

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Guerlain, 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 Period 3/1/72-2/28/75. :

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 28th day of November, 1980, he served the within notice of Decision by mail upon Guerlain, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Guerlain, Inc.
Route 138
Somers, NY 10589

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
28th day of November, 1980.

Deborah A Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Guerlain, 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 Period 3/1/72-2/28/75. :

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 28th day of November, 1980, he served the within notice of Decision by mail upon Fred D. Fine 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. Fred D. Fine
51 East 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 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
28th day of November, 1980.

Donald A. Bank

J. Vredenburg

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

November 28, 1980

Guerlain, Inc.
Route 138
Somers, NY 10589

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
Fred D. Fine
51 East 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GUERLAIN, 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 March 1, 1972	:	
through February 28, 1975.	:	

Petitioner, Guerlain, Inc., Route 138, Somers, New York 10589 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 March 1, 1972 through February 28, 1975 (File No. 18376).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1979 at 10:45 A.M. Petitioner appeared by Fred D. Fine, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (William Fox, Esq. of counsel).

ISSUE

Whether petitioner is entitled to a refund of tax it paid on sample perfume and perfume testers.

FINDINGS OF FACT

1. On March 8, 1976, Guerlain, Inc. filed an Application for Credit or Refund of State and Local Sales or Use Tax for the period March 1, 1972 through February 28, 1975 in the amount of \$13,199.20. Petitioner signed a Consent Extending Period of Limitation for Assessment to March 20, 1976.

2. On January 19, 1977, the Audit Division granted the petitioner a refund of \$6,583.47. It denied the balance of \$6,615.73 on March 11, 1977, which represented tax due on sample perfume and perfume testers. The denial was based on a prior field audit which held a use tax due on sample perfume and perfume tester bottles. The use tax was not assessed on audit but merely offset over-payments of use tax reported by petitioner.

3. The Audit Division held the use tax due on these perfume testers based on the selling price at which the petitioner would sell items of the same kind to other persons in the regular course of business as provided by sections 1110(B) and 1111(a) of the Tax Law. On audit a mark up of 149 percent was applied to the cost of the perfume and perfume tester bottles.

4. Guerlain, Inc. is a processor of perfume and other related products. Petitioner's regular course of business is the sale of the processed products to department stores for resale. Upon filling a purchase order from a department store, Guerlain includes one perfume tester of each fragrance ordered. The testers are transferred to their customers at no charge and are available only to department stores ordering its products. The tester is kept on the store's counter for use by prospective customers in sampling fragrances offered for sale.

5. Petitioner contended that it was not the user of the perfume tester or its contents. The testers are used by the department stores as a selling aid. Further, these testers are not given away to the prospective customer as a whole. Only a minute amount of the contents of the tester is given a prospective customer upon request.

6. Petitioner does not sell perfume in the same quantity or bottle as the tester. The quality of the tester bottles are inferior to the bottles sold. The perfume tester submitted by petitioner accommodates no more than 4cc's of perfume. The smallest bottle of perfume offered for sale contains 7cc's.

7. The total cost of the perfume tester bottle and the sample perfume is approximately 98 cents per unit. The perfume tester bottle accounts for approximately 7.6 cents or 8 percent of its cost.

CONCLUSIONS OF LAW

A. That section 1111(a) of the Tax Law states in summary that the compensating use tax imposed when computed in respect to tangible personal property wherever manufactured, processed or assembled and used by such manufacturer, processor or assembler in the regular course of business within this state shall be based on the price at which items of the same kind of tangible personal property are offered for sale by him; that Guerlain, Inc. exercised "use", as defined by section 1101(b)(7), of its products processed. The products were of the same kind as offered for sale; therefore, the contents of the testers are subject to the tax on the selling price at which they are offered for sale.

B. That the purchase by the petitioner of the tester bottles was a purchase at retail as defined by section 1101(b)(1) of the Tax Law; therefore, 8 percent of the total cost of testers as found in finding #7 is subject to the use tax at petitioner's cost.

C. That the petition of Guerlain, Inc. is granted to the extent indicated in Conclusion "B" above; that the Audit Division is hereby directed to accordingly modify the denial of refund dated March 11, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION

James A. Tully
PRESIDENT

Thomas H. Jones
COMMISSIONER

Francis R. Keating
COMMISSIONER