

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
KUMAX CORPORATION	:	DECISION
(formerly Melody Productions, Inc.)	:	
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, 1975	:	
through February 28, 1979.	:	

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Petitioner, Kumax Corporation (formerly Melody Productions, Inc.), 205 West 48th Street, New York, New York 10036, 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, 1975 through February 28, 1979 (File No. 44335).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 8, 1985 at 9:15 A.M. Petitioner appeared by Konove & Konove, P.C. (Robert Konove, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael Glannon, Esq., of counsel).

ISSUES

- I. Whether petitioner is entitled to a refund of taxes paid.
- II. Whether an erroneous conclusion of a conferee estops the State Tax Commission from denying petitioner's application for refund.

FINDINGS OF FACT

1. During the audit period in issue, petitioner, Kumax Corporation (doing business at that time as Melody Productions, Inc. and hereinafter referred to as "Kumax") operated a burlesque show consisting primarily of strip acts done

to recorded music. Kumax filed no sales tax returns taking the position that its shows were musical arts performances which fell within the exclusion provided by section 1105, subdivision (f)(1) of the Tax Law.

2. On October 4, 1979, the Audit Division issued to Kumax a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting taxes of \$76,000.16 plus statutory penalty and interest for the period September 1, 1975 through February 28, 1979. The asserted tax liability arose from three sources: (1) Fixed asset accounts were examined and showed acquisitions of \$163,000.00. Because petitioner was unable to substantiate payment of sales tax at the time of acquisition, tax was assessed in the amount of \$13,064.00. (2) The auditor found that Kumax sold a small number of calendars and records; receipts from the alleged sale of these items were combined with the proceeds from the sale of admission tickets. (3) All sales receipts were treated as taxable on the theory that theatrical exhibitions of a pornographic nature did not come within the exclusion for dramatic or musical arts performances.

3. Petitioner filed a timely petition and, on October 7, 1981, a pre-hearing conference was held in the New York District Office. The Conferee proposed a cancellation of all tax assessed on admission charges but sustained that portion of the assessment based upon fixed asset acquisitions (or leasehold improvements) and the alleged sale of calendars and records. Following the conference, petitioner submitted proof of payment of tax on some of the fixed assets purchased. On this basis, the Audit Division issued a Notice of Assessment Review asserting an adjusted tax due of \$10,843.84 plus minimum statutory interest.

4. The petitioner, by its attorney, signed a Withdrawal of Petition and Discontinuance of Case dated April 14, 1982 agreeing to the revised tax. A

deferred payment agreement was entered into between petitioner and the Tax Compliance Bureau. As of February 10, 1983 payments amounting to \$11,913.90 were made pursuant to this agreement.

5. At the pre-hearing conference, the Audit Division had cited a State Tax Commission decision, Matter of Flah's of Syracuse, Inc., State Tax Commission, November 28, 1980, as controlling authority to support its position that petitioner's fixed asset acquisitions were subject to sales tax. In December 1982, petitioner wrote to the Audit Division to bring to its attention the decision of the Appellate Division, Third Department in Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729, annulling the determination of the State Tax Commission. In effect, the petitioner requested a refund of taxes paid on the basis that the Audit Division's position and the withdrawal of petition were grounded in a mutual mistake of law.

6. The Audit Division denied petitioner's request for refund explaining that such a request was barred by the statutory time limitations set forth in section 1139 of the Tax Law. Thereafter, petitioner filed a timely petition protesting the refund denial, and a pre-hearing conference was held on February 9, 1984. Ignoring the issue of timeliness, the conferee concluded that petitioner's leasehold improvements should not have been subjected to sales tax. On the basis of the conferee's representation that taxes paid would be refunded, petitioner, by its president, signed a second withdrawal of petition dated October 29, 1984 which stated, inter alia:

"I understand that all refund claims are subject to the approval of the Comptroller. Accordingly, this withdrawal and continuance is conditioned upon the granting of such approval and the payment of the refund."

6. Petitioner's refund request was denied by the Comptroller on the grounds that the request was barred by statutory time limitations.

CONCLUSIONS OF LAW

A. That pursuant to section 1139, subdivision (a)(ii) of the Tax Law, an application for refund of taxes paid must be made within three years from the date when such taxes were payable under the Tax Law. Petitioner requested a refund of taxes paid for the period November 30, 1975 through February 28, 1979. Sections 1136(b) and 1137(a) of the Tax Law required that sales taxes for the last quarter of this audit period be paid by March 29, 1979. Consequently, petitioner's request for refund, made on or about December 3, 1982, was barred by the three year statutory time limitation.

B. That section 1139, subdivision (c) of the Tax Law provides that a person shall not be entitled to a refund of a tax determined to be due pursuant to section 1138 of the Tax Law where he has had a hearing or failed to avail himself of his right to a hearing as provided for in section 1138. Following a pre-hearing conference, petitioner voluntarily agreed to pay a revised assessment of \$10,843.84 and executed a Notice of Withdrawal of Petition and Discontinuance of Case on April 14, 1982. In thus choosing not to pursue the administrative remedies provided by law, petitioner forfeited any entitlement he may have had to a refund of taxes paid.

C. That where a conferee proposes a resolution of a controversy which entails a refund, approval of the Comptroller is necessary [20 NYCRR 601.4(c)(3)]. Moreover, the State Tax Commission Rules of Practice and Procedure (20 NYCRR 601.4) make it clear that the conferee's authority to resolve disputes is confined by the framework of the Tax Law [20 NYCRR 601.4(c)(1)]. Neither the Comptroller nor the State Tax Commission is bound by a resolution which is in direct conflict with the Tax Law.

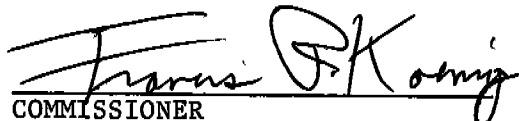
D. That the petition of Kumax Corporation (formerly Melody Productions, Inc.) is denied in all respects.


DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER