$1,294.50.

2. The petitioner, L & M Graphics, Inc., by signature of its president, Edward Licitra, executed consents extending the period of limitations for assessing sales and use taxes for the period in question to March 31, 1981.

3. On audit, the auditor tested expense purchases for the period July 1, 1977 through June 30, 1978. Purchase invoices for other years were not available. The auditor determined that the petitioner failed to pay sales or use tax on film purchases of \$13,146.00 and chemical purchases of \$7,257.00 which amounts represented percentages of error to gross sales of 12.878 percent and 7.089 percent respectively. The percentages of error were applied to gross sales reported for the period at issue, resulting in additional film purchases of \$65,513.00 and chemical purchases of \$36,063.00 and tax of \$2,620.52 and \$2,885.04 respectively. The film purchases were subject to the 4 percent New York City rate, whereas, the chemicals were subject to the 8 percent combined New York State and New York City rate.

The auditor also examined fixed assets for the entire period at issue and found that the petitioner failed to pay tax on assets totalling \$1,400.00 resulting in tax due of \$96.00.

Further, the auditor allowed the petitioner a credit of \$230.50 representing tax paid on electricity used in production. The taxes found due on film, chemical and fixed asset purchases, less the credit for tax paid on electricity purchases resulted in additional taxes due of \$5,371.06. At issue herein are the additional taxes found due on the film and chemical purchases.

4. L & M Graphics, Inc. is a trade flatmaker and a trade platemaker. The petitioner also sold developed film or "negatives" by themselves not incorporated on a flat.

The petitioner purchases film in bulk, usually a one to three weeks supply. From artwork supplied by the printer or the printer's customers, and the use of cameras, the petitioner generates pieces of film which are developed and stripped together on a flat. A flat is a piece of orangy colored or goldenrod paper or plastic upon which the individual pieces of film are mounted in such a way that they will be correctly positioned for a printing plate. The flats are occasionally sold after the above operations by petitioner without the production of a plate.

The next step is the creation of lithographic plates. By a process of photographic exposure of the flat onto a piece of metal, and appropriate development, an image is created thereon which accords with the lithographic process, i.e. it will be receptive in certain areas to greasy ink and repellent in certain areas to water.

5. The plates are forwarded on to the printer for creation of the final product. The flats, at the direction of the printer or the printer's customer, are either stored by petitioner for the eventual creation of additional plates or sent to the printer or the printer's customer. According to trade customs, all right and title to the flat belongs to the printer or the printer's customer.

6. The chemicals which petitioner purchased were used in the processing of film and the manufacture of printing plates. The chemicals are not completely removed from the plates or film after creation, i.e. small amounts can be detected on the plates and film. Approximately 60 percent of the chemical purchases was used in the manufacture of plates whereas the remaining 40 percent was used in the processing of film.

7. The petitioner failed to produce any evidence to show the amount of film sold by itself without the creation of a flat, or film sold as part of a flat without the creation of a printing plate.

CONCLUSIONS OF LAW

A. That section 1101(b)(4) of the Tax Law provides for an exclusion from the tax imposed on retail sales of tangible personal property as follows:

"(4) Retail sales. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property..." (emphasis added).

B. That the petitioners failed to sustain the burden of proof required to show that amount of film which was resold as such without the creation of a flat, i.e. "negatives", or film sold as part of a flat without the creation of a printing plate.

That the film which was developed and incorporated in a flat and used by petitioner in the manufacture of a printing plate was not purchased for resale within the meaning and intent of section 1101(b)(4) of the Tax Law (Matter of Baronet Lithographic Co., STC August 25, 1978. The primary purpose of the film was not of reselling it to petitioner's customers but rather for petitioner's use in making a flat and any resale thereof was purely incidental (Matter of Laux Advertising, Inc. v. State Tax Commission, 67 A.D.2d 1066; Matter of Cut-Outs, Inc. v. State Tax Commission, 85 A.D.2d 838)).

C. That while only small amounts of the chemicals may be detected in the film and plates, the degree of consumption was not made a statutory factor and the ordinary meaning of a "component" is broad enough to include detectable traces contained in the finished product (Finch, Pruyn & Co. v. Tully, 69 A.D.2d 192, 419 N.Y.S.2d 232 (1979)).

D. That petitioner, L & M Graphics, Inc., has shown that 60 percent of the chemical purchases, which was used in the manufacture of plates, was purchased for resale within the meaning and intent of section 1101(b)(4) of the Tax Law.

E. That the petitioner failed to sustain the burden of proof required to show the amount of chemical purchases which was used to process film resold as such without the creation of a flat, or film sold as part of a flat without the creation of a printing plate.


That chemicals which were used to create flats which were used in the manufacture of printing plates, were not purchased for resale within the meaning and intent of section 1101(b)(4) of the Tax Law.

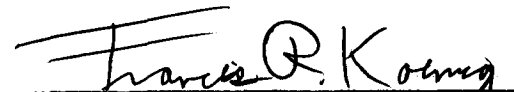
F. That the petition of L & M Graphics, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 2, 1981, and; that except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

MAR 21 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>2846 Graphics, etc.</i>	
Street and No. <i>19 W. 24th St.</i>	
P.O., State and ZIP Code <i>NY, NY 10011</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 440 976 785

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>George L. Robbins</i>	
Street and No. <i>87 Newkirk Rd.</i>	
P.O., State and ZIP Code <i>Yonkers, NY 10710</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