

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
NAMES IN THE NEWS, INC. and
WALTER LAKE and JOYCE LAKE,
Individually and as Officers
For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Sales and Use
Taxes under Article(s) 28 and 29 of the
Tax Law for the ~~XXXXXX~~ Period (X)
September 1, 1971 through August 31, 1974.

AFFIDAVIT OF MAILING

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 1st day of September, 1978, he served the within
Notice of Determination by ~~(certified)~~ mail upon Names in the News, Inc.

(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Names in the News, Inc.
31 East 28th Street
New York, New York

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

1st day of September, 1978.

M. Walker

John Huhn

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
NAMES IN THE NEWS, INC. and
WALTER LAKE and JOYCE LAKE,
Individually and as Officers
For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Sales and Use
Taxes under Article(s) 28 and 29 of the
Tax Law for the ~~Year(s)~~ Period ~~(x)~~
September 1, 1971 through August 31, 1974.

AFFIDAVIT OF MAILING

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 1st day of September, 1978, he served the within
Notice of Determination by ~~(certified)~~ mail upon Walter Lake and
Joyce Lake ~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Walter Lake and Joyce Lake
71 Shore Drive
Larchmont, New York

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

1st day of September, 1978.

John Huhn

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

NAMES IN THE ^{of} NEWS, INC. and
WALTER LAKE and JOYCE LAKE,
Individually and as Officers
For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 and 29 of the :
Tax Law for the ~~Year(s)~~ Period(s) :
September 1, 1971 through August 31, 1974.

AFFIDAVIT OF MAILING

State of New York
County of Albany

John Huhn , being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 1st day of September , 1978, she served the within
Notice of Determination by ~~(certified)~~ mail upon Dirk S. Gould
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Dirk S. Gould, Esq.
Alter, Lefevre, Raphael, Lowry & Gould, P.C.
530 Fifth Avenue
New York, New York 10036
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

1st day of September , 1978

[Signature]

John Huhn



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

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

September 1, 1978

**Names in the News, Inc.
31 East 28th Street
New York, New York**

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) **1138 and 1243** 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,

**Michael Alexander
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
NAMES IN THE NEWS, INC. and	:	
WALTER LAKE and JOYCE LAKE,	:	DETERMINATION
Individually and as Officers	:	
	:	
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, 1971	:	
through August 31, 1974.	:	

Applicants, Names in the News, Inc. (hereinafter "NIN"), 31 East 28th Street, New York, New York, and Walter Lake and Joyce Lake, 71 Shore Drive, Larchmont, New York, filed an application 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, 1971 through August 31, 1974 (File No. 11483).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 18, 1976, March 15, 1977 and March 16, 1977. Applicants appeared by Alter, Lefevre, Raphael and Gould, PC (Dirk S. Gould, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether mailing lists consisting of "Cheshire labels" furnished by a mailing list owner to a "user" or "mailer" constitute tangible personal property subject to sales tax.

II. Whether mailing lists consisting of "magnetic tapes" constitute tangible personal property or information services subject to sales tax.

III. Whether NIN (a mailing list broker) was required to collect sales tax from the mailing list users in transactions in which NIN was the broker for mailing lists consisting of Cheshire labels and magnetic tapes, for which it received no fee or commission from the user.

IV. Whether the transactions between NIN and Ogilvy and Mather were subject to sales tax.

V. Whether NIN was required to collect sales tax on its transactions with Ogilvy and Mather.

VI. Whether the transactions between NIN and International Correspondence School were subject to sales tax.

VII. Whether NIN was required to collect sales tax on its transactions with International Correspondence School.

VIII. Whether the transactions between NIN and Consumer's Union were subject to tax.

IX. Whether NIN was required to collect sales tax on its transactions with Consumer's Union.

X. Whether Walter Lake and Joyce Lake were responsible officers of NIN and required to collect sales tax.

XI. Whether penalties and additional interest should be waived.

XII. Whether the test period used on audit was proper.

FINDINGS OF FACT

1. NIN is a corporation with offices at 31 East 28th Street, New York, New York. Walter Lake and Joyce Lake are officers of NIN.

2. NIN is a "mailing list broker" or "mailing list consultant," instrumental in arranging a rental transaction between a list owner and a list user or mailer, with respect to the rental of the owner's mailing list. In a typical case, NIN is contacted by a mailer for assistance regarding a particular direct-mail promotion in which the user wishes to engage. NIN maintains a file of 5,000 to 6,000 index data cards containing information about the various lists available for rental. It recommends various lists to the user which most meets said user's needs. NIN then ascertains from the list owner the availability of the mailing list and secures the owner's approval of the proposed mailing.

3. NIN then prepares a printed list rental instruction and order form consisting of 4 pages with 3 carbons. Page 1 is mailed to the list owner, while page 2 is mailed to the list user or mailer. Page 3 is a follow-up mailed to the list owner and page 4 is retained by NIN as its office copy. There is a provision on pages 1 and 2 to the effect that the instructions cover a one-time use and that the mailer guarantees no copies of names will be made. There is a provision on page 1 as follows:

"BILLING - On completion of addressing, list owner will bill c/o NAMES IN THE NEWS, INC. less 20% brokerage commission. NAMES IN THE NEWS, INC. will bill mailer on behalf of the list owner."

The aforementioned provision does not appear on the other copies of the list rental instructions and order form. There is a statement on page 2 of the aforementioned form as follows: "LIST RENTAL CONFIRMATION - We appreciate the opportunity to represent you on this list rental. You can be assured we will follow through on this order in your behalf. If there are any changes required please advise us at once. Thank you." This provision does not appear on any of the other pages. A portion of the carbon paper between pages 1 and 2 is cut out so that the name and address of the list owner is blocked out on page 2 thereof.

4. NIN does not receive any fee or compensation whatsoever from the mail order user or mailer.

5. After the order has been placed, the list owner ships the mailing list (either in the form of magnetic tapes or cheshire labels) to the mailer or the service bureau of the mailer, in accordance with the instructions contained in the order form. On some occasions, the list owner will ship the magnetic tapes or labels to his own service bureau. "Magnetic tapes" contain impulses that can only be used through data processing to generate hard copy. To use the information contained on the magnetic tape, the tape itself must be hooked up to a computer, so as to translate the magnetic impulses into English or hard copy that is readable. This process furnishes a name and address for use by the mailer or list user. The service bureau commences a merge - purge operation (a process of merging multiple lists to eliminate duplication). The magnetic tapes are then returned to the list owner. The "Cheshire labels" are printed pieces of paper containing names and addresses of individuals on a particular mailing list. The labels are generally produced by the list owner and usually shipped to a service bureau or letter shop which takes the labels and affixes them to the mailing pieces that are then mailed out. Any unused labels are destroyed or returned to the

list owner. After the tapes and labels are delivered to the user or the service bureau or letter shop, the list owner sends an invoice to NIN for the number of names rented, plus shipping charges and any other additional charges incurred by the mailer. The service bureau charges are incurred by the mailer. NIN then issues its own invoice to the mailer for the amount indicated on the invoice of the list owner. Upon payment by the mailer of the NIN invoice, NIN deducts its 20% commission of the list rental fee (excluding shipping charges and other service fees) and remits the balance to the list owner.

6. The list owner owns the magnetic tapes and there is no transfer of title to the tapes by the list owner to the mailer or anyone else. The tapes are for a "one time" use only and no copying of the names is permitted. The mailer is not permitted to make copies of the names on the labels which are for a "one time" use only.

7. Applicant NIN executed a waiver extending to June 20, 1975 the period within which to issue an assessment for the period September 1, 1971-through August 31, 1974. On June 16, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to NIN and to Walter Lake and Joyce Lake, individually and as officers, for the period

September 1, 1971 through August 31, 1974. Said Notice imposed additional tax of \$161,133.76, plus penalty and interest of \$53,760.82, for a total of \$214,894.58. Applicants timely filed an application for a hearing with respect to the Notice of Determination.

8. The examiner who conducted the audit and prepared the work sheets in connection therewith carried forward the wrong figure of his total for the month of April, 1974. The examiner used the figure \$64,497.16 for April instead of \$44,538.31, thereby reducing the taxable percentage from 38.35% to 35.7% which resulted in a reduction of the tax due by \$16,140.91. The original examiner who conducted the audit was unavailable, since he was no longer employed by the Department of Taxation and Finance at the time of the hearing. Based on a recomputation, it was conceded by the Sales Tax Bureau that additional taxable sales for the test period should be reduced to \$193,588.13 from \$213,447.67 and allocable as follows:

(a) American Express	\$112,075.17
(b) International Correspondence Schools	42,245.73
(c) Consumer's Union	21,984.94
(d) All others	<u>17,282.99</u>
Total	\$193,588.83

9. The audit was based on a test of sales for three months, namely, March, April and August of 1974. A total of 1,446 invoices representing 8.5% of total sales for the audit period were tested. No evidence was presented at the hearing by applicants that the test period was not representative, or that a different test period would disclose a more favorable result to applicants.

10. Ogilvy and Mather (hereinafter referred to as "O & M") is the advertising agency for American Express. O & M entered into an agreement with American Express in 1965, whereby the former acted as agent for the latter with respect to its advertising and direct mail transactions. American Express had a direct pay permit for payment of sales taxes, issued August 1, 1965, commencing in February of 1973, NIN invoices were directed to "O & M/American Express".

11. NIN was furnished with an exempt use certificate by International Correspondence School (hereinafter referred to as "ICS") dated January 30, 1975 which did not bear the certificate of authority identification number, but stated that "property purchased by user while a nonresident of New York." The transactions in issue antedate the date of the execution of the certificate.

12. NIN contends that it was not required to collect sales tax on its transactions with Consumer's Union (hereinafter referred to as "CU"), since it is a non-profit organization. No proof was submitted by NIN that CU was an organization exempt from sales or use tax, in accordance with the provisions of Articles 28 and 29 of the Tax Law.

13. NIN contends that in a great number of instances, delivery of the magnetic tapes and labels took place outside New York State. No proof was submitted as to actual delivery outside the State, although some invoices were mailed to users outside the State.

14. The arrangement between the mailing list owner and the user prohibited the reproduction of names. It merely provided for a "one time" use, unless the user desired to use the mailing list again, for which he would pay another fee for the use thereof.

15. NIN failed to present proof that shipments with respect to transactions between NIN and ICS were made outside the State of New York.

16. NIN acted in good faith.

17. NIN issued invoices to Ogilvy-Mather/American Express from February 8, 1973 to August 31, 1974. Prior to that date invoices were issued solely to OM. No proof was presented to the effect that the direct pay permit of American Express applies to mailing lists prior to February 8, 1973 or that NIN relied on the aforementioned direct pay permit prior to February 8, 1973.

18. No proof was presented at the hearing to show that the officers of NIN, namely, Walter S. Lake and Joyce Lake, were not responsible officers who were required to collect sales tax on behalf of NIN.

CONCLUSIONS OF LAW

A. That the transactions between the mailing list owner (NIN) and the user (with respect to the use of magnetic tapes) constitutes either the sale of tangible personal property, in accordance with the provisions of section 1101(b)(5) or, in the alternative, a taxable service within the intent and meaning of section 1105(c)(1) of the Tax Law.

B. That the right to use magnetic tapes for a one time use and the use of cheshire labels for a one time use in a transaction between a mailing list owner and a mailing list user or mailer does not constitute the reproduction of printed matter on an exclusive and confidential basis excluded from sales tax, under the exception to section 1105(c)(1) of the Tax Law.

C. That the transfer of cheshire labels by the mailing list owner and the right to the use or possession thereof by the user or mailer for affixation to envelopes or printed matter (which are mailed by or on behalf of the user) constitutes the sale of tangible personal property, within the intent and meaning of

section 1101(b) (5) of the Tax Law or, in the alternative, a taxable service within the intent and meaning of section 1105(c) (1) of the Tax Law.

D. That in accordance with the provisions of section 1101(b) (8) (i) (A) through (E), defining the term "vendor", section 1101(b) (8) (ii) also extends the definition of the term "vendor" to include "In addition, 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."

E. That in the opinion of the Tax Commission, the efficient administration of Article 28 makes it necessary to treat NIN as the agent of the list owners and, therefore, makes NIN responsible for the collection and payment over of the tax.

F. That NIN was required to collect sales tax on its transactions with Consumer's Union, since no exempt organization certificate or resale certificate of Consumer's Union was offered in evidence at the hearing.

G. That NIN was not required to collect sales tax with respect to transactions with Ogilvy-Mather/American Express, and with respect to invoices commencing with February 8, 1973, since American Express had a direct payment permit on which NIN relied. American Express had a tax obligation from that date, namely, from February 8, 1973 to August 31, 1974.

H. That the test period used was not unreasonable or arbitrary.

I. That the interest in excess of the minimum interest and the penalty imposed pursuant to section 1145(a) of the Tax Law be and the same are hereby waived.

J. That Walter S. Lake and Joyce Lake were responsible officers of NIN and, therefore, responsible for the collection of sales tax on behalf of NIN.

K. That the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 16, 1975 in accordance with Conclusions of Law "G" and "I", supra, but that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
September 1, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER