

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ALAN DREY COMPANY, INC.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales & Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~XXXXXX~~ Period(s) Ending: :
August 31, 1975 through February 29, 1976

State of New York
County of Albany

John Huhn , 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 27th day of January , 1978 , ~~he~~ he served the within
Notice of Determination by ~~certified~~ mail upon Alan Drey Company, Inc.

~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

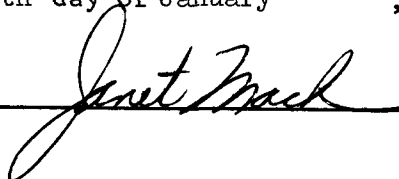
as follows: Alan Drey Company, Inc.
333 North Michigan Avenue
Chicago, Illinois 60601

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)~~
~~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

27th day of January , 1978





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Gilbert H. Weil, Esq. &

Notice of Determination

by (~~XXXXXX~~) mail upon Robert L. Sherman, Esq. of

Weil, Guttman & Davis, Esqs. (representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

Gilbert H. Weil, Esq. &

as follows: Robert L. Sherman, Esq. of

Weil, Guttman & Davis, Esqs.

60 East 42nd Street

New York, New York 10017

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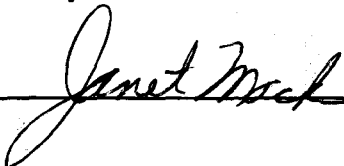
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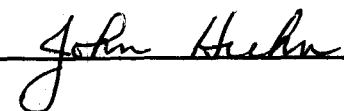
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Sworn to before me this

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

January 27, 1978

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

Alan Drey Company, Inc.
333 North Michigan Avenue
Chicago, Illinois 60601


Gentlemen:

Please take notice of the **Determination**
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1158 & 1245** 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,


Aloysius J. Hendon
Assistant Director

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE TAX COMMISSION

of :

DETERMINATION

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A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 27, 1976 at 9:15 A.M. Applicant appeared by Weil, Guttman & Davis (Gilbert H. Weil, Esq. and Robert L. Sherman, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Arnold Dorman, Esq., of counsel).

I. Whether a mailing list transaction, wherein a "list owner" permits a one-time use of a mailing list by a "list user" (and such

use is restricted in both time and manner of utilization), is subject to the imposition of sales tax under section 1105 of the Tax Law.

II. Whether a mailing list broker (where the transaction described in ISSUES "I" is found to be taxable) is responsible for the collection and remittance of sales taxes.

FINDINGS OF FACT

1. Notices of determination and demand for payment of sales and use taxes due for the quarters ended August 31, 1975, November 30, 1975 and February 29, 1976 were issued against applicant, Alan Drey Company, Inc., on November 24, 1975, February 23, 1976 and May 24, 1976, respectively.

2. Applicant, Alan Drey Company, Inc., and the Sales Tax Bureau stipulate that the scope of the determination of the Commission shall involve only the applicability of the sales tax to the transaction hereinafter described and the liability of the applicant herein.

3. Applicant, Alan Drey Company, Inc., is an Illinois corporation with its corporate headquarters in Chicago and other offices in New York, New York, St. Louis, Missouri and Miami, Florida.

4. A mailing list is a collection of names and addresses accumulated for the purpose of providing to the customers of the "list owner" the list owner's product, service or other information.

Mailing lists may also be assembled by a "list compiler" who assembles the list of names which have some common characteristics that may be of assistance in reaching a particular group of people.

5. List owners will often contact a "mailing list broker" such as the applicant, Alan Drey Company, Inc., and express their interest in permitting the use of their list. Applicant will request information regarding the manner in which the list was compiled and elicit information concerning such matters as how the list was accumulated, how current the list is, how many names are on the list and other pertinent information. Applicant, Alan Drey Company, Inc., would compile this information on a "list data card". This card would also contain the terms upon which the list owner would permit a usage, including the price per thousand names.

6. The normal and common practice in a transaction between a list owner and a list user is to restrict the usage of the list to a single mailing only. The list owner retains title to the list, and the user is permitted only that single use to transmit its message to those names on the list. The list user may not copy the list nor utilize the list other than in the time fixed for such utilization of the list and for purposes agreed to and approved by the owner of the list.

7. Applicant, Alan Drey Company, Inc., usually functions as the intermediary conveying messages between the list owner and the list user. Alan Drey Company, Inc. would build an inventory of lists available and when contacted by a possible user, would advise such party about lists which may serve the purposes of the party. After considering the product to be marketed and the potential market the potential list user seeks to communicate with, applicant would then attempt to match the market the potential user sought to reach with the list of a list owner in the inventory of applicant. Where the potential list user agrees that the list seems attractive, applicant would then communicate with the list owner and seek permission for the usage.

8. The applicant cannot alter the terms regarding the price the user is to pay for a list or a portion of a list. That price is fixed by the list owner. However, the list user may make an offer through the applicant to the list owner on different terms. Alan Drey Company, Inc. would convey this offer to the list owner and may on occasion, advise the list owner that it was the applicant's opinion that the suggested adjustments in the price or quantity should be accepted. Applicant, Alan Drey Company, Inc., submitted such information on a form called "Request for List Rental Clearance" which would advise the owner of the quantity, the list, the

price per thousand names, and such information as may be pertinent in the list user's offer. At the bottom of this particular form, the list owner would indicate his approval or disapproval of the offer or changes in the terms. Such information would be conveyed to applicant who would in turn convey the information to the potential list user. At no time was there direct communication between the list owner and the potential list user.

9. The agreement between the list owner and the list user, when reached, is submitted on applicant's "List Use Order", which order contains the name and address of the list owner and the name and address of the list user, the mailing date by which such material must be utilized by the list user, the quantity of names in the list, a description of that list and the rate per thousand names used, plus any additional charge for further selectivity (for instance the omission of names in certain regions), the date upon which the material must be received by the list user or the list user's "letter shop", shipping instructions, a person who may be contacted regarding this order and, finally, the manner in which the material is to be addressed or other special instructions.

10. Mailing lists forwarded to the list user or to a "letter shop" (a person or company in the business of doing mailings for other businesses), during the taxable periods here in question,

were in the form of either "cheshire labels", which constitute an address on a computer printout which can be gummed, cut and transformed into labels for attachment to envelopes, or by use of magnetic tapes which can be reproduced on the user's material by means of computer printing equipment. The tapes are usually required to be returned after the one-time use and any unused labels are either destroyed or returned to the vendor within the time fixed by the agreement between the list owner and the list user. Unused cheshire labels may not be kept by the list user for another use.

11. The applicant, Alan Drey Company, Inc., would receive an invoice drawn by the list owner to the list user in care of applicant. Such invoice would contain the amount due the list owner less the brokerage commission (20% pursuant to business custom), plus any special charges. On occasion, applicant was required to get additional information from the list user regarding the amount of names utilized where the agreement between the list owner and the list user provided for the possibility of usage of less than the total number of names sent. In one such instance, the list user guaranteed payment based on a percentage of the names in the list, regardless of the amount of names actually used.

12. Applicant, Alan Drey Company, Inc., would, using the invoice from the list owner, prepare an invoice of its own and

send it to the list user. Such invoice contained the items and figures contained in the invoice drawn by the list owner, but added back the commission of applicant. The total due per the invoice did not separately state any figure for applicant's commission.

13. The "List Use Order" used by applicant, Alan Drey Company, Inc., and the invoice sent the list user contain the statement: "If at some future date liability for sales taxes or use taxes is asserted upon any payment for the furnishing of the list ordered herein, ALAN DREY COMPANY, INC. acting solely as a broker disclaims any and all liability or responsibility for payment, collection or remission of any such tax."

14. The list user would then remit a check to applicant for the amount of the invoice. Applicant would then forward payment to the list owner in the amount of the invoice minus applicant's commission. This method was employed to ensure receipt of applicant's commissions.

15. Applicant, Alan Drey Company, Inc., advertised its services and actively sought to increase its inventory of owners of mailing lists who would be willing to permit the use of their lists. Potential list users were also actively sought.

16. The temporary possession by the list user, or the letter shop, of the names and addresses on the list owner's list is solely

for the necessity of addressing the mailing. The possession does not constitute passage of title from the owner to the user of the list, but is a transfer of a piece of property for only the limited usage involved. The same list could be in the possession of more than one list user at the same time, both of whom would have a limited one-time use within specific time constraints and other agreed-upon restrictions.

CONCLUSIONS OF LAW

A. That a list of names comprising a mailing list constitutes tangible personal property within the meaning of section 1101(b)(6) of the Tax Law, despite the storage of the mailing list in a computer or on a magnetic tape.

B. That section 1101(b)(5) defines sale, selling or purchase to be "Any transfer of title or possession or both, ...rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

C. That the mailing list transactions during the taxable periods here in question involve sales by a list owner to a list user, pursuant to a contractual agreement (often reached after a series of offers and counteroffers by the parties) whereunder the consideration is an amount of money in exchange for a limited one-time use of a number of names.

D. That section 1105(a) of the Tax Law imposes a tax upon "The receipts from every retail sale of tangible personal property except as otherwise provided in this article."

E. That section 1105(c)(1) of the Tax Law imposes a tax upon "The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner..."

F. That the sale described in Conclusion of Law "C", above, results in a receipt subject to the imposition of sales tax pursuant to both subdivision (a) and (c)(1) of section 1105.

G. That applicant, Alan Drey Company, Inc., is engaged in mailing list transactions as a mailing list broker and receives remuneration for its services of finding list users willing to use the list owner's list, communicating offers and counteroffers between these parties and negotiating the terms of the contract. That such remuneration is paid to the applicant by the list owner in the form of a commission which is a percentage of the consideration under the contract price.

H. That a "person required to collect tax" is defined in section 1131(1) of the Tax Law to include every vendor of tangible personal property or services.

I. That the term "vendor" includes, in addition to those persons or entities described in section 1101(b)(8)(A) through (E),: "...when in the opinion of the tax commission it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him or for whom he solicits business, the tax commission may, in its discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax." (Tax Law, 1101(b)(8)(ii)).

J. That it is the opinion of the Commission that for the efficient administration of Article 28 of the Tax Law, it is necessary to treat applicant, Alan Drey Company, Inc., as the agent of the list owner and, therefore, responsible for the collection and payment over of the tax.

K. That the application of Alan Drey Company, Inc. is denied and the notices of determination and demand for payment of sales and use taxes due issued on November 24, 1975, February 23, 1976 and May 24, 1976 are sustained as to the taxability of the transactions, subject to a separate hearing, when appropriate, to determine the amount of tax due.

DATED: Albany, New York
January 27, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER