

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Western New York Hospital Television Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 of the Tax Law
for the Years 1970-1974. :

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 17th day of August, 1979, he served the within notice of Determination by mail upon Western New York Hospital Television Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Western New York Hospital Television Inc.
210 Franklin St.
Buffalo, NY 14202

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
17th day of August, 1979.

Carmen Mattolise

Jay Vredenburg



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

STATE TAX COMMISSION

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

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 17, 1979

Western New York Hospital Television Inc.
210 Franklin St.
Buffalo, NY 14202

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 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,

A handwritten signature in cursive script, reading "Michael Alexander".

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
WESTERN NEW YORK HOSPITAL TELEVISION, INC. : DETERMINATION
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, :
1970 through February 28, 1975. :
:

Applicant, Western New York Hospital Television, Inc., 210 Franklin Street, Buffalo, New York 14202, 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, 1970 through February 28, 1975 (File No. 13448).

A formal hearing was held before Alan R. Golkin, Esq., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 7, 1977 at 1:15 P.M. Applicant appeared by George M. Zimmermann, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

- I. Whether applicant is liable for payment of sales tax.
- II. Whether applicant collected sales taxes for its customers.
- III. Whether applicant is entitled to a refund of monies paid to the Sales Tax Bureau for the periods at issue herein.

FINDINGS OF FACT

1. Applicant, Western New York Hospital Television, Inc., timely filed its application for a hearing on March 25, 1976 and timely filed an Application for Credit or Refund of State and Local Sales or Use Tax on April 10, 1975, covering the period September 1, 1970 through February 28, 1975.

2. On the advice of its accountants and auditors and in response to notices of determination and demand for payment of sales and use taxes due issued by the Sales Tax Bureau, applicant made various payments covering the periods herein examined.

3. All such payments were made under protest and contrary to opinions of applicant's counsel, who had informed applicant that no liability for sales tax existed.

4. During the period September 1, 1970 through October 20, 1972, applicant was not liable for sales taxes, did not collect sales taxes from its customers and had deviated from prior practices when it had charged, collected and paid over sales taxes (prior to September 1, 1968).

5. By stipulation of counsel for applicant and the Sales Tax Bureau and after examination of pertinent cases (e.g. Bathrick Enterprises, Inc. v. Murphy, 27 A.D. 2d 215), applicant was found not liable for sales taxes, since its transactions were beyond the scope of Articles 28 and 29 of the Tax Law.

6. During the period October 20, 1972 through February 28, 1975, applicant did not charge or collect sales taxes from its customers.

7. Applicant's billing form in use from September 1, 1968 through October 20, 1972 (and more particularly in use over the period September 1, 1970 through October 20, 1972) included the legend "Includes Sales Tax, if any". This was done on the advice of counsel and as assurance to applicant's customers that they, in turn, bore no additional liability for sales taxes; however, it was also done with no intention of conveying the impression that applicant was or might be liable for sales taxes, and that such taxes were included in said billing and would be paid.

8. During the period September 1, 1970 through October 20, 1972, applicant neither intended nor actually charged or collected sales taxes from its customers.

9. Applicant's segregation of funds and separate accounting ledgers and payments "under protest" therefrom to the Sales Tax Bureau were done on advice from auditors, bankers and accountants, so as to be properly protected against a contingent liability of sales taxes for that period up to October 20, 1972.

10. For the period October 20, 1972 through February 28, 1975, applicant did not charge or collect sales taxes from its customers. The removal of any legend from applicant's billing forms removed any possible equivocation.

11. Applicant's segregation of funds, distinction of accounting journals and payments "under protest" therefrom to the Sales Tax Bureau for the period October 20, 1972 through February 28, 1975 did not constitute the charging or collecting of sales taxes from its customers, but were merely a protection against a potential problem on advice of applicant's auditors.

12. Applicant collected no sales taxes from customers after August 31, 1968 and made no refunds to its customers for that reason.

13. No windfall to applicant can occur since payments have been made by applicant to the Sales Tax Bureau from applicant's funds which would otherwise have been business profits.

14. That the interest paid of \$4,715.26 was applied to a different Notice (No. 90,744,624) covering the period September 1, 1968 through August 31, 1970, and that matter is separate and distinct from the issues stated herein.

CONCLUSIONS OF LAW

A. That the Statute of Limitations was never raised by the Sales Tax Bureau prior to the submission of its brief. The inclusion of such an argument at that stage and for the first time is inappropriate.

B. That the Application for Credit or Refund of State and Local Sales or Use Tax and application for hearing are timely filed, in so far as they relate to the date of payment and the date of assessment, rather than the period during which the tax was assessed.

C. That the evidence, testimony, argument and case law examination clearly show that applicant has not (since September 1, 1968) been and is not now liable for sales taxes incident to its business of renting television sets to hospital patients. (Bathrick Enterprises, Inc. v. Murphy, 27 A.D. 2d 215)

D. That no windfall can occur where funds are returned to a taxpayer (such as applicant) who was never liable for payment to begin with in the period covered hereby, and where such payments were made from its own funds absent any collections thereof from its customers.

E. That the wording of applicant's billing forms was not so incongruous or equivocal as to permit the conclusion that applicant not only was really charging its customers for sales tax, but that applicant, with the advice of counsel and accountants, intentionally violated section 1132(a) of the Tax Law. The weight and credibility of the testimony and evidence support a finding that applicant was well-advised, was not liable for sales taxes, intended to collect none from its customers, and had no intent to violate section 1132(a). The singularity of the invoice price was nothing more than the cost of applicant's services. No proof

was introduced to establish anything to the contrary, and such a pricing practice, whether the bill referred to the inclusion of "taxes, if any," or remained silent on the question of tax liabilities has been held in the U.S. Supreme Court to be proper. (Lash's Products Co. vs. U.S., 278 U.S. 175, 176, 49 S. Ct. 100, 73 L. Ed. 251)

F. That applicant is not barred from claiming a refund for failing to make refunds to customers, since applicant collected no sales taxes from its customers; therefore, no refunds are due applicant's customers.

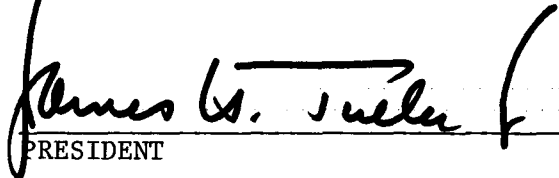
G. That applicant is liable for use taxes under Articles 28 and 29 of the Tax Law, if the application for refund of sales taxes is granted, and applicant, through counsel, has so stipulated.


H. That the application of Western New York Hospital Television, Inc. for credit or refund of state and local sales or use tax is granted to the extent that applicant is entitled to a refund of any monies paid with respect to applicant's liability for the period September 1, 1970 through February 28, 1975, less the use taxes due as indicated in Conclusion of Law "G", supra.


DATED: Albany, New York

AUG 17 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER