

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Muyskens Madison Inc. :  
and Bill Muyskens, Indv. & as Officer : 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 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 12th day of March, 1981, he served the within notice of Decision by mail upon Muyskens Madison Inc., and Bill Muyskens, Indv. & as Officer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Muyskens Madison Inc.  
and Bill Muyskens, Indv. & as Officer  
216 E. 49th 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  
12th day of March, 1981.

*Ernie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Muyskens Madison Inc. :  
and Bill Muyskens, Indv. & as Officer : 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 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 12th day of March, 1981, he served the within notice of Decision by mail upon Marvin E. Basson 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. Marvin E. Basson  
30 Wren Dr.  
Roslyn, NY 11576

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  
12th day of March, 1981.

*Crane P. Hagelund*

*J. Vredenburg*

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

March 12, 1981

Muyskens Madison Inc.  
and Bill Muyskens, Indv. & as Officer  
216 E. 49th 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  
Marvin E. Basson  
30 Wren Dr.  
Roslyn, NY 11576  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
MUYSKENS MADISON, INC. and BILL MUYSKENS, : DECISION  
Individually and as an Officer :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Periods March 1, 1972 :  
through February 28, 1975. :

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Petitioners, Muyskens Madison, Inc., 216 East 49th Street, New York, New York, and Bill Muyskens, individually and as an officer of Muyskens Madison, Inc., 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 Number 15008).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 9, 1979 and continued on May 10, 1979. Petitioner appeared by Marvin E. Bosson, Esq. The Audit Division appeared by Peter Crotty, Esq. (Samuel Friend and Irwin Levy, Esqs., of counsel).

ISSUE

Whether certain personal property was delivered to a point outside of New York so as to be exempt from sales and use tax.

FINDINGS OF FACT

1. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioners on March 12, 1976. This was pursuant to a consent extending the period of limitation for assessment to June 19, 1976. The taxes due amount to \$15,727.85, plus penalty and interest of \$6,513.77, for a total of \$22,241.62.

2. The individual petitioner is an officer of the corporation. He has not contested his liability for any sales taxes which may be found here to be due from the corporation.

3. The corporate petitioner is located in New York City. It is engaged in the business of producing films for television commercials. Its customers are generally advertising agencies also located in New York City.

4. (a) The corporate petitioner's work of producing films for television commercials for advertising agencies is typically performed under contract. The contract is obtained through a bid which is in one lump sum amount. This amount would include expenses, "creative fees" and a margin of profit. When, however, the job is awarded and the proposed contract is received from the advertising agency, the contract price will be allocated between two separate "items" or "elements". The petitioner does not participate in deciding on this allocation.

(b) Item A of the contract consists of all materials which have been used in the production of the film prior to the final negative. Such materials include much film that could not be used. Such materials were never sufficient to produce a duplicate final print without more work. For purposes of allocating the contract price, the materials are also considered to include all expenses including salaries for "creativity" and supervision. The portion of the contract price assigned to item A is what remains after calculating the cost of item B.

(c) Item B of the contract consists of only the film that will be used to make release prints for distribution by the advertising agency. The contract price allocated to this portion is estimated at forty cents a foot on the number of feet of film delivered. This is intended to approximate the cost of raw film and its developing and printing.

5. The contract provides that the film specified in item B on the contract should be deliverable to the advertising agency (or a film printing firm designated by the agency) at an address in New York City. It further provides that the film and other material specified in item A should be delivered to the same agency but at an address in New Jersey. What was then done with this material does not appear in the record.

6. The bills received from the advertising agencies included an itemized charge for New York sales taxes. This was calculated only on the price for the portion designated in item B.

7. Delivery of all materials was typically actually performed by an agent of the advertising agency (or of a film printing firm designated by the agency) which would pick the film up at the corporate petitioner's place of business.

8. (a) The tax assessed of \$15,727.85 is composed of \$4,006.87 of use tax on purchases of \$52,232.25 and of \$11,720.98 for sales taxes on sales of \$147,704.67, which had been claimed by corporate petitioner to be exempt but which were found by the auditor to be taxable. The disallowed sales of \$147,704.67 for the audit period represent 20.32 percent of the net sales per the corporate petitioner's general ledger for the audit period. This 20.32 percent "margin of error" figure was computed on the basis of a one year test period where sales of \$61,954.42 were disallowed out of total sales of \$304,853.00.

(b) The use tax due on purchases has been agreed to by the corporate petitioner with the Audit Division to be \$1,127.07.

(c) The sales of \$61,954.42 which were disallowed in the test period were the portions of sales claimed to be exempt which were evidenced by thirteen invoices to four different advertising agencies.

(d) Certain sales were allowed by the State's auditor as exempt by reason of delivery outside of New York State. The corporate petitioner has not shown that any such sale and delivery were in any way similar to a sale and delivery which was not allowed as exempt.

(e) The corporate petitioner has not objected to the use of a test period for this audit. The corporate petitioner has neither asserted nor proved at the hearing that its books and records during any part of the audit period were in any way adequate to show that any of the sales on which the assessment is based were delivered in New Jersey.

9. The corporate petitioner has produced no evidence which pertains specifically to the thirteen sales invoices in dispute in this case. Neither has it produced any specific evidence which pertains to any other sales and deliveries which it made during the audit period.

10. The corporate petitioner has advanced no argument or evidence with respect to any penalties included in the determination under review.

#### CONCLUSIONS OF LAW

A. That the corporate petitioner's contentions as to its sales must be rejected. Although its contracts do provide for delivery in New Jersey, it has failed to introduce any specific evidence to show that this was actually done and, in fact, the general testimony indicates the opposite, that delivery to its customer takes place at its own office which is in New York. Furthermore, even if it were shown that the auditor allowed as exempt other sales identical to the sales disallowed because of delivery out-of-state, any such allowance would be for the corporate petitioner's benefit and cannot be the basis of a complaint as to the sales disallowed.

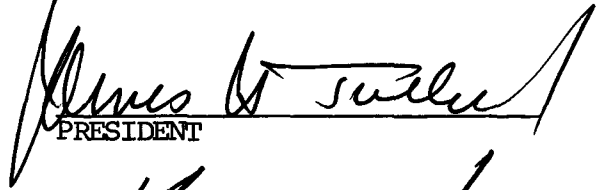
B. That the use tax in issue is found to be due only in the amount agreed upon as set forth in paragraph 8(b).

C. The determination under review is modified to reduce the use tax due and, as modified, it is sustained with penalty and interest.

DATED: Albany, New York

MAR 12 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER