

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Fred Gardner Co., 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 & 29 of the Tax Law
for the Period 12/1/71-11/30/74. :

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 3rd day of October, 1980, he served the within notice of Decision by mail upon Fred Gardner Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Gardner Co., Inc.
50 E. 42nd St.
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
3rd day of October, 1980.

Debbie Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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Sales & Use Tax :
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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 3rd day of October, 1980, he served the within notice of Decision by mail upon Joseph H. Murphy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
Syracuse, NY 13202

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
3rd day of October, 1980.

Luigi Berra

[Signature]

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

October 3, 1980

Fred Gardner Co., Inc.
50 E. 42nd St.
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) 1138 & 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
FRED GARDNER CO., INC.	:	DECISION
	:	
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 December 1, 1971 through	:	
November 30, 1974.	:	

Petitioner, Fred Gardner Co., Inc., 50 East 42nd Street, New York, New York 10017, 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 December 1, 1971 through November 30, 1974 (File No. 10470).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on September 27, 1977 at 9:15 A.M. Petitioner appeared by Hancock, Estabrook, Ryan, Shove & Hust, Esqs. (Joseph H. Murphy, Esq., of counsel) and by Brady, Tarpey, Hoey, P.C. (Gregory H. Doherty, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (James J. Morris, Esq., of counsel).

ISSUE

Whether the receipts from production sales by the taxpayer advertising agency, including that portion denominated by the taxpayer as "commissions" for the services of an advertising agent, were subject to sales tax pursuant to section 1105 of the Tax Law.

FINDINGS OF FACT

1. On July 29, 1975, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90756833) against

Fred Gardner Co., Inc. and against Frederick H. Gardner, Harry C. Lotufo and Robert L. Luce, individually and as officers of said corporation, for the period December 1, 1971 through November 30, 1974. Said Notice asserted taxes due of \$15,862.66, plus penalty and interest of \$5,246.88, for a total amount of \$21,109.54.

2. On January 15, 1975, Fred Gardner, as president of Fred Gardner Co., Inc., signed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes for the taxable periods December 1, 1971 through November 30, 1974, up to and including December 20, 1975.

3. L. Peter Dolan, as assistant treasurer of Fred Gardner Co., Inc., filed a Demand for Hearing with the State Tax Commission in a timely manner.

4. Petitioner, Fred Gardner Co., Inc., was a corporation in the business of providing advertising services to a wide variety of clients in New York and in other states.

5. During the period January 15, 1975 through June 13, 1975, a Sales Tax Examiner conducted a field audit of petitioner corporation which resulted in the issuance of the aforementioned Notice. The following taxes were found to be due and owing:

(a) Compensating use taxes on furniture and fixtures in the amount of \$385.68. Petitioner conceded that said taxes were properly assessed, by letter from Mr. Dolan, assistant treasurer, dated August 29, 1975.

(b) Compensating use taxes on materials utilized in the production of advertisements subsequently sold to out-of-state clients in the amount of \$1,922.75. At the formal hearing, counsel for petitioner conceded these taxes to be properly assessed.

(c) Sales taxes in the amount of \$13,554.23 on commissions charged by petitioner on production billings. Of the issues raised by the field audit,

this is the only one contested by petitioner.

6. Petitioner segregated its invoices, in accordance with the type of sale, into the following categories:

(a) media sales, which consisted of placing advertisements in a newspaper or with a radio or television station, for which petitioner billed its clients for the actual cost of placement of the ad, plus a commission;

(b) media sales, for which petitioner billed its clients for the actual cost, as above, plus a monthly or annual fee for advertising services; and

(c) production sales, which involved the creation of advertisements for placement in the media, for which petitioner billed its clients for the actual costs involved (including fees paid to outside vendors such as photographers and engravers, and hourly charges for technicians such as artists and copywriters employed by petitioner) plus a percentage commission on this amount for advertising services.

7. During the course of the audit, the Sales Tax Examiner did not review the invoices for sales in the first two categories because he determined these sales to be of a non-taxable nature, pursuant to section 1105(c)(1) of the Tax Law.

8. Invoices for production sales were reviewed by the examiner in detail. He prepared a schedule exhibiting the date of each invoice, the customer's name and address, the applicable percentage of tax, the amount of the job, the commission, the amount of the job plus the commission (which he labeled "total sale"), tax due on the "total sale", less tax reported by petitioner and/or tax paid on materials used in making the advertisement, and his conclusion as to the "net tax due".

9. Regarding production sales, petitioner had charged, collected and paid sales tax on the receipt, excluding the commission which it alleged was

non-taxable pursuant to Tax Law section 1105(c)(1). It was petitioner's position that the commissions were for the professional services of an advertising agent, of generally the same type as those rendered pursuant to media sales.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax upon the "receipts from every retail sale of tangible personal property...".

B. That the exclusion from tax for the services of advertising agents is specifically provided by section 1105(c)(1):

"[T]here is hereby imposed and there shall be paid a tax...upon:

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed...matter... including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding...the services of advertising or other agents..."

C. That in the instant case, petitioner produced advertisements for its customers in a form appropriate to the media in which the advertisement was to be placed. These advertisements constituted tangible personal property and when sold to petitioner's customers, the receipts therefrom were subject to tax.

D. That the exclusion of section 1105(c)(1) is inapplicable. Said exclusion is exemplified by such services as consultation between agent and client or placement of an advertisement with a newspaper by the agent on behalf of the customer without the transfer, by agent to customer, of any tangible personal property.

E. That the portion of the receipts denominated by petitioner as "commissions" cannot be extricated from the total receipt and excluded from tax. The commission was a percentage applied to the costs of producing the advertising materials and was an integral part of the total receipt. The

entire production billing, including fees of outside vendors, charges for petitioner's artists and other employees and commission, was the price paid by petitioner's customers for the purchase of tangible personal property and was therefore subject to New York State and local sales taxes in accordance with the meaning and intent of section 1105(a). (See Matter of Beverly Sheff, State Tax Commission, December 1, 1975.)

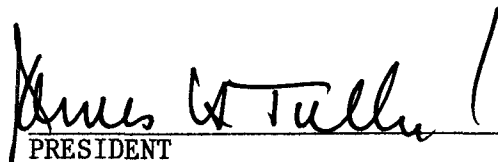
F. That insofar as petitioner acted in good faith throughout the period in question and throughout the proceeding, the penalties and interest in excess of the minimum statutory rate are cancelled.

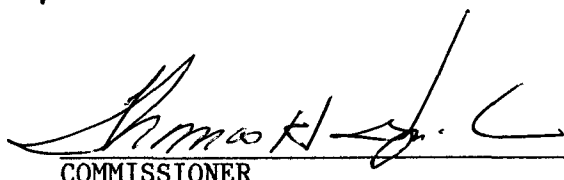
G. That the petition of Fred Gardner Co., Inc. is denied, except to the extent indicated in Conclusion of Law "F"; that the sales taxes assessed for the period December 1, 1971 through November 30, 1974 are due with interest at the minimum statutory rate; and that the Audit Division is directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued July 29, 1975.


DATED: Albany, New York

OCT 03 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER