

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Protape, 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:
9/1/74-8/31/77.

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 23rd day of October, 1981, he served the within notice of Decision by certified mail upon Protape, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Protape, Inc.
c/o William Sobelsohn
1540 Broadway
New York, NY 10036

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
23rd day of October, 1981.

Carmie A. Hagelund

Jay Vredenburg

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

October 23, 1981

Protape, Inc.
c/o William Sobelsohn
1540 Broadway
New York, NY 10036

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PROTAPE, INC.
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 September 1,
1974 through August 31, 1977.

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DECISION

Petitioner, Protape, Inc., 1540 Broadway, New York, New York 10036, 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 September 1, 1974 through August 31, 1977 (File No. 22197).

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 March 19, 1980 at 10:45 A.M. Petitioner appeared by William Sobelsohn, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether the use of a three-month test period for review of petitioner's purchases properly reflected its use tax liability.
- II. Whether fees paid for information services are subject to sales tax.
- III. Whether charges for preparing and revising mailing lists are subject to sales tax.
- IV. Whether charges for a recording studio are subject to sales tax.
- V. Whether petitioner made an overpayment of sales tax and, if so, whether a credit for such overpayment was timely claimed against the audit assessment.

FINDINGS OF FACT

1. On March 13, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Protape, Inc. for the period September 1, 1974 through August 31, 1977 in the amount of \$1,006.44 tax, plus penalties and interest. The Notice was issued as a result of a field audit.

2. Petitioner executed a consent extending the period of limitation for assessment to June 19, 1978.

3. Petitioner's business activity consisted of the sale of cassette tapes of courses to prepare individuals for CPA examinations. In order to enhance its market, petitioner hired individuals and made use of temporary employment agencies such as "Manpower" to review lists of CPA candidates maintained by various state boards of accountancy. Petitioner was charged fees by the various states' boards for access to these lists or for the lists themselves. The individuals hired to review the lists would report to petitioner any deletions or additions to the previous list used for promotional mailings. Petitioner would forward the information to a computer service company for the updating of a master list. One copy of the printout was retained by the service company for use in mailing advertising material from petitioner. One or two copies of the printout were given petitioner for use in updating the next list.

4. On audit, the Audit Division examined purchases in petitioner's advertising and promotion account for the period June 1 through August 31, 1977. It held that the services of individuals or temporary employment agencies and the access to various lists provided by state boards of accountancy were taxable information services. Total recurring purchases subject to use tax for

the test period amounted to \$807.72 which represented 8.13 percent of the recurring purchases in the advertising and promotion account.

The Audit Division also found that the advertising and promotion account included charges for preparing and revising mailing lists on which no sales tax was paid. Since these purchases were of a non-recurring nature, the Audit Division held the use tax due on all charges for preparing and revising mailing lists billed in the audit period on which no sales tax was paid. These purchases amounted to \$5,508.02 for the audit period.

The Audit Division eliminated mailing list maintenance costs charged to the advertising and promotion account for the audit period and applied 8.13 percent to the remaining purchases resulting in taxable purchases of \$6,239.36. Other purchases held subject to use tax were charges for recording studio time totaling \$833.00. Total purchases subject to use tax for the audit period were \$12,580.38 and tax due thereon was \$1,006.44.

5. The purchases in the test period were not typical of an entire year since the CPA examinations are held semi-annually; therefore, candidates lists are reviewed semi-annually and the appropriate costs incurred semi-annually. Adequate books and records were maintained by petitioner.

6. The services provided petitioner by individuals and temporary employment agencies consisted of research work in reviewing CPA candidate lists and typing. Charges for these services for the test period amounted to \$499.54.

7. Petitioner argued that fees paid to various states' boards of accountancy for access to records or lists of CPA candidates constituted "taxes", "licenses" or "permits". These fees amounted to \$111.71 for the test period. Petitioner submitted a receipt in the amount of \$5.70 from the District of Columbia to

show payment for a license fee. The remaining invoices submitted relative to the test period were fees paid for the lists themselves.

8. The charges of \$833.00 were for the rental of a recording studio on the premises of Announcer Training Studio.

9. Petitioner contended that only 5 percent of the cost of preparing and revising mailing lists should be subject to tax since 95 percent of advertising material is mailed outside New York State. The mailing list services were performed in New York State and the charges did not include any advertising material. The service consisted of updating a master list by computer and producing a revised master list.

10. Petitioner submitted an invoice dated July 25, 1975 on which it sought a credit or refund of 95 percent of the tax paid on maintenance of mailing list costs consistent with Finding of Fact "9". Petitioner first notified the Department of the contended overpayment on November 28, 1978.

11. Petitioner acted in good faith.

CONCLUSIONS OF LAW

A. That resort to a test period as a method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.) That petitioner Protape, Inc. maintained adequate books and records from which an exact amount of tax could be determined; therefore, any tax determined in the test period is limited to the test period purchases.

B. That the fees paid to individuals and temporary employment agencies in the amount of \$499.54 for the test period were clerical services not subject to

tax under section 1105(c)(1) or (2) of the Tax Law. That the tax due on such services is cancelled.

C. That the license fee paid to the District of Columbia as noted in Finding of Fact "7" is not subject to tax since the license to use occurred outside New York State; that the remaining fees paid to various states' boards of accountancy were for information services taxable under section 1105(c)(1) of the Tax Law.

D. That the charges for recording studio constituted the rental of real property which is not subject to sales or use tax. The tax due on charges for studio space in the amount of \$833.00 is hereby cancelled.

E. That section 1105(c)(2) of the Tax Law imposes a tax on printing services. That the preparing and revising of mailing lists were such services and taxable in their entirety since they were performed in New York State and their use was confined to New York State. That since the Audit Division examined all charges for the preparing and revising of mailing lists during the audit period, the use tax determined due on mailing list costs was proper and in accordance with section 1110 and 1254 of the Tax Law.

F. That the issue of the timeliness of petitioner's claim of overpayment is moot based on Conclusion of Law "E" above.

G. That the penalties and interest in excess of the minimum statutory rate are cancelled.

H. That the petition of Protape, Inc. is granted to the extent indicated in Conclusions of Law "A", "B", "C", "D" and "G" above; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand

for Payment of Sales and Use Taxes Due issued March 13, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 23 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER