

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Motion Picture Enterprises, 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 9/1/72-6/30/76.	:	

State of New York  
County of Albany

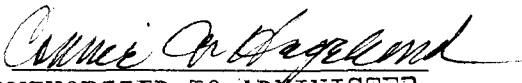
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of September, 1982, he served the within notice of Decision by certified mail upon Motion Picture Enterprises, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

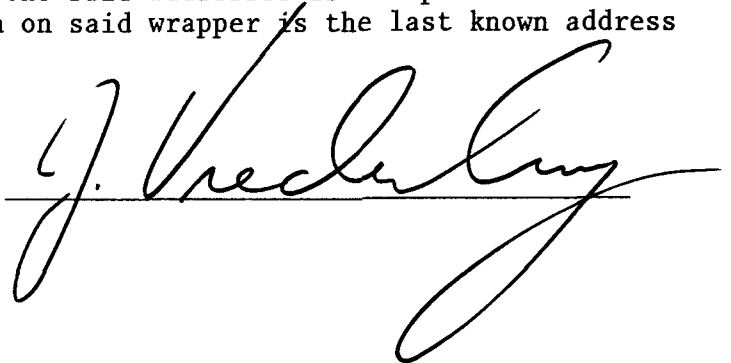
Motion Picture Enterprises, Inc.  
P.O. Box 276  
Tarrytown, NY 10591

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  
29th day of September, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Motion Picture Enterprises, 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 9/1/72-6/30/76. :  
\_\_\_\_\_

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 29th day of September, 1982, he served the within notice of Decision by certified mail upon George Reiss the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George Reiss  
Epstein, Wayne, Reiss & Goodman  
110 E. 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  
29th day of September, 1982.

*Constance A. Hagelund*

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

*J. Vredenburg*

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

September 29, 1982

Motion Picture Enterprises, Inc.  
P.O. Box 276  
Tarrytown, NY 10591

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
George Reiss  
Epstein, Wayne, Reiss & Goodman  
110 E. 42nd St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
MOTION PICTURE ENTERPRISES, 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 September 1, 1972	:	
through June 30, 1976.	:	

---

Petitioner, Motion Picture Enterprises, Inc., P.O. Box 276, Tarrytown, New York 10591, 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, 1972 through June 30, 1976 (File No. 25997).

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 June 3, 1981 at 10:45 A.M. Petitioner appeared by Epstein, Wayne, Reiss and Goodman (George Reiss, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether the petitioner's purchase of equipment from Lab TV, Inc. constituted a sale in bulk, otherwise than in the ordinary course of business, pursuant to section 1141(c) of the Tax Law.

II. Whether the Audit Division properly determined additional taxes due from Lab TV, Inc. for the period September 1, 1972 through June 30, 1976.

FINDINGS OF FACT

1. On September 23, 1977, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Lab TV, Inc. (hereinafter "Lab") for the period September 1, 1972

through June 30, 1976 for taxes due of \$5,901.15, plus penalty and interest of \$3,414.76, for a total due of \$9,315.91.

Lab executed consents extending the time within which to issue an assessment for sales and use taxes to December 20, 1977.

2. On September 23, 1977, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against the petitioner, Motion Picture Enterprises, Inc. (hereinafter "MPE") for the period September 1, 1972 through June 30, 1976 for taxes due of \$5,901.15, plus penalty and interest of \$3,414.76, for a total due of \$9,315.91.

The Notice against the petitioner provided the following explanation:

"[t]he following taxes are determined to be due from Lab T.V., Incorporated [sic] and represents your liability, as purchaser in accordance with Section 1141(c) of the Sales Tax Law."

3. During the period at issue, Lab operated a motion picture film processing business at 723 Seventh Avenue, New York, New York. Lab ceased operations in June 1976.

4. The Audit Division performed a field audit of the books and records of Lab. The auditor found that Lab failed to file a sales tax return for its final month of business. The sales tax due on taxable sales for this period in the amount of \$30.46 was included in the assessment. The auditor tested non-taxable sales for the test period February 27, 1973 to March 6, 1973 and found that \$584.00 or 5.77 percent of non-taxable sales in the test period should be disallowed. The percentage of disallowance was applied to the non-taxable sales for the audit period and resulted in disallowed sales of \$73,678.00. The auditor also disallowed sales to West German TV for the audit period in the amount of \$6,298.53. The resultant total non-taxable sales

disallowed amounted to \$79,976.53 on which the sales tax due amount was \$5,870.69. Total additional taxes due amounted to \$5,901.15 for the audit period.

5. The books and records of Lab were adequate for the Audit Division to determine the exact tax liability.

6. The petitioner, MPE, was a dealer or distributor of professional motion picture equipment and supplies. MPE sold supplies to Lab about twice a month and, approximately once every 3 to 4 years, either bought from or sold equipment to Lab.

7. On June 15, 1976, MPE took possession of the following equipment from Lab:

1. Bell & Howell Model C, 1600C printer Serial No. 1691
2. 2 loop trees
3. 1 large air compressor with heads
4. 1 Bell & Howell air vacuum pump
5. 1 Bell & Howell tape punch Serial No. 340
6. Miscellaneous power supplies for above units

The above printer was one of approximately twenty pieces of equipment on the premises of Lab. It was petitioner's practice to remove equipment from the seller's premises prior to the actual purchase during which time the petitioner searched for liens. On July 7, 1976 the petitioner, MPE, purchased the above equipment from Lab for \$20,000.00. Of the purchase price, \$10,793.02 was paid to First National City Bank, the holder of a security interest in said equipment, and the remainder was paid to Lab. The purchase price was equal to the fair market value of the equipment. The petitioner did not notify the Tax Commission of said purchase.

8. It was in the normal course of Lab's business to dispose of equipment either because the equipment was surplus to Lab's needs, Lab was changing its method of operation, or Lab was merely upgrading equipment. It was also in the normal course of petitioner's business to purchase used machinery.

9. It was the petitioner's position that this transaction was not a sale in bulk by Lab in that it was the sale of only one piece of equipment out of twenty owned by Lab. The petitioner also argued that this transaction was in the ordinary course of Lab's business.

10. Petitioner acted in good faith at all times.

#### CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides, in pertinent part, that:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale...notify the tax commission by registered mail of the proposed sale

\* \* \*

For failure to comply with the provisions of this subdivision the purchaser...shall be personally liable for the payment to the state of any such taxes...determined to be due to the state from the seller..." (emphasis added).

B. That the sale of equipment by Lab TV, Inc. to petitioner was a sale of "any part" of the business assets of Lab TV, Inc. pursuant to section 1141(c) of the Tax Law.

That, further, said sale was "otherwise than in the ordinary course of business" according to section 1141(c) of the Tax Law in that said sale was made subsequent to the seller ceasing operations. That the petitioner, Motion Picture Enterprises, Inc., failed to show that the sale was made in the ordinary course of Lab's business, i.e. the equipment was surplus to Lab's needs, Lab was changing its method of operation, or Lab was upgrading its equipment.

C. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such 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 since Lab TV, Inc. maintained adequate books and records from which the Audit Division could have determined the exact amount of tax due, the use of a test period was unwarranted. Consequently, only that portion of the assessment based on an actual audit of the books and records of Lab TV, Inc. can be sustained. The portion based on the test period is cancelled.

D. That the penalty is cancelled and interest is reduced to the minimum statutory rate.


E. That the petition of Motion Picture Enterprises, Inc. is granted to the extent indicated in Conclusions of Law "C" and "D" above; that the Audit Division is hereby directed to modify the Notice and Demand for Payment of Sales and Use Taxes Due issued September 23, 1977, and that except as so granted, the petition is in all other respects denied. The Audit Division is also directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 23, 1977 against Lab TV, Inc. in accordance with Conclusion of Law "C" above.

DATED: Albany, New York

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER