

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
The Psychological Corp.

:
:
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law for :
the Years 1969 - 1972.

State of New York
County of Albany

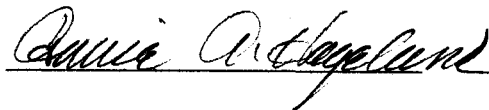
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon The Psychological Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

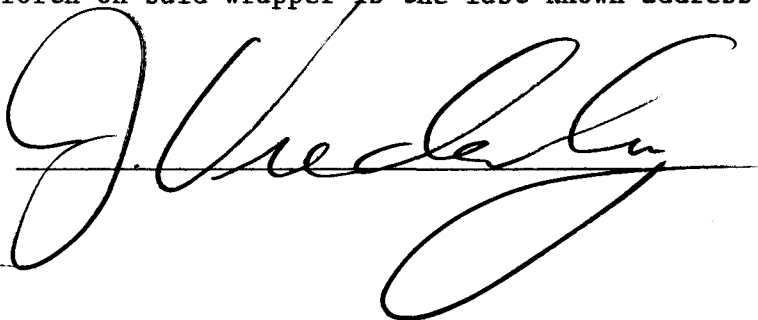
The Psychological Corp.
757 Third Ave.
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
4th day of August, 1982.





STATE OF NEW YORK

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In the Matter of the Petition :
of :
The Psychological Corp. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law for:
the Years 1969 - 1972.

State of New York
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Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon George J. Marchese the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George J. Marchese
Miller, Montgomery, Sogi & Brady
200 Park Avenue
New York, NY 10166

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 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.

Sworn to before me this
4th day of August, 1982.

Connie A. Haglund

J. Vredenburg

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

August 4, 1982

The Psychological Corp.
757 Third Ave.
New York, NY 10017

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) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
George J. Marchese
Miller, Montgomery, Sogi & Brady
200 Park Avenue
New York, NY 10166
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
THE PSYCHOLOGICAL CORPORATION : DECISION
for Redetermination of a Deficiency or for :
Refund of Franchise Tax on Business Corporations :
under Article 9-A of the Tax Law for the Years :
1969 through 1972.

Petitioner, The Psychological Corporation, 757 Third Avenue, New York, New York 10017, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the years 1969 through 1972 (File No. 23605).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 21, 1981 at 1:15 P.M. and continued to conclusion on November 30, 1981 at 1:15 P.M. Petitioner appeared by Miller, Montgomery, Sogi & Brady, P.C. (George J. Marchese, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel at the May 21, 1981 hearing and Angelo Scopellito, Esq., of counsel at the November 30, 1981 hearing).

ISSUE

Whether petitioner maintained a regular place of business outside New York during the years at issue so as to be entitled to allocate its business income.

FINDINGS OF FACT

1. On December 17, 1973, the Audit Division issued to petitioner, The Psychological Corporation, a Notice of Deficiency asserting additional franchise

tax due under Article 9-A of the Tax Law for the year 1971 in the amount of \$174.00, plus interest.

On August 22, 1975, the Audit Division issued to petitioner a Notice of Deficiency asserting additional franchise tax due for 1972 in the amount of \$14,732.96, plus interest.

These adjustments were due to the Audit Division's disallowance of petitioner's allocation of its business income.

2. By petition dated February 8, 1974, petitioner requested redetermination of the deficiency asserted for 1971. In addition, petitioner sought refund of taxes for 1969 and 1971 in the respective amounts of \$10,294.99 and \$15,080.00, which refund claims had been disallowed by the Audit Division on October 23, 1973.

By petition dated December 12, 1975, petitioner requested redetermination of the deficiency for 1972 and refund of taxes for 1970 in the amount of \$8,887.95, which refund claim had been denied by the Audit Division on July 21, 1975.

3. Petitioner was incorporated under the laws of New York and began business in this state in April, 1921. It is a publisher of tests (e.g., aptitude and ability tests, intelligence tests, special clinical tests and equipment, and achievement and reading tests) and related testing material. Its products include test materials, answer media, test scoring and ranking services and the preparation of press-on labels (for student folders), rosters and reports representing the scoring services. These products are sold to psychologists, schools and universities, and a small group of industrial users.

4. During the years in question, the primary sales vehicle of petitioner's products was its sales catalog. Catalogs were mailed to over 50,000 potential customers, including guidance counselors in virtually every school district in the United States and Canada.

5. Customers ordered from the catalog by forwarding their orders to petitioner's office in New York City. The orders were fulfilled and billed by the same office, and customers sent payment to petitioner's post office box at Grand Central Station. Alternatively, petitioner bid for contracts for city-wide testing programs, such as for the City of New York. In such instances, petitioner's price encompassed test booklets, answer media and scoring results (labels, rosters, cards, reports to parents and/or other options).

6. The answer sheets were an integral part of the test package marketed by petitioner. These answer media, on which students or other examinees recorded their answers, also captured identifying data, such as birthdate, sex, grade and date of test.

7. Upon completion of testing, customers forwarded the answer media, in accordance with instructions contained in the test materials package, to DAT-MRC Scoring Service ("MRC"), 321 Market Street, Iowa City, Iowa 52240.

8. MRC, or Measurement Research Center, is owned by Westinghouse Corporation. Pursuant to contracts with petitioner which were renewed annually, MRC processed the answer media. MRC owned all the computer hardware necessary for the processing, while petitioner owned the software, or computer programs.

9. The actual scoring process may be outlined as follows:

a) The answer sheets are passed through an optical scanner which transfers the data on the documents onto magnetic tape.

- b) The tape is validated and corrected to eliminate any administrative or scanning errors.
- c) The raw scores are converted, via computer program, into percentile ranges and stanines, in comparison with national norms.
- d) The identifying information and scores are printed on such forms and reports as were chosen by the customer.

MRC then mailed the results directly to petitioner's customers. At the customer's request, the answer sheets were also returned; otherwise, MRC held the answer sheets for six months and thereafter destroyed them.

10. MRC, an independent contractor, was compensated by petitioner for the services it rendered on a per student basis. MRC's cost of mailing the results to customers was an extra charge to petitioner.

11. Petitioner supplied MRC with all materials onto which the test scores were transcribed. The labels, rosters and reports, which bore petitioner's name and its logo of the Greek letter psi, were purchased by petitioner, shipped by petitioner to MRC and held in inventory by MRC until used. The Psychological Corporation materials were held and stored separately from materials of other firms for which MRC provided scoring services.

MRC used a public warehouse for holding petitioner's materials during 1969 and 1970, but stored petitioner's materials on its own premises during 1971 and 1972.

12. Aside from mailing test results and answering customer inquiries about such shipments, MRC had no other contact with petitioner's customers. All other questions were referred by MRC to petitioner. MRC never billed petitioner's customers.

13. Petitioner had no employees regularly stationed at the MRC facility. However, when a new answer form was being tried or a very large testing program scored, petitioner's employees visited MRC to observe, monitor, and assist when necessary.

14. Petitioner had no "branch office" in Iowa City, was not licensed to do business in Iowa and did not pay franchise tax to Iowa. The Iowa City directory listed a telephone number therein for petitioner, which was identical to MRC's number.

15. Of the proposed findings of fact submitted by petitioner, all but paragraphs 7 and 8 are adopted and incorporated herein; said paragraphs are unnecessary for purposes of this decision.

CONCLUSIONS OF LAW

A. That during the years at issue, Tax Law section 210.3(a)(4) required that any corporation, which did not maintain a regular place of business outside New York, allocate all its business income and capital to this state. Former 20 NYCRR 4.11(b), effective for the years at issue, defined a "regular place of business" for purposes of the business allocation as follows:

"A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. Where as a regular course of business, property of the taxpayer is stored by it in a public warehouse until it is shipped to customers, such warehouse is considered a regular place of business of the taxpayer and, where as a regular course of business, raw material or partially finished goods of a taxpayer are delivered to an independent contractor to be converted, processed, finished or improved, and the finished goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business of the taxpayer..."

The regulation effective for taxable years commencing on or after January 1, 1976 (repealed, April 1, 1981) adds the following language to the last sentence above-quoted: "if the taxpayer retains title to the material or goods." 20 NYCRR 4-2.2(b)(2).

It is petitioner's position that it has met the standard set forth in the regulation, insofar as it delivered "partially finished goods" in the form of answer media to MRC for processing or finishing through scoring services, and such goods remained in MRC's possession until shipped to petitioner's customers.

B. That petitioner has failed to establish several of the elements deemed crucial by this Commission to an entitlement to allocate. Petitioner was not qualified to do business in nor did it pay franchise tax to the state of Iowa. Petitioner did not hold itself out as conducting business in Iowa: its customers were instructed to forward answer sheets for scoring to "DAT-MRC Scoring Service", an entity independent of and separate from petitioner. Finally, petitioner had no full-time employees regularly in attendance at MRC. Former 20 NYCRR 4.16(d); Matter of Micro Computer Corporation, State Tax Commission, August 16, 1977, determination confirmed, Matter of Micro Computer Corporation v. State Tax Commission, 65 A.D.2d 867 (1978); Matter of U.G.P. Properties, Inc., State Tax Commission, January 27, 1976, determination confirmed, Matter of U.G.P. Properties, Inc. v. State Tax Commission, 64 A.D.2d 316 (1978).

Looking to the example given by the regulation upon which petitioner relies, it is abundantly clear that "partially finished goods of a taxpayer" (emphasis supplied) were not delivered to MRC for processing; the answer media were the property of the customer schools. Nor has petitioner demonstrated that it held and retained title to the forms (raw material) once delivered to MRC. See Matter of Dan-Ellen, Inc., State Tax Commission, December 13, 1978,

determination confirmed, Matter of Dan-Ellen, Inc. v. State Tax Commission, 79 A.D.2d 732 (1980).

C. That the petition of The Psychological Corporation is hereby denied and the notices of deficiency issued on December 17, 1973 and November 13, 1975 are sustained in full.

DATED: Albany, New York

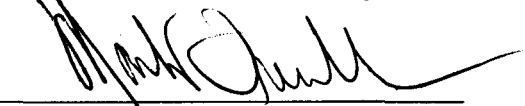
AUG 04 1982

STATE TAX COMMISSION

ACTING


PRESIDENT


COMMISSIONER


COMMISSIONER