STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VIDEO MEMORIES ASSOCIATES, LTD., AND MICHAEL MARANO, AS OFFICER	:	DECISION DTA No. 812291
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1985 through August 31, 1990.	:	

Petitioners Video Memories Associates, Ltd., and Michael Marano, as Officer, 412 Pearl Street, Syracuse, New York 13203, filed an exception to the determination of the Administrative Law Judge issued on July 13, 1995. Petitioner Michael Marano appeared pro se and on behalf of Video Memories Associates, Ltd. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq. and Robert Tompkins, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners' reply brief was due on September 29, 1995, and began the six-month period for issuance of this decision; however, no reply brief was received. Petitioners' request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUE

Whether the Division of Taxation improperly determined that petitioners' receipts from videotaping special events and providing copies of such videotapes to their clients are subject to sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Video Memories Associates Ltd. ("Memories") and Michael Marano (together "petitioners") during all relevant periods were engaged in the business of photographing weddings and other special events on videotape for their customers in New York. The videotapes are then transferred to the customers and petitioners are paid a fee.

The Division of Taxation ("Division") audited petitioners' business operation for the period June 1, 1985 through August 31, 1990 ("the audit period") and concluded they were engaged in selling tangible personal property subject to sales tax under Tax Law § 1105(a).

The auditor made a written request for records requesting petitioners' books and records for the period June 1, 1987 through May 31, 1990. Petitioners provided sales invoices and sales journals for the years 1987, 1988 and 1989. At this point, the auditor determined that Memories was not a registered vendor and did not maintain a sales tax accrual account.[1] The auditor then advised petitioners that the audit was being extended to include June 1, 1985 through May 31, 1987, and was being extended from May 31, 1990 to August 31, 1990. A verbal request for additional books and records for the extended period was made to petitioners (tr., pp. 28-30). The auditor conducted a detailed audit for the years 1987 through 1989 based on the records provided. No books and records were provided for 1985, 1986 and 1990 including Federal income tax returns.

Since no records were provided for 1985, 1986 and 1990, the auditor applied the annual inflation rate based on the cost of living index to 1987's actual gross sales to arrive at estimated gross sales for 1986. Similar computations were done for 1985. At the time of audit, the inflation rate for 1990 was not yet available, so the auditor took the average increases in sales

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[1]Petitioners registered immediately upon being advised by the auditor that their videotapes were taxable.

from 1987 through 1989 and applied that average to 1989 sales to arrive at estimated gross sales for 1990. The auditor's calculations took into consideration petitioners' exempt sales. The auditor arrived at total additional taxable sales of $171,585.08 for the audit period with additional sales tax due of $12,010.95. The audit methodology and audit computations are not disputed in this proceeding, and for that reason, have not been shown.

On July 12, 1991, notices of determination were issued to Memories asserting total additional sales tax due of $12,010.95 for the audit period, plus penalty and interest. Corresponding notices were issued the same day to Mr. Marano, as officer.

Petitioners filed a timely request for conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). At the conciliation conference, petitioners provided the Federal income tax returns for 1985, 1986 and 1990. The auditor used the actual sales figures from these returns to recompute the tax for these years. Ultimately, the tax asserted upon audit was based on petitioners' own books and records.

On July 31, 1992, a Conciliation Order (CMS No. 118439) was issued to petitioners cancelling omnibus penalties and reducing the tax asserted for the audit period to $11,029.26, plus penalty and interest, but otherwise sustaining the notices (Notice Nos. S910712148C, S910712149C, S910712152C, S910712153C).

Petitioners filed a timely petition with the Division of Tax Appeals challenging these assessments and the instant proceeding ensued.

Memories paid tax on all of its purchases of videotapes. The auditor did not give the corporation credit for the tax paid on its purchases, since Memories was not a registered vendor. Since it was not registered as a vendor, Memories would not be able purchase with a resale certificate (tr., p. 38).

Petitioners called their public accountant, Joseph Rotondo, as a witness. Mr. Rotondo testified that he had advised petitioners that they were engaged in providing a service, not the taxable sale of tangible personal property. In forming his opinion, Mr. Rotondo stated that he did not look at section 526(8)(a)(3) of the Division's regulations.

Michael Marano testified that he graduated from Syracuse University with a degree in television and video. In 1983, he decided he wanted to videotape weddings. He went to his lawyer, Mr. Primo, and Video Memories was incorporated. Mr. Primo advised him that his taping of weddings was a nontaxable service.

Mr. Marano started collecting sales tax from his customers back in 1990 when he was first advised by the auditor that his transactions were taxable. He stated that he was not trying to avoid paying sales tax, he was just relying on the advice of his accountant and attorney.

OPINION

In his determination, the Administrative Law Judge concluded that petitioners' receipts were subject to sales tax. However, he concluded that petitioners' failure to timely report and pay sales tax was due to reasonable cause and not due to willful neglect. As a result, he cancelled the penalty imposed by the Division. The Division did not take exception to the determination.

On exception, petitioners argue that their receipts are not taxable because the magnetic medium environment in which videotography operates is most similar to that of computer software. The Division has indicated in TSB-M-93(3)S that custom software for computer applications is not subject to sales and use tax. Petitioners argue that since each event that is videotaped is unique, as is custom software for computer applications, both services are nontaxable.

In opposition, the Division argues that sales of videotapes are taxable sales of tangible personal property. Petitioners do not demonstrate how customized computer software is comparable to videotapes. Further, they do not distinguish videotapes from motion picture films or recordings (both of which store signals and are taxable). The Division argues that custom computer software is not tax exempt because of the magnetic medium used to store the data but because it is the sale of a conceptual design.

Tax Law § 1105(a) imposes a sales tax on receipts from every sale of tangible personal property. Tax Law § 1101(b)(3) defines the term "receipts" as the amount of the sale price of any property taxable under this article. Tax Law § 1101(b)(5) defines a "sale" as any transfer of title or possession or both in any manner or by any means whatsoever for a consideration. "Tangible personal property" means "corporeal personal property of any nature having a material existence and perceptibility to the human senses" (20 NYCRR 526.8[a]). Tangible personal property includes, but is not limited to, "artistic items, such as sketches, paintings, photographs, moving picture films and recordings" (20 NYCRR 526.8[a][3]). Tax Law § 1132(c) provides a presumption that all receipts for property or services of any type mentioned in Tax Law § 1105(a), (b), (c) and (d) are subject to tax until the contrary is established, with the burden of proving nontaxability on the person required to collect tax.

Petitioners' argument that videos should be equated with custom computer software is not persuasive. First, it must be noted that not all computer software is exempt from sales and use tax. In Technical Services Bureau Bulletin 1978-1(S) (dated February 6, 1978), the Division opined that customized computer software was exempt from sales and use tax. It defined software as "[i]nstructions and routines (programs) which, after an analysis of the customer's specific data processing requirements, are determined necessary to program the customer's electronic data processing equipment to enable the customer to accomplish specific functions with his EDP system" and required that certain elements be present in order for the software to be exempt. On October 21, 1988, the Division issued TSB-A-88(54)S which provided that software meeting the criteria of Bulletin 1978-1(S), "whether placed on cards, tape disc pack or other machine readable media or entered into a computer directly," was intangible personal property and exempt from sales and use tax. Software programs not meeting the criteria of Bulletin 1978-1(S), however, were subject to tax.

In March 1993, the Division issued TSB-M-93(3)S (relied on herein by petitioners) which further restricted the type of software exempt from sales and use tax to that which was "designed and developed to the specifications of a specific purchaser." There is no evidence in

the record and petitioners have provided no explanation why sales of their videotapes should be considered the equivalent of sales of custom computer software for sales and use tax purposes while sales of sketches, paintings, photographs, moving picture films and recordings are all subject to such tax.

The Administrative Law Judge concluded that:

> "[i]t is undoubtedly true that part of what petitioners sell is their expertise and the service of taping events. However, it is the videotape memorializing the special event that the customer is seeking. Petitioners' expertise is just one of the elements that goes into making the video. While the videotaping of an event by itself would not be taxable, when petitioners go to an event, videotape the event, and transfer the videotape to the customer for a fee, petitioners are making a retail sale of tangible personal property pursuant to Tax Law § 1105(a), and the entire receipt is subject to sales tax (Dynamic Telephone Answering v. State Tax Commission, 135 AD2d 978, 522 NYS2d 386, lv denied 71 NY2d 801, 527 NYS2d 767)" (Determination, conclusion of law "D").

We agree with his conclusion and find no reason to modify his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Video Memories Associates, Ltd., and Michael Marano, as Officer, is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Video Memories Associates, Ltd., and Michael Marano, as Officer, is granted to the extent that penalties are cancelled as set forth in the determination of the Administrative Law Judge; and

4. The four notices of determination dated July 12, 1991, as modified by the Conciliation Order dated July 31, 1992, are sustained.

DATED: Troy, New York
March 14, 1996

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner