

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
NICHOLAS SEYBERT PRINTING CORP. : DETERMINATION  
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 September 1, 1974 :  
through November 30, 1977. :

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Petitioner, Nicholas Seybert Printing Corp., 420 West 25th Street, New York, New York 10001, 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 September 1, 1974 through November 30, 1977 (File No. 800043).

On May 5, 1987, petitioner, through its duly authorized representative, waived a hearing and agreed to submit the case for determination based on the Division of Taxation file and a memorandum of law to be submitted by petitioner by July 24, 1987. After due consideration of the record, Daniel J. Ranalli, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether the Audit Division's treatment of certain purchases made by petitioner as machinery and equipment used in its printing business, as opposed to purchases for resale, was a violation of the equal protection clauses of the New York State and United States Constitutions.

FINDINGS OF FACT

1. Petitioner, Nicholas Seybert Printing Corp., was engaged in a printing business located at 420 West 25th Street, New York, New York.
2. On April 10, 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 covering

the period September 1, 1974 through November 30, 1977 for taxes due of \$12,393.50, plus penalty and interest of \$4,941.98, for a total of \$17,335.48.

3. The audit disclosed that petitioner failed to pay sales or use tax on purchases of printing plates and certain fixed assets. The printing plates were considered production equipment and were held subject to the four percent New York City tax imposed under section 1107 of the Tax Law. The tax due on the purchases of plates amounted to \$12,049.56 and \$343.94 was assessed on the purchases of fixed assets.

4. In May 1980 the State Tax Commission instituted a policy which accorded equal treatment to all items purchased for use in production by printers. The following categories were deemed to be machinery and equipment:

- (a) Offset plates, photoengraving plates (aluminum, bimetal, trimetal, deep etch, paper, photopolymer, plastic, rubber, zinc) and glass screens.
- (b) Lithographic positives, negatives, color separations and film (exposed and unexposed).
- (c) Composition, typography and progressive proofs.
- (d) Artwork, illustrations, layouts, drawings, paintings, mechanicals, overlays, designs, photographs and pasteups.

Such machinery and equipment, when used in the production of property for sale, are not subject to New York State sales tax but are subject to New York City sales tax. Since July 1, 1977, however, New York City has allowed a credit against the City corporation tax and unincorporated business tax for the City sales tax paid on the purchases of such machinery and equipment.

5. On January 18, 1979, the State Tax Commission adopted a policy limiting the assessment periods of printing industry audits involving the City sales tax on items included in categories (a) and (b), supra, to those periods beginning on or after December 1, 1975. Since the sales tax paid on purchases of machinery and equipment is eligible for a credit against City general business taxes with respect to purchases made on or after July 1, 1977, printers were

subject to City sales tax, for which there was no corresponding general business tax credit, on purchases of items in categories (a) and (b) during the period from December 1, 1975 to July 1, 1977. Prior to the establishment of the May 1980 policy, purchases of items in category (c) had been excluded from tax as purchases for resale and, therefore, there was no tax impact on such purchases.

6. On August 2, 1982, the Audit Division issued a Notice of Assessment Review to petitioner which indicated that the tax due on the notice dated April 10, 1978 was adjusted to \$8,496.18 by deleting the tax determined due on purchases of plates for periods prior to December 1, 1975. The penalty was cancelled and interest was reduced to the minimum amount prescribed by law.

7. In Matter of B & B Enterprises, Inc. (State Tax Commission, February 6, 1985), it was held that purchases of printing, paper, typography etc. used to produce "Stagebills" were for resale and therefore not subject to sales and use taxes. This holding was overruled in Matter of Martin Lithographers, Inc. (State Tax Commission, December 2, 1985) which held that in order to prevent inconsistency of sales tax treatment, the policy of limiting the assessment periods of printing industry audits would be extended to all the items considered to be machinery and equipment set forth in Finding of Fact "4", including items in category (d). The Audit Division followed this holding with respect to all printing industry audits.

#### SUMMARY OF PETITIONER'S POSITION

8. Petitioner argued that it received inequitable treatment compared to that given B & B Enterprises, Inc. and as a result incurred the expense of unpaid sales tax and interest charges not borne by B & B Enterprises, Inc. Petitioner alleged that such unequal treatment is unjust and unlawful discrimination and a violation of the New York State and United States Constitutions, specifically the equal protection clauses.

#### CONCLUSIONS OF LAW

A. That there was no unjust and unlawful discrimination against petitioner which would violate the equal protection clauses of the United States or New York State Constitutions.

Administrative agencies are free to correct a prior erroneous interpretation of the law by overruling a past decision. (Matter of Charles A. Field Delivery Service, Inc., 66 NY2d 516.) A specific conclusion in Matter of B & B Enterprises, Inc. (State Tax Commission, February 6, 1985) was found to be erroneous and was clearly overruled in Matter of Martin Lithographers, Inc. (State Tax Commission, December 2, 1985). The Commission explained in Martin Lithographers that it was extending a longstanding policy so as to prevent inconsistency in tax treatment. It further explained that to the extent such holding was inconsistent with its decision in B & B Enterprises, such decision was overruled. This the Commission was entitled to do and petitioner's arguments to the contrary are without merit.

B. That the petition of Nicholas Seybert Printing Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 10, 1978, as modified by the Notice of Assessment Review dated August 2, 1982, is sustained.

DATED: Albany, New York  
November 12, 1987

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ADMINISTRATIVE LAW JUDGE