

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
McCall Publishing Co., Inc. (Seller) :
and :
Redbook Publishing Co., Inc. (Purchaser) : 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 1st day of May, 1981, he served the within notice of Decision by mail upon McCall Publishing Co., Inc. (Seller), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

McCall Publishing Co., Inc. (Seller)
230 Park Ave.
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
1st day of May, 1981.

Arnie A. Haydon

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
McCall Publishing Co., Inc.(Seller) :
: 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 1st day of May, 1981, he served the within notice of Decision by mail upon Noah Block 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. Noah Block
230 Park Ave.
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
1st day of May, 1981.

Ann P. Hayden

Jay Vredenburg

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

May 1, 1981

McCall Publishing Co., Inc.(Seller)
230 Park Ave.
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
Noah Block
230 Park Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
McCALL PUBLISHING COMPANY, INC. (SELLER)	:	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.	:	

In the Matter of the Petition	:	
of	:	
REDBOOK PUBLISHING COMPANY, INC. (PURCHASER)	:	
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 August 31, 1973.	:	

Petitioners, McCall Publishing Company, Inc. (Seller) and Redbook Publishing Company, Inc. (Purchaser), 230 Park Avenue, New York, New York, filed petitions 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. 15547 McCall Publishing Company, Inc.) and for the period December 1, 1971 through August 31, 1973 (File No. 16243 Redbook Publishing Company, Inc.).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 15, 1978 at 11:00 A.M. McCall Publishing Company, Inc. appeared, by Noah Block, Esq. and Myles J. Gilsenan, Esq. and Redbook Publishing Company, Inc. appeared by Arthur H. Bonner, Esq. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether orders or contracts for reproduction rights of fine artwork i.e. photographs, drawings, illustrations, etc. are subject to the State Sales and Use Tax if the artists' invoice fails to indicate that the artwork is for reproduction only and/or that it is to be returned to the artist without alteration.

II. Whether the transfer by McCall Publishing Company, Inc. of the assets and liabilities of its Redbook division to its newly organized subsidiary, Redbook Publishing Company, Inc., in exchange for the latter's stock, constituted a bulk Sale subject to the State Sales and Use Tax.

FINDINGS OF FACT

1. On March 29, 1976 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against McCall Publishing Company, Inc. stating:

"A recent audit of your records has disclosed additional purchases subject to use tax and tax due on the transfer of personal property. These taxes are determined in accordance with section 1138. Officer liability is determined in accordance with sections 1131 and 1133 of the Tax Law.

PERIOD ENDING	TAX DUE	P & I	TOTAL
2/29/72	\$8883.91	\$4619.63	\$13503.54
5/31/72	8883.91	4353.12	13237.03
8/31/72	9313.08	4284.02	13597.10
11/30/72	9527.70	4096.91	13624.61
2/28/73	9527.70	3811.08	13338.78
5/31/73	9527.70	3525.25	13052.95
8/31/73	9533.09	3241.25	12774.34
11/30/73	18932.69	9845.00	28777.69
2/28/74	7594.65	3721.38	11316.03
5/31/74	6823.25	3138.70	9961.95
8/31/74	7473.01	2989.20	10462.21
11/30/74	7798.00	2651.32	10449.32
TOTAL	\$113818.69	\$50276.86	\$164,095.55"

2. On March 29, 1976, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against Redbook Publishing Company, Inc. stating:

"The following taxes are determined to be due from McCall Publishing Co., Inc., and represents your liability, as purchaser, in accordance with section 1141(c) of the Sales Tax Law.

PERIOD ENDING	TAX DUE	P & I	TOTAL
2/29/72	\$8883.91	\$4619.63	\$13503.54
5/31/72	8883.91	4353.12	13237.03
8/31/72	9313.08	4284.02	13597.10
11/30/72	9527.70	4096.91	13624.61
2/28/73	9527.70	3811.08	13338.78
5/31/73	9527.70	3525.25	13052.95
8/31/73	9533.09	3241.25	12774.34
TOTAL DUE	\$74859.61	\$32955.77	\$107,815.38"

3. McCall Publishing Company, Inc. ("McCall"), a publisher of magazines, was a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 230 Park Avenue, New York, New York. During the period December 1, 1971 to September 28, 1973, McCall Publishing Company Inc. consisted of several divisions, two of which were the McCall Magazine division and the Redbook Magazine division. These two divisions, respectively, published McCall Magazine and Redbook Magazine.

4. On August 20, 1973 McCall Publishing Company, Inc. organized under the laws of the State of Delaware a subsidiary corporation, Redbook Publishing Company, Inc. ("Redbook").

5. On September 28, 1973 McCall transferred all of the assets, liabilities and functions of its Redbook Magazine division to McCall's newly organized subsidiary, Redbook, in return for 100 shares of Redbook stock.

6. As part of the publication of both McCall and Redbook magazines, McCall obtained reproduction rights to fine artwork, including illustrations, drawings, paintings, color transparencies, black and white photographs and

cartoons, etc. McCall obtained the reproduction rights pursuant to a contract or order with each artist. These contracts or orders entitled "Editorial/Art Order" contained all the terms of the agreements between McCall and the artists, including the price for the purchase of the reproduction rights, the issue and/or article in which or with which the artwork was planned to be reproduced and the type of reproduction rights being granted by the artists.

7. In some instances McCall obtained non-exclusive (one time use) reproduction rights to the artwork. In other instances McCall obtained limited exclusive (North American, Western Hemisphere etc.) reproduction rights and in other instances McCall obtained exclusive reproduction rights. Each contract or order was signed by an authorized signatory of McCall and delivered to the artists who would then perform. If McCall determined not to reproduce the artwork, it nevertheless paid the artists and returned the artwork to the artists.

8. The artists would deliver the artwork into the temporary possession of McCall solely for the making of separations and engraved metal plates necessary for the reproduction process. These separations and plates would be made in New York or in Connecticut and then the plates would be sent to Ohio to be reproduced for publication.

9. McCall would not retouch, correct, change, alter, exhibit or destroy the artwork. McCall only obtained reproduction rights to the artwork and did not obtain title. Possession was temporary, solely to make the reproduction.

10. McCall, at all times, recognized the artists' rights to title of the artwork and complied with any and all instructions from the artists, with respect to title of the artwork. If the artists requested return, McCall, at all times returned the artwork. McCall would only retain original artwork in

its files at the artists request and then only until the artists sought the return thereof. This retention was not for reproduction purposes, as reproduction had been completed, but solely for the convenience of the artists.

11. When submitting their invoices for payment, some of the artists would indicate, thereon, words to the effect the artwork was for reproduction only and/or the artwork was to be returned after reproduction. Other artists merely submitted a statement of the amount due without the indicative words of ownership.

CONCLUSIONS OF LAW

A. That for purposes of sales and use taxes, the definition of a sale is:

"Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefore, including the rendering of any service,....for a consideration or any agreement therefore." (Section 1101(b)(5) of the Tax Law)

B. That although some of the artists merely submitted invoices without indicating the retention of ownership, all of the contracts and/or orders for the artwork, herein, indicated they were for reproduction rights only. In all instances, for this purpose, temporary possession was given to the petitioners herein.

C. That although, at the time of the audit herein, regulations had not been promulgated, 20 NYCRR 526.7(f)(1) and (2), effective September 1, 1976 provide that:

"(f) Reproduction rights. (1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale and is not taxable....".

"(2) Mere temporary possession or custody for the purpose of the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use....".

D. That since the transactions at issue involved only the granting of the right to reproduce they were not taxable sales.

E. That the transfer by McCall Publishing Company, Inc. of the assets and liabilities of its Redbook division to its newly organized subsidiary, Redbook Publishing Company, Inc., in exchange for the latter's stock, was not a sale subject to sales or use tax. Section 1101(b)(4)(ii)(D) of the Tax Law provides:

"(ii) The term retail sale does not include:

* * *

(D) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock."

F. That the petitions of McCall Publishing Company, Inc. and Redbook Publishing Company, Inc. are granted and that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due and Notice of Demand, both dated March 29, 1976 are cancelled.

DATED: Albany, New York

MAY 01 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER