STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
PUBLISHERS CLEARING HOUSE	:
	DETERMINATION
	DTA NO. 811500
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, 1982 through November 30, 1985.	:

Petitioner, Publishers Clearing House, 382 Channel Drive, Port Washington, New York 11050, 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, 1982 through November 30, 1985.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 26, 1994 at 9:15 A.M., with all briefs to be submitted by May 1, 1995, which date began the six-month period for the issuance of this determination. Petitioner appeared by Hutton & Solomon, Esqs. (Stephen L. Solomon, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to a refund, pursuant to Tax Law § 1119(a)(4), for sales or use taxes paid with respect to certain printed and/or imprinted promotional materials mailed

from New York State to recipients outside New York State.

II. Whether the printing and/or imprinting services purchased by petitioner and performed upon its promotional materials which were then mailed from New York State to points outside the State were exempt from the imposition of sales tax pursuant to Tax Law § 1115(d).

III. Whether the Division of Tax Appeals has jurisdiction to consider petitioner's claim for refund of sales and use taxes paid with respect to outer envelopes used in its promotional mailings.

FINDINGS OF FACT

Pursuant to a field audit of petitioner, Publishers Clearing House ("PCH"), the Division of Taxation ("Division"), on May 12, 1987, issued two notices of determination and demands for payment of sales and use taxes due to PCH as follows:

Notice No.	Period	Tax	Interest	Total
S870512159C	3/1/82 - 2/28/85	$853,345.24	$328,595.95	$1,181,941.19
S870512160C	3/1/85 - 11/30/85	174,283.22	26,349.96	200,633.18

Previously, PCH executed five consents (see, Division's Exhibit "B") extending the period of limitation for assessment of sales and use taxes, the last of which agreed that for the period March 1, 1982 through February 28, 1984, the amount of sales and use taxes due could be determined at any time on or before June 20, 1987.

PCH is in the business of selling magazine subscriptions through direct mail advertising and other related marketing techniques. During the period at issue, PCH mailed millions of

promotional packages, consisting of offerings for discounted magazine subscriptions, to persons located both within and without the State of New York. Since its sales are nontaxable, the audit was of PCH's purchases only.

Although the records provided by PCH were sufficient and adequate for the performance of a detailed audit, on June 3, 1986 an officer of PCH executed an audit method election form agreeing to a test period audit of its "personalized paper", i.e., a computer form containing certain artwork, contest entry rules, a standard form letter, other promotional information and the name, address and contest prize numbers associated with the ultimate recipient. The computerized forms have perforated strips to fit into the sides of a printer. Tax was not assessed on the purchase of any other paper by PCH which was put into the outer envelope. It was conceded that PCH had correctly reported the taxable portion of these paper purchases on its sales tax returns for the audit period.

At the hearing, PCH's controller, Ted Kasnicki, testified that while each envelope actually contained three personalized pieces, these pieces actually start out as a single pre-printed form imprinted in various places with the recipient's name and/or address and contest numbers. The form is then "chopped" (sliced apart into separate personalized pieces) and the pieces are inserted into the package with other nonpersonalized material. One of the pieces is inserted into the envelope so that the recipient's name and address is visible through a translucent window.

Mr. Kasnicki testified, in detail, as to the procedures employed by PCH in purchasing the paper and the printing services. He stated that upon receipt of the personalized computer forms from the printer/imprinter who printed the name, address and contest prize numbers on the form, the mailer performed all of the activities required for mailing out the entire package. These activities included, among other things, collating, folding and stuffing into envelopes. Mr. Kasnicki testified that the personalized and nonpersonalized promotional materials were "timed" so as to arrive at the mailer at approximately the same time. At no time did PCH ever take delivery of any of the printed (personalized or nonpersonalized) promotional materials.

Mr. Kasnicki testified that, during the audit period, approximately 50% of the time PCH bought the paper for the printing of the computerized form letter with blanks left in the appropriate places for the insertion of the personalized information; the other 50% of the time, PCH purchased the computer form letters already printed.

Marsha Eisner, Sales Tax Auditor II, was the team leader throughout the audit. The original auditor was John Mandia, who was assigned the case in March 1985; Stephen Spector became the auditor in September 1985. Ms. Eisner appeared at the hearing on behalf of the Division and testified concerning the conduct of the audit.

With respect to the invoices for the purchase of the computerized forms, Ms. Eisner stated that the auditors had

intended to analyze them in order to determine their taxable status. However, the invoices did not include information as to the location from which the forms were mailed (whether mailed from New York State or from outside the State). In the alternative, the auditors examined PCH's advertising campaign records which contained information as to the personalization services and place of mailing. Because PCH did not want to assemble all of its records relating to its previous advertising campaigns, it requested that a test period audit be performed (see, Finding of Fact "3").

PCH selected the advertising campaigns to be utilized in this test period audit. Three such mailings during 1985 and 1986 were selected (numbers 85-10, 85-60 and 86-30). These mailings revealed the cost of the forms as well as the cost of the personalization services (the additional printing of the recipient's name, address and prize numbers). The personalization service invoices did indicate from where the forms were mailed.

From an examination of the three advertising campaigns, a weighted average was determined (a ratio of forms mailed from New York as compared to total mailings). This weighted average was computed to be 45.66%, i.e., 45.66% were found to have been mailed from New York.

Computer form letter purchases for the audit period were found to be $20,977,916.00. This amount, when multiplied by the weighted average (45.66%), resulted in purchases of computer form letters mailed from New York of $9,578,518.00. Since the

in-state bulk mailers were located in Suffolk County, the rate applicable to that county (7.25% or 7.5%) was utilized and tax due was determined to be $699,752.00. Credit for tax paid ($44,493.00) was given and total additional tax due on the purchase of these forms was, therefore, $655,259.00.

Ms. Eisner testified that, during the audit period, PCH had been incorrectly reporting tax due on the purchase of the computer forms based upon a New York State distribution allocation ratio, the numerator of which was mailings from New York delivered into New York and the denominator of which was all mailings. Mr. Kasnicki testified that this New York distribution allocation ratio was also applied to determine the taxable amount of personalization services (printing, imprinting) as well.

PCH's purchases of personalization printing services were analyzed in detail. After the paper was purchased, it was delivered to a printer (located both inside and outside of New York). In many cases, the same printer printed both the computer form and the general promotional pieces. The general or nonpersonalized pieces were sent from the printer to the mailer; the computer form or personalized form was then sent by the printer, at PCH's direction, to an imager (or personalizer) who imprinted it with the name, address and contest prize numbers associated with the ultimate recipient. Some of the imagers were located in New York, while others were not. Some of the personalized forms were then sent to the bulk mailers located in New York; some were sent to bulk mailers in other

states. The bulk mailer collated the forms (both personalized and nonpersonalized), folded them, stuffed them into the other envelopes and mailed them out.

PCH had reported no personalized printing services subject to tax for the periods March 1 through May 31, 1982, December 1, 1982 through May 31, 1983 and March 1 through November 30, 1985. For the remaining portions of the audit period, PCH reported taxable purchases of these services based upon the New York distribution allocation ratio (see, Finding of Fact "5").

Initially, the Division assessed tax on all personalized printing services performed in and out of New York on forms which were later shipped back to New York for mailing. Later (but prior to the issuance of the notices of determination), the audit findings were revised so that tax was assessed only on services performed in New York on computer forms which were mailed from New York. Total tax due on personalized printing services was, therefore, determined to be $372,369.46. This amount, when added to tax assessed on the purchase of forms ($655,259.00), resulted in a total assessment of sales and use taxes in the amount of $1,027,628.46 which represents the total set forth on the notices of determination issued to PCH (see, Finding of Fact "1"). Tax and interest was paid by PCH which now seeks a refund thereof.

Ms. Eisner testified, on direct examination, that penalty was not assessed because "these issues had not been addressed on the prior audit." On cross examination, she stated that it had, in fact, been addressed, but had been assessed "as though they

were regular promotional materials." She further stated, however, that the issue of whether the personalized forms qualified for exemption or refund pursuant to Tax Law § 1119(a)(4) had not been previously addressed.

The audit report stated:

> "Recommend simple interest be imposed on the disagreed portion as vendor reported in accordance with the findings of the prior three audits & the issue involves interpretation of law."

Ms. Eisner testified (see, tr., pp. 38, 53, 60-62, 69-78) that the primary basis for this assessment against PCH was her interpretation of a note contained in the May 1977 supplement to the Division's Form ST-152, Collection and Reporting Instructions for Printers and Mailers. This form, initially published in May 1969 (see, Petitioner's Exhibit "9"), was amended in May 1971 and again in May 1977 (see, Petitioner's Exhibit "3").[1]

Ms. Eisner stated that the "alternative method" set forth in the May 1971 version of the ST-152 provided for a method of determining sales and use taxes where a taxpayer's mailing records are not adequate to show the destinations of all the printed matter mailed to persons in New York. The note in the May 1977 supplement to the ST-152, according to the testimony of Ms. Eisner, prohibits the use of this alternative method for personalized printed matter and renders them fully taxable.

As a result of its audit of PCH, the Division, on June 6,

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[1]Petitioner's Exhibit "6", an instruction memorandum entitled "Collection and Reporting Instructions for Printers and Mailers", was issued on July 18, 1966 and was, apparently, the predecessor to Form ST-152, which was initially published in May 1969.

1986, issued two statements of proposed audit adjustment. The first, in the

amount of $271,054.99, set forth additional tax due which was agreed to by PCH on June 11, 1986.

Ms. Eisner testified that the agreed-upon areas of the audit related to assessments on purchases of fixtures and equipment for the entire audit period as well as purchases of outer envelopes and list rentals for the transitional period (the period subsequent to the prior audit but before the issues of the prior audit were resolved). As to the list rentals, the transitional period was March 1, 1982 through November 30, 1982. For purchases of outside envelopes, the transitional period was March 1, 1982 through May 31, 1983. Payment of $360,890.68 (representing tax of $271,054.99 and interest of $89,835.69) was received from PCH on October 15, 1985. Ms. Eisner stated that the notices of determination issued to PCH on May 12, 1987 (see, Finding of Fact "1") include no assessments which relate to PCH's purchases of outside envelopes.

On August 7, 1987, PCH filed a petition with the former Tax Appeals Bureau of the former State Tax Commission. The petition sought a revision of the two notices of determination dated May 12, 1987 in the amounts of $853,345.24 and $174,283.22, plus interest. In addition to the specific grounds relating to the assessments on promotional materials, PCH alleged in paragraph 4(E) as follows:

> "In addition to the foregoing, other and further grounds exist, including constitutional issues,

pursuant to which PCH seeks relief herein. PCH reserves the right to supplement and amplify its contentions in this regard."

PCH thereafter filed a petition with the Division of Tax Appeals on December 28, 1992 which incorporated, by reference, the contents of the petition previously filed with the Tax Appeals Bureau. This petition specifically protested assessment numbers S870512159C and S870512160C.

The Division filed a Demand for Bill of Particulars on March 19, 1993 which sought specification of the contents of paragraph "E" of the petition, stating:

"Paragraph 'E' of the Petition states:

> In addition to the foregoing, other and further grounds exist, including constitutional issues, pursuant to which PCH seeks relief herein. PCH reserves the right to supplement and amplify its contentions in this regard.

"1(a). With respect to paragraph 'E', specify in detail the legal theories or claims contemplated under the terms 'other and further grounds' which Petitioner intends to argue upon the trial of this matter.

"1(b). Specify the facts which you will argue at trial in support of the legal claims or theories articulated in your response to '1(a)', supra."

In a Bill of Particulars dated October 19, 1994, PCH stated as follows:

"1. PCH intends to seek a refund of all sales and/or use taxes paid by it, plus interest thereon, attributable to the purchase of promotional envelopes that were mailed from New York and delivered to recipients outside of New York.

"2. Petitioners [sic] will present, at trial, evidence showing that such promotional envelopes qualify for exemption as described in Department publication ST-152 ('Collection and Reporting Instructions for Printers and Mailers')."

At the hearing, the Division objected to the raising of the issue concerning the taxability of the outer envelopes on the basis that, since the tax had been paid and no refund claim had been filed with respect to tax paid on the purchase of the envelopes, the Division of Tax Appeals was without jurisdiction to substantively decide this issue.

In its brief (p. 27, n. 18), PCH stated as follows:

> "PCH understands that it remains bound by the amount of the refund claimed in its Petition, which did not include the tax, or interest thereon, paid on the envelopes, and further understands that it may recover on this claim only to the extent that PCH does not obtain complete relief on its claim with respect to the 'personalization' issue."

PCH also stated in its brief (at p. 28) that it has learned that this issue will be addressed by the Appellate Division, Third Department in Matter of Garden Way Incorporated (Tax Appeals Tribunal, February 24, 1994) and, as such, PCH desires to keep its claim open should that decision be rendered prior to a determination in the present matter.

In a letter to the Division from Robert D. Wallingford, Esq., one of PCH's representatives, dated April 8, 1993, it was stated, in pertinent part, as follows:

> "The sole issue of law raised by the above petition is whether a single promotional piece included among many promotional materials mailed as a single package from New York State to recipients outside New York State is subject to New York State sales or use tax."

Anthony J. Pujia, C.P.A., participated in the audit of PCH. He also participated in a prior audit of PCH for the period September 1, 1977 through August 31, 1981 (this audit will hereinafter be referred to as "the prior audit").

Mr. Pujia stated that he also revised workpapers for two other audits, i.e., one audit for the period September 1, 1970 through August 31, 1973 and a second audit for the period December 1, 1973 through August 31, 1977. Mr. Pujia stated that the issue of "personalization" was never raised in either of these two earlier audits.

In the prior audit, Betsy Dimos was the field auditor and Joseph Channon was her supervisor. The auditors reviewed PCH's personalization account and determined that this personalization service was taxable. At that time, PCH had been paying tax on the forms (upon which the personalization services were performed) using an "allocated basis". Mr. Pujia testified that a meeting between PCH's representatives and the Division's auditors was held at which time it was agreed that the personalization services would be taxed based upon an allocation method which would represent a percentage of those mailings containing "New York names". This was the same allocation formula utilized by PCH in reporting taxable purchases of its other printing services. In furtherance of this agreement, Ms. Dimos prepared a listing of all personalization invoices and applied a percentage which represented the New York names and then applied a "blended tax rate" to that allocated number (the "blended tax rate" was described as something of an average of the rates from all locations in which sales tax was to be collected).

After Ms. Dimos completed her workpapers (see, Petitioner's Exhibit "5") relative to this agreement, Mr. Pujia met with PCH

personnel (including bookkeepers) who then coded invoices in the manner set forth by Ms. Dimos' allocation.

Mr. Pujia also testified that tax on the computer forms was reported and paid by PCH on this same allocated basis. This method was never challenged by the Division until the present audit was commenced.

CONCLUSIONS OF LAW

A. Tax Law § 1105 imposes a sales tax upon the sale of certain property, including printed materials, and the sale of certain services, including the printing and/or imprinting of tangible personal property, as follows:

> "On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:
>
> "(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.
>
> * * *
>
> "(c) The receipts from every sale, except for resale, of the following services:
>
> * * *
>
> "(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed."

To the extent that the property or services were not subject to sales tax, Tax Law former § 1110, in effect for the period at issue, imposed a use tax thereon as follows:

> "Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and

> after June first, nineteen hundred seventy-one, except as otherwise exempted under this article,
>
> * * *
>
> "(D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described in paragraphs (2) and (3) of subdivision (c) of section eleven hundred five have been performed.
>
> * * *
>
> "For purposes of clauses (C) and (D) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for the service, including the consideration for any tangible personal property transferred in conjunction with the performance of the service . . . ."

B. Tax Law § 1115(d) exempts from the imposition of sales tax certain services otherwise taxable under Tax Law § 1105(c), such as printing or imprinting services, "if the tangible property upon which the services were performed is delivered to the purchaser outside this state for use outside this state."

C. Tax Law § 1119(a) allows a refund or credit for sales or use taxes paid on certain tangible personal property (including printed or imprinted materials) upon the following conditions:

> "Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten . . . (4) on the sale or use within this state of tangible personal property, not purchased for resale, if the use of such property in this state is restricted to fabricating such property (including incorporating it into or assembling it with other tangible personal property), processing, printing or imprinting such property and such property is then shipped to a point outside this state for use outside this state . . . ."

20 NYCRR 534.3(e) provides, in pertinent part, as follows:

> "Property, the use of which is restricted to fabricating, processing, printing, or imprinting. (1) A purchaser who has paid the tax on the tangible

personal property may claim a refund or credit for such tax provided:

"(i) the use of the tangible personal property in New York is restricted to fabricating such property (including the incorporation of it into or assembling it with other tangible personal property), processing, printing, or imprinting such property;

"(ii) such property is then shipped to a point outside New York State for use outside the State; and

"(iii) such property is so used within three years from the date the tax was payable to the Department of Taxation and Finance, and application for the credit or refund is filed within three years after the date the tax was payable to the Department of Taxation and Finance.

"(2) The fabricator, assembler, processor, printer, or imprinter may be either the purchaser or a user distinct from the purchaser.

* * *

"Example 3: A company purchases 20,000 advertising circulars which are delivered by the printer to a firm in New York State that will address and mail them. The printer charges and collects the New York State sales tax. A refund or credit will be allowed on that portion of the circulars which are mailed to addresses outside of New York State."

D. For the period in issue and for purposes of the sales and use taxes imposed by Tax Law §§ 1105 and 1110, respectively, Tax Law § 1101(former [b]) defined "use" as follows:

"When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

"(7) Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for

> any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property."

E. The assessments at issue herein are for sales and use taxes on both the property (the computer forms) and the services (the printing or imprinting of the names, addresses and contest prize numbers) which, together, created the personalized computer forms that, along with various other nonpersonalized promotional materials, were mailed from New York State to out-of-state recipients.

The team leader who supervised the field audit of PCH testified that it was her interpretation of the Division's Form ST-152 (the note contained in the May 1977 supplement) which formed the primary basis of these assessments (see, Finding of Fact "8"). The May 1977 supplement to Form ST-152 (5/71) provided, in pertinent part, as follows:

> "Meanings of terms used below are:
>
> Printer - Printer or other person engaged in the business of printing or duplicating.
>
> Printed Matter - Includes, but is not limited to advertising matter, annual reports, prospectuses, proxy notices and other printed items.
>
> Mailer - Person engaged in mailing such matter.
>
> "A printer delivering printed matter to a mailer in New York State is required to collect the sales tax on his entire charge unless he is furnished with proof of the portion of the matter to be mailed to persons outside of New York State and the destinations of all the matter to be mailed to persons in New York State. If such proof is furnished, he is required to collect tax only on his charge for that portion of the matter

that will be mailed to persons in New York State.

"A mailer or printer-mailer is required to collect the statewide and appropriate local sales taxes on his printing, addressing, and other taxable charges for printed matter mailed to persons in New York State. The mailer or printer-mailer must maintain records showing the portion of the matter he mailed to persons outside New York State and destinations of all matter to persons in New York State.

"The statewide tax and local sales taxes at the rate in effect where delivery is made must be collected on the entire charge where printed matter is delivered to the customer in New York State even if the customer will subsequently send some or all of the matter to persons outside New York State.

"NOTE: The alternative method set forth on Form ST-152 (5/71) can not be used with respect to printed matter upon which clerical, office typing or computer printing operations are required in order to prepare the printed matter in acceptable form for the individual recipient and to accommodate the senders [sic] usual use of such items. Thus, printed items such as invoices, statement forms, payment notices, letterheads, envelopes for correspondence, and items which by their contents are not interchangeable with other recipients on the mailing list are subject to the New York State Sales Tax in effect at the point from which the actual mailing service occurs.

"Outside mailing envelopes used to mail printed matter from a point in New York State, through a New York State Post Office, are fully taxable as their use occurs in New York State, notwithstanding the fact that all or a portion of the contents may be subject to the Alternate Method. However, business reply envelopes which are enclosed for the recipient's use in replying are eligible for the Alternative Method, where such recipient is outside New York State."

The "alternative method", set forth on Form ST-152 (5/71), consisted of the following:

"I. Alternative Method

"Where mailing records are not adequate to show the destinations of all of the matter mailed to persons in New York, the alternative method described below may be used to determine State and local sales and use taxes, provided the following conditions are met:

"(1) The mailing must include points throughout New York State;

"(2) If the mailing list includes out-of-state mailing and is compiled by geographic location, an actual count of out-of-state mailing should be made. If the list is not compiled by geographic location, a sampling technique may be used provided 10% of the list, or 5,000 mailing pieces, whichever is less, is sampled;

"(3) The actual number of pieces mailed to New York City must be determined. Sampling under the conditions in Item 2, may be used.

"Note: Any reasonable method may be used in connection with a particular list if it is approved by the Sales Tax Bureau as fairly and equitably reflecting proper allocation.

"II. Application of Alternative Method

"Under this method an alternative rate, based on the population of New York State (excluding New York City) and the combined tax rates imposed thereon, is applied to the New York State (excluding New York City) mailings and the imposed rate of 7% is applied to New York City mailings. For mailings made on and after June 1, 1971, the alternative rate is 5.938%. For mailings made prior to June 1, 1971, the alternative rate varied in almost every period. Schedules of the various rates may be obtained by contacting the Sales Tax Bureau, State Campus, Albany, New York 12227."

F. Effective September 1, 1989 (after the audit period herein), chapter 61 of the Laws of 1989 added a new paragraph (12) to Tax Law § 1101(b) to define "promotional materials" as follows:

> "Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, promotional displays and Cheshire labels but does not include invoices, statements and the like."

In addition, chapter 61 of the Laws of 1989 added a new subdivision (n) to Tax Law § 1115 which provided as follows:

> "(1) Promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.
>
> "(2) Services otherwise taxable under paragraph one or two of subdivision (c) of section eleven hundred five of this article relating to mailing lists or activities directly in conjunction with mailing lists shall be exempt from tax under this article if such services are performed on or directly in conjunction with promotional materials exempt under paragraph one of this subdivision."

Tax Law § 1101(b)(7) was also amended by this law to provide that "use" also includes the distribution of tangible personal property such as promotional materials.

G. Subsequent to the aforesaid amendments in 1989, the Division's Technical Services Bureau of the Taxpayer Services Division published a memorandum entitled "The Sales And Use Tax And Promotional Materials" (TSB-M-92[4]S), the stated purpose of which was to clarify the overall effect of these amendments to the Tax Law. TSB-M-92(4)S stated, in pertinent part, as

follows:

"When these changes are viewed together, they establish a tax plan that exempts sales of promotional material that are delivered to the buyer, the buyers [sic] agent or designee, inside New York State, if the buyer, agent or designee will then have such property delivered to points located outside this state; and taxes, where applicable, any promotional materials, regardless of point of sale or origin, that are ultimately delivered to locations inside this state.

"Example (1)	A New York vendor purchases catalogs from a printer. The vendor will mail or in some other manner have the catalogs delivered to customers and prospective customers located outside New York State The New York vendor is allowed to purchase such catalogs from the printer without the payment of sales or use tax pursuant to the exemption provided in Section 1115(n) of the Tax Law.
"Example (2)	A multi-state vendor with sales offices in New York purchases catalogs from a printer outside this State. The multi-state vendor will mail or in some other manner have the catalogs delivered to customers or prospective customers located in New York State. The multi-state vendor owes a compensating use tax based on its cost of the catalogs which are delivered to locations inside New York State. (The authority for the imposition of this compensating use tax is Sections 1110 and 1101(b)(7) of the Tax Law).

"The following chart helps illustrate the difference between the tax status of certain purchases related to promotional material both before and after September 1, 1989.

Promotional Materials	Before 9/1/89	As of 9/1/89
Contents of Envelope (non-personalized)		
- Mailed from N.Y. to N.Y. destinations	Taxable	Taxable
- Mailed from N.Y. to destinations outside N.Y.	Exempt*	Exempt
- Mailed from outside N.Y. to N.Y. destinations	Exempt	Taxable

*Exempt Through Refund

Contents of Envelope (personalized)		
- Mailed from N.Y. to N.Y. destinations	Taxable	Taxable
- Mailed from N.Y. to destinations outside N.Y.	Taxable	Exempt
- Mailed from outside N.Y. to N.Y. destinations"	Exempt	Taxable

H. Tax Law § 1132(c) provides, in pertinent part, as follows:

> "For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer."

In its brief, at page 15 thereof, the Division, citing Crown Publishers v. Tully (96 AD2d 990, 466 NYS2d 822, revd on other grounds 63 NY2d 660, 479 NYS2d 523), agrees that while Tax Law § 1119(a) actually provides a refund or credit of tax, its practical application and treatment by the courts are the same as an exemption because the taxpayer bears the same burden of

proving entitlement thereto. Since both statutes are, therefore, deemed to be exemption statutes, their applicability to the facts of this case will be considered together.

I. Chapter 627 of the Laws of 1967, among other provisions, amended Tax Law § 1119 (redesignating it as subdivision [a]) to provide for a refund or credit of sales or use tax paid on the sale or use within New York State of tangible personal property, not purchased for resale, if the use of the property in New York is restricted to fabricating, processing, printing or imprinting such property and the property is then shipped to a point outside the State for use outside the State.

The Division's memorandum in support of the bill (see, Petitioner's Exhibit "8") provided, in pertinent part, as follows:

> "The third amendment made by this bill consists of the amendment to section 1119(a) of the Tax Law and involves property which is fabricated, processed or printed in this State and then shipped elsewhere for use.
>
> * * *
>
> "Another example exists in the case of a direct mail advertiser who purchases from an out-of-state source the paper to be used in his advertisements. If delivery of this paper to a printer in New York State will incur liability for New York sales tax on the whole shipment of paper, even though all or most of the advertising material (after the printing has been done) is to be used in other states, such a firm will be likely to have its printing done in some other state.
>
> "The present bill will eliminate the incentive, which the present law creates, to have fabrication, processing and printing done outside New York State where the completed product is to be used outside this State."

The Division maintains that in order to qualify for the

exemption provided for in Tax Law § 1119(a)(4), PCH must prove that it did not have any use of the property (the computerized forms) other than those enumerated uses permitted by the language of the statute. In its brief (at pp. 17 through 19), the Division sets forth, in detail, the various uses which it contends occurred in New York. Among the uses were "segregating", "sending", "receiving", "storing", "inserting", "collating" and "stuffing".

In response, PCH, in its reply brief, concedes that, with the exception of segregation (which, pursuant to Mr. Kasnicki's testimony, PCH maintains did not occur), all of the aforementioned activities did occur. PCH further concedes that other activities, the mention of which was omitted by the Division, also occurred. These activities include packaging, holding, unpacking, dividing, loading, sorting, bundling, etc. (see, Petitioner's reply brief, p. 4). PCH contends that while these activities occurred with respect to the other printed promotional materials (the nonpersonalized material) mailed in PCH's envelopes as well, the Division admits that, when mailed from a New York mailer to a recipient outside the State, the other promotional materials are not taxable.

In Matter of Garden Way Incorporated (Tax Appeals Tribunal, February 24, 1994), the Tribunal cited specific quotations from the determination of the Administrative Law Judge as follows:

> "During the period at issue, Tax Law § 1119(a) did not provide for an exemption for promotional materials. This provision allowed an exemption from use tax where, after allowing for certain limited (nontaxable) uses, tangible personal property was shipped outside New York for use outside New York. Promotional materials are

> one kind of tangible personal property which may have been exempt under Tax Law § 1119(a) since such materials are generally not put to use as promotional materials until received by prospective customers. The fact that certain tangible personal property may be classified as promotional materials does not, however, qualify such property for exemption. The key to taxation or exemption is use or non-use in New York. Where tangible personal property is used in New York it is generally subject to use tax. The fact that this same tangible personal property may also be used outside New York does not result in an exemption."

In its brief, the Division points to additional language from Matter of Garden Way Incorporated (supra) in which the Tribunal stated:

> "We agree with the observation of the Administrative Law Judge that the fact that such legislation (the amendments made by Chapter 61 of the Laws of 1989) was necessary to provide for this exemption supports the Division's interpretation that section 1119(a)(4) did not provide for such an exemption for the period March 1, 1984 through August 31, 1989, the years covered in this case."

Reading the language of the Administrative Law Judge and of the Tribunal together leads to the conclusion that, while Tax Law § 1119(a)(4), prior to the enactment of chapter 61 of the Laws of 1989, did not specifically provide for an exemption for promotional materials, such materials could still qualify for exemption if shipped outside the State for use outside the State if the materials were not used in New York. Unlike Garden Way (supra), in which a particular class of promotional materials, i.e., promotional envelopes, were found not to qualify for exemption from tax pursuant to Tax Law § 1119(a), in the present matter the Division has drawn a distinction between personalized and nonpersonalized promotional materials for purposes of qualifying for exemption under Tax Law § 1119(a) and § 1115(d).

As pointed out in PCH's reply brief, the Division maintains that the activities of PCH's printers/imprinters and mailers, with respect to the imprinted computer forms, exceeded the statutorily prescribed uses and, therefore, were not exempt from sales and use taxes. Ted Kasnicki, PCH's controller, testified in detail as to the procedures employed by PCH in purchasing the paper and in printing the personalized promotional materials used in its mailings (see, tr., pp. 105-106). Other than perhaps one additional activity, i.e., sending the printed computerized form to the "personalizer" (who would print the names, addresses and contest prize numbers on the forms), Mr. Kasnicki stated that, upon receipt of the personalized computer forms from the personalizer (the nonpersonalized forms usually arrived at the mailer at approximately the same time), the mailer then performed the necessary activities for mailing out the entire package. These activities included collating, folding, envelope stuffing and mailing.

PCH maintains that each and every one of the activities was a normal and necessary function of a printer/imprinter (the imager or personalizer) or mailer. PCH states that:

> "[t]o construe such normal and necessary activities as separate and distinct 'uses' to defeat the application of § 1115(d) and § 1119(a)(4) would render the exemption wholly meaningless and virtual nullities."

PCH points to McKinney's Consolidated Laws of NY, Book 1, Statutes § 144 which provides, in part, as follows:

> "In the course of construing a statute the court must assume that every provision thereof was intended for some useful purpose, and that an enforceable result was intended by the statute. The courts will not impute to lawmakers a futile and frivolous intent, and

> the intention is not lightly to be imputed to the Legislature of solemnly enacting a statute which is ineffective. Statutes are to be interpreted workably, and a statute must not be construed in such a way that would result in the Legislature having performed a useless or vain act.
>
> "A construction which would render a statute ineffective must be avoided, and as between two constructions of an act, one of which renders it practically nugatory and the other enables the evident purposes of the Legislature to be effectuated, the latter is preferred. No part of an original act or an amendment thereto is to be held inoperative, if another construction will not conflict with the plain import of the language used."

In Garden Way (supra), the Administrative Law Judge held (and the Tribunal affirmed) that:

> "where, as here, promotional envelopes are used in New York to convey other promotional materials, the fact these envelopes are also used as promotional materials outside New York does not render such materials exempt."

The same is not true in the present matter. While the personalized computer forms may, in effect, have required additional printing and handling activities associated therewith, there was no "use" of this particular form in New York, i.e., it, too, was a promotional material (as were the nonpersonalized forms), and there is no evidence that it was ever used as such in New York at any time prior to its having been mailed outside the State to customers or potential customers.

Tax Law § 1101(former [b]) defined the term "use" during the audit period. In Matter of Crown Publishers v. Tully (96 AD2d 990, 466 NYS2d 822, revd on other grounds on dissenting opn below 63 NY2d 660, 479 NYS2d 523), the court, in considering an exemption from tax under Tax Law § 1119(a)(4) for pre-addressed

gummed mailing labels, stated that the aforesaid exemption statute "specifically allows a limited use in New York provided such use is limited to incorporating the property into or assembling it with other property." Clearly, all of the ancillary activities by PCH's printers/imprinters and mailers (Ted Kasnicki testified that at no time did PCH take delivery of the personalized computer forms [see, tr., p. 86]) were performed in furtherance of bringing together each of the individual promotional materials to form the complete package which was mailed out of State to customers or prospective customers. The Division's contention that certain additional activities performed in conjunction with the personalized computer forms constituted a use in New York is, therefore, rejected.

J. There is no dispute herein that the Division's interpretation of the relevant statutes, regulations and publications has resulted in its determination that the personalized promotional materials (and the printing/ imprinting services rendered thereon) which were then mailed from New York State to points outside the State were subject to sales and use taxes while the remaining promotional materials, i.e., the nonpersonalized materials (and the printing/imprinting services thereon) mailed from New York to points outside the State were held to be exempt.

The Division contends that the distinction between personalized and nonpersonalized promotional materials is supported by statute, regulation and case law (see, Division's

brief, p. 24), yet no specific authority is cited. A review of the evidence submitted discloses that the first time in which a distinction between personalized and nonpersonalized printed material is drawn is in the note in the May 1977 supplement to Form ST-152 (see, Conclusion of Law "E"). Later, after certain amendments to the Tax Law were made in 1989 (see, Conclusion of Law "F"), the Division restated this position in 1992 through its publication of TSB-M-92(4)S (see, Conclusion of Law "G").

The Division, in its brief (at pp. 24 and 25), admits that the "ST-152 is not a statute; it is a set of instructions to an industry . . . ." The alternative method discussed in the May 1971 version of the ST-152 is applicable only "[w]here mailing records are not adequate to show the destinations of all of the matter mailed to persons in New York." Its purpose was to calculate the appropriate tax rate (utilizing the State and local tax rates in effect where delivery is made). The note in the May 1977 supplement to Form ST-152 stated specifically that:

> "The alternative method set forth on Form ST-152 (5/71) can not be used with respect to printed matter upon which clerical, office typing or computer printing operations are required in order to prepare the printed matter in acceptable form for the individual recipient and to accommodate the senders [sic] usual use of such items. Thus, printed items such as invoices, statement forms, payment notices, letterheads, envelopes for correspondence, and items which by their contents are not interchangeable with other recipients on the mailing list are subject to the New York State Sales Tax in effect at the point from which the actual mailing service occurs."

This appears to be the first time that a distinction was drawn between personalized and nonpersonalized printed matter. It was not, however, the last.

In 1992, TSB-M-92(4)S discussed the difference between the tax status of certain purchases related to promotional materials both before and after the effective dates of the amendments made to the Tax Law by chapter 61 of the Laws of 1989. As was the case with the note in the May 1977 supplement to the ST-152, no authority was cited for the distinction drawn between personalized and nonpersonalized materials.

It should be noted herein that the fact that the definition of "promotional materials" in the new paragraph (12) added to Tax Law § 1101(b) specifically makes it all inclusive, i.e., "whether or not personalized by the recipient's name or other information uniquely related to such person", does not mean that there had ever been a distinction in the law previously. While this was the first statutory definition of "promotional materials", the Division, in another Technical Services Bureau memorandum (TSB-M-79[9]S) defined the term as follows:

> "'Promotional materials and other mailings' consist of any tangible personal property which is given without charge by a manufacturer, wholesaler or distributor to a vendor for distribution to a prospective or current customer as an inducement or reward for a purchase, and any literature or printed matter given without charge for distribution or use to advertise, induce, or facilitate a sale or to be used in any manner by said vendor. Examples of such items would include:
>
> 1. Free gifts, whether a sample or given as the result of a purchase.
> 2. Complimentary maps and other items given away to travel club members.
> 3. Advertising literature.
> 4. All sales and ordering forms, including applications, return envelopes, etc.
> 5. Corporate annual reports.
> 6. Travel brochures.
> 7. Promotional displays."

This memorandum set forth the taxable status of promotional materials and certain other mailings as follows:

> "The following is the policy of the State Tax Commission in regard to the taxable status of catalogs, promotional materials and other mailings sent by vendors, free of charge, directly to their customers.
>
> "1. Mailed or shipped by common carrier from outside New York State directly to customers within New York State - EXEMPT
>
> "2. Mailed or shipped from outside New York State to the issuing company or its outlets, offices or agents within New York State for distribution to customers within New York State - TAXABLE
>
> "3. Mailed, shipped or otherwise distributed from within New York State to customers within New York State - TAXABLE
>
> "4. Mailed or shipped to customers outside New York State - EXEMPT"

As will be hereinafter discussed, it is the first category (materials mailed from outside the State to customers within New York) which was the primary focus of the 1989 amendments to the Tax Law.

After the close of the hearing, the Division submitted the Division of the Budget's memorandum in support of A.3608-A (which became chapter 61 of the Laws of 1989), seeking that the Administrative Law Judge take judicial notice thereof.[2] This memorandum was part of the Governor's Bill

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[2]PCH, in a letter dated May 24, 1995, objected to this submission by the Division since, among other things, it occurred after the hearing record was closed. While this is true, the memorandum of support is a matter of public record which could have been and, in fact, was accessed by the Administrative Law Judge. Since its submission was in the nature of a legal argument rather than an attempt to introduce additional evidence, it has, therefore, been considered in this determination.

Jacket. At pages L8 and L9 thereof, the memorandum, in discussing the competitive disadvantage of New York vendors and the attempt by this legislation to eliminate this disadvantage, stated:

> "New York printers suffer additional disadvantages arising from the fact that sales tax applies to the mailing envelopes and labels used in connection with promotional materials, as well as any personalized materials, regardless of where these materials are ultimately destined. Ordinarily, tangible personal property sold for delivery outside the State by a vendor is not subject to tax, and, even if stored here by a business for later use outside the State, would qualify for a refund or credit in that situation.
>
> "In 1985, industry reported that, as a result of the foregoing, 'few if any New York retailers use New York printers when they are doing a significant mailing to New York residents.' (Legislative Memorandum on Senate 5778-A of 1985).
>
> "These provisions will restore the competitive position of New York printers vis-a-vis printers in other states. They also seek to achieve parity for printers with other vendors in New York State, who are not required to collect sales tax on tangible personal property delivered outside this State. Where such property is used outside the State, it is likewise exempt from compensating use tax. The provisions thus provide that promotional material mailed from within New York State to points outside New York is exempt from sales and use tax."

A reading of the entire memorandum in support discloses that the primary purpose of this legislation, i.e., the portion dealing with the taxation of tangible personal property such as catalogs and other promotional materials, was to rectify the holding in Bennett Brothers v. State Tax Commn. (62 AD2d 614, 405 NYS2d 803), which held that New York could not collect tax on the use within the State of catalogs and other mailings which had been shipped by common carrier or mailed into New York by an out-of-state printer on behalf of a New York vendor. Therefore, this

legislation attempted to achieve parity for New York printers by requiring vendors to collect tax on catalogs and promotional materials shipped into the State and subjecting to use tax all such materials that out-of-state vendors distribute in New York. Since vendors (other than printers) were not required to collect sales tax on tangible personal property delivered outside the State, this law (through its amendments to Tax Law § 1101[b] and § 1115[n]) also attempted to achieve parity for printers with these other vendors.

While the Division seeks to have its position, as set forth in TSB-M-92(4)S, adopted as a valid interpretation of the law as it existed both before and after September 1, 1989, it does not seek the same status for TSB-M-79(9)S which makes no distinction, for purposes of taxability, between personalized and nonpersonalized promotional materials.

As the Tax Appeals Tribunal pointed out in Matter of Garden Way Incorporated (supra):

> "Technical Services Bureau memoranda are statements issued by the Division which are informational in nature, designed to disseminate the Division's current interpretation of the Tax Law in response to similar requests from a broad class of taxpayers; however, these statements are not promulgated pursuant to specific statutory authorization or direction and, thus, are not legally binding (see, Developing and Communicating Interpretations of the Tax Laws: A Report to the Governor and the Legislature Reviewing Department of Taxation and Finance Policies and Practices at 20, 29 [Mar. 1990]; Matter of Grand Union Co. v. Tully, 94 AD2d 509, 466 NYS2d 492; see also, Proposed Regulations Communicating Tax Policy and Interpretations, § 2375.6[c])."

Therefore, without statutes or regulations to support the Division's interpretations, it cannot be found that these

memoranda are, in any way, binding upon PCH. In Matter of Crown Publishers v. Tully (supra), the court stated:

> "Tax exemption statutes are to be strictly construed and ambiguities resolved against exemption (Matter of Airlift Int. v. State Tax Comm., 52 AD2d 688, 689, 382 NYS2d 572), and the construction by an agency responsible for its administration will generally be upheld if not irrational or unreasonable (Matter of Berg v. Tully, 92 AD2d 436, 461 NYS2d 562). However, where the question depends upon apprehension of legislative intent and requires simple reading and analysis, no reliance upon agency expertise is required and its construction bears little weight (Kurcsics v. Merchants Mut. Ins. Co., 49 NY2d 451, 459, 426 NYS2d 454, 403 NE2d 159.)"

The fact that the Division, in TSB-M-92(4)S, states that personalized promotional materials, prior to September 1, 1989, were taxable when mailed from New York to destinations outside New York (and, after September 1, 1989, were exempt) while nonpersonalized promotional materials, prior to September 1, 1989, were exempt by virtue of refund provisions (and, after September 1, 1989, were exempt) does not make it so without statutes or regulations to support the Division's position.

In Dreyfus Special Income Fund v. New York State Tax Commn. (72 NY2d 874, 532 NYS2d 356, 357), the Court of Appeals stated:

> "Legislative approval of a past administrative interpretation should not be inferred from a statutory amendment that makes no reference to the prior administrative practice."

The Division admits, at page 30 of its brief, that:

> "The enactment of the legislation in 1989 does not necessarily mean that the Division's interpretation of these narrowly construed exemption statutes is correct . . . ."

Absent statutes or regulations which differentiate between personalized and nonpersonalized promotional materials or which

clearly evidence that, prior to September 1, 1989, exemptions for tangible personal property (Tax Law § 1119[a][4]) or for printing or imprinting services thereon (Tax Law § 1115[d]) on property delivered (or mailed) outside the State for use outside the State did not apply to personalized promotional materials, it must be found that PCH's purchases of both the property and printing/ imprinting services were exempt from sales and use taxes for the period at issue herein. Accordingly, PCH is entitled to a refund of tax paid ($1,027,628.46), plus interest paid thereon, together with such interest as may be due and owing.

K. It should be noted herein that while evidence regarding prior and subsequent audits of PCH was introduced at the hearing, since penalties were not assessed on the subject assessments it is hereby determined that the treatment of the personalized computer forms and the printing/imprinting services thereon in such other audits is deemed not to be relevant to the present matter.

L. Tax Law § 1138(c) provides as follows:

> "A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

As indicated in Finding of Fact "9", PCH agreed to tax (per a June 6, 1986 Statement of Proposed Audit Adjustment) in the amount of $271,054.99 on June 11, 1986. PCH previously paid the

amount of $360,890.68 (representing the aforementioned tax plus interest in the amount of $89,835.69) on October 15, 1985.

The next document filed with the Division by PCH was its petition filed with the former Tax Appeals Bureau on August 7, 1987. This petition sought a revision of the two notices of determination dated May 12, 1987 in the amount of $853,345.24 and $174,283.22, plus interest. The Division maintains (and PCH agrees) that these notices did not include any amounts of tax assessed on its purchases of outer envelopes. That amount had previously been agreed to and paid.

In addition to specific grounds relating to the assessments covered by the notices of determination, i.e., purchases of the computerized forms and the printing/imprinting services thereon, PCH alleged in paragraph 4(E) of its petition as follows:

> "In addition to the foregoing, other and further grounds exist, including constitutional issues, pursuant to which PCH seeks relief herein. PCH reserves the right to supplement and amplify its contentions in this regard."

No mention was made regarding the tax assessed on the outer envelopes nor was any claim for refund made with respect to any tax previously paid thereon.

As indicated in Finding of Fact "9", it was only on October 17, 1994, when PCH filed a Bill of Particulars in response to the Division's demand therefor, that any mention was made of the envelopes or entitlement to a refund of tax and interest previously paid on its purchases thereof.

M. Tax Law former § 1139(c) provides as follows:

> "A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty

> which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing or an opportunity for a hearing as provided in said section or has failed to avail himself of the remedies therein provided. However, a person filing with the tax commission a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivision (a) and (b) of this section, as long as such application is made within the time limitation set forth in such subdivision (a) or within two years of the date of payment of the amount assessed in accordance with the consent filed, whichever is later, but such application shall be limited to the amount of such payment."

Tax Law § 1139(a) provides that a claim for refund of tax, penalty and interest paid must be filed within three years after the date when the tax was payable. The signed Statement of Proposed Audit Adjustment (see, Division's Exhibit "F") indicates that the agreed-to portions were for the period March 1, 1982 through February 28, 1985. Therefore, for the last quarter at issue, tax would have been payable on March 20, 1985. Pursuant to Tax Law § 1139(c), a refund application would had to have been filed within three years after the tax was payable (March 20, 1988) or two years after payment of the amount assessed in accordance with the consent filed (this amount was paid on October 15, 1985, so the refund application had to have been filed by October 15, 1987), whichever is later. Therefore, PCH had until March 20, 1988 to file its claim for refund.

N. 20 NYCRR 3000.4(c) sets forth the Rules of Practice and Procedure of the Tax Appeals Tribunal relating to pleadings and amended pleadings stating, in pertinent part, as follows:

> "No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading."

PCH admits (see, Finding of Fact "9") that its petition did not include a request for refund of the tax or interest paid on the envelopes. Clearly, a general statement such as the one set forth by PCH in paragraph 4(E) of its petition does not constitute a valid refund claim nor does it, in any way, hold open the statute of limitations on issues not specifically addressed in its original pleading. To hold otherwise would be to sanction the use of this or similar statements by all petitioners and would render statutes of limitations and pleadings meaningless.

Since no claim for refund of tax and interest paid on PCH's purchase of outer envelopes was timely filed, the Division of Tax Appeals is without jurisdiction to consider such claim.

O. The petition of Publishers Clearing House is granted and the Division is hereby directed to refund the sum of $1,027,628.46, plus interest paid thereon, together with such additional interest which may be due and owing.

DATED: Troy, New York
October 26, 1995

/s/ Brian L. Friedman

ADMINISTRATIVE LAW JUDGE