

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Tampa Marketing Corp. :

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 6/1/71-5/31/74. :

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 13th day of February, 1980, he served the within notice of Determination by mail upon Tampa Marketing Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

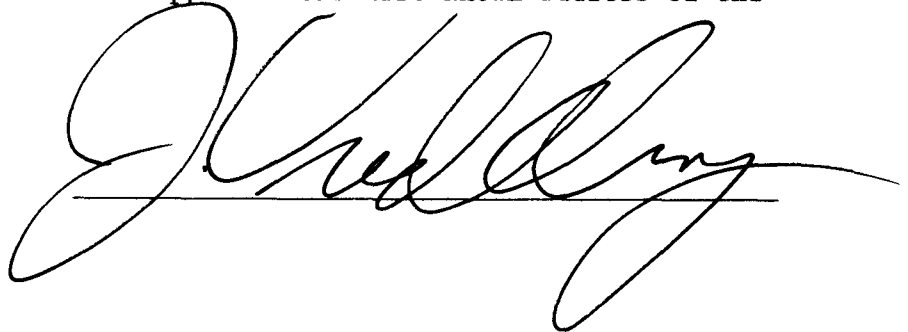
Tampa Marketing Corp.
Executive Square, Box 23117
Tampa, FL 33622

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
13th day of February, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Tampa Marketing Corp. :
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 6/1/71-5/31/74. :

AFFIDAVIT OF MAILING

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 13th day of February, 1980, he served the within notice of Determination by mail upon Joseph Calderon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

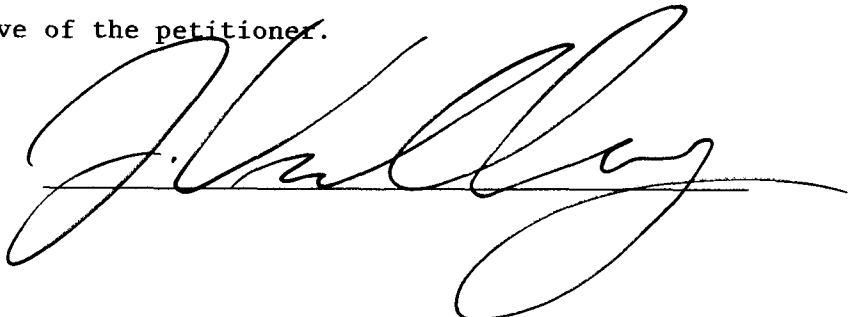
Mr. Joseph Calderon
Linden & Deutsch
110 E. 59th St.
New York, NY 10022

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
13th day of February, 1980.

Joanne Knapp



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

February 13, 1980

Tampa Marketing Corp.
Executive Square, Box 23117
Tampa, FL 33622

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 & 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 Calderon
Linden & Deutsch
110 E. 59th St.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
TAMPA MARKETING CORP. : 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 June 1, 1971 :
through May 31, 1974. :
:

Applicant, Tampa Marketing Corp., Executive Square, Box 23117, Tampa, Florida 33622, 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 June 1, 1971 through May 31, 1974 (File No. 10318).

A formal hearing was held before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 22, 1977 at 1:15 P.M. and was continued at the same location on March 25, 1977 at 9:15 A.M.

Applicant appeared by Linden and Deutsch, Esqs. (Joseph Calderon and Richard A. Whitney, Esqs. of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether a mail order sale of record albums and tapes to New York residents by a Florida corporation, as advertised on television stations in New York State, subjects the foreign corporation to New York State sales and use taxes on such sales.

FINDINGS OF FACT

1. Applicant, Tampa Marketing Corp., did not file New York State and local sales and use tax returns for the period June 1, 1971 through May 31, 1974.

2. On June 28, 1974, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to applicant in the amount of \$300,000.00 in sales taxes, plus \$62,473.25 in penalties and interest, making a total of \$362,473.25 due for June 1, 1971 through May 31, 1974.

3. On June 28, 1974, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Autumn Leaves, 406 Rea Street, Tampa, Florida, in the amount of \$168,000.00 in sales taxes, plus \$34,985.02 in penalties and interest, making a total of \$202,985.02 due for June 1, 1971 through May 31, 1974.

4. On June 28, 1974, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Great Stars, Box 1075, Champaign, Illinois, in the amount of \$10,800.00 in sales taxes, plus \$2,249.07 in penalties and interest, making a total of \$13,049.07 due for June 1, 1971 through May 31, 1974.

5. Applicant, Tampa Marketing Corp., is a corporation organized November 15, 1971 under the Florida State laws and is engaged in the sale of phonograph records and tapes by mail order throughout the United States. "Autumn Leaves" and "Great Stars" are not business entities but, rather, represent the names of phonograph record albums and, as such, are products offered for sale by applicant.

6. Applicant maintains its sole office or place of business in Tampa, Florida. All the corporation's officers reside in the State of Florida. The corporation maintains no office, warehouse or any other place of business in New York State and does not retain or employ any salesmen in New York. The corporation does not own any tangible property, real or personal, in this State and does not have a New York telephone listing.

7. Applicant negotiated and entered into contracts with various record companies whereby applicant was given a license to promote and make mail-order sales of phonograph albums and tapes containing selections of popular songs, to which the record companies owned publishing and/or recording royalty rights. Each of the record companies in question maintained an office in New York State. While the contracts were not executed in New York State, certain of applicant's officers, agents and/or employees travelled to this State to conduct and further the corporation's business dealings with the record companies.

8. The phonograph records and tapes were pressed or processed outside New York State, primarily in Indiana and Illinois, and contained single selections from previously-released albums. The choice of content of the albums and tapes, together with the requirement of obtaining releases or clearances for the use of material was a joint effort between applicant and the record company.

9. Lindsay Advertising, Inc., an advertising agency located in Tampa, Florida, with no branch offices in New York State, placed commercials on television stations in this State by telephone and correspondence. No officer, agent or employee of Lindsay Advertising, Inc., came into New York State to transact business. Lindsay Advertising, Inc., earned (and was paid by the applicant) fifteen percent commissions on the monetary amount of advertising placed and was responsible for making payments of fees to the television stations.

10. The television commercials featured an announcer reciting a script prepared by Lindsay Advertising, Inc., while excerpts from the record album were played. The script consisted of the names of the recording artists, the price of the record album and, ultimately, an offer or solicitation to the

public to purchase the album. The commercial ended with the address of the television station (or mailing address affiliated with the television station) in New York State being stated by the announcer (while simultaneously flashed on the screen) and the viewer being requested to place an order for the album by making payment to that address.

The address used for each television station in this State was different so that applicant could determine the "pull" of a particular television station.

11. Once the order was received at the appropriate mailing address in New York State the order was mailed, unopened, to applicant's office in Tampa, Florida. Applicant would then forward the record album by mail to the consumer in New York State.

12. Applicant and the Sales Tax Bureau stipulated on the record with respect to the legal issue that, after determination of such legal issue, the matter would be remanded to the Hearing Officer for further proceedings, if necessary, with respect to the amount of the tax liability.

CONCLUSIONS OF LAW

A. That an administrative hearing is not the proper forum to challenge the jurisdiction of the State Tax Commission on the ground that a statute is unconstitutional.

B. That applicant, Tampa Marketing Corp., has a "plain, speedy and efficient" remedy to challenge the jurisdiction of the State Tax Commission on the grounds that a statute is unconstitutional or inapplicable by commencing an Article 78 proceeding or an action for declaratory judgement in the Courts of this State. Tully v. Griffin, Inc., 429 US 68 (1976); Hospital Television Systems, Inc. v. New York State Tax Commission 63 Misc.2d 75, 311 NYS 2d 568 (Sup. Ct., Albany Co. 1970), aff'd, 41 AD 2d 576, 339 NYS 2d 603 (3rd Dept. 1973); Stacy v. State, 82 Misc.2d 181, 368 NYS 2d 448 (Sup. Ct., Albany Co. 1975).

C. That a mail order sale of record albums and tapes to residents of New York State by applicant, Tampa Marketing Corp., advertising on television stations in New York State, constitutes applicant a "vendor" within the meaning of section 1101(b)(8)(i)(C) of the Tax Law. Accordingly, said applicant was required to be registered pursuant to section 1134 of the Tax Law, to file quarterly returns pursuant to section 1136 of the Tax Law, and to remit the sales and use tax due under section 1137 of the Tax Law.


D. That, the application of Tampa Marketing Corp. is denied and the notices of determination and demand for payment of sales and use taxes due issued on June 28, 1974 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

FEB 13 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER