

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Neptune 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 9/1/72-6/30/76.		

State of New York
County of Albany

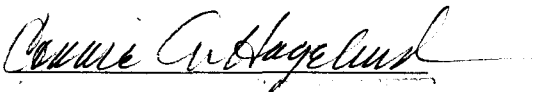
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of September, 1982, he served the within notice of Decision by certified mail upon Neptune Corp., the petitioner in the within proceeding,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

Neptune Corp.
c/o Sheldon Kaplan, Pres.
333 W. 52nd St.
New York, NY 10019

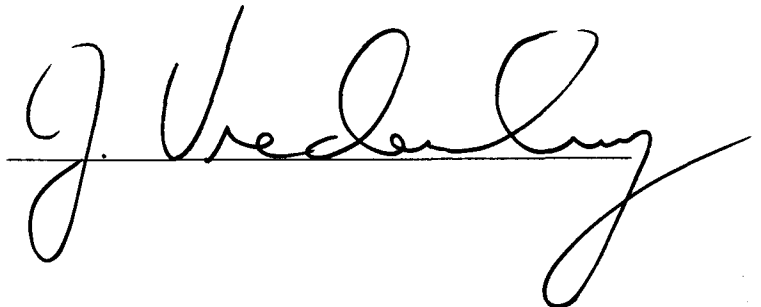
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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.



OFFICE OF THE CLERK
SECTION 274



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

September 29, 1982

Neptune Corp.
c/o Sheldon Kaplan, Pres.
333 W. 52nd St.
New York, NY 10019

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NEPTUNE CORPORATION	:	DECISION
(Purchaser)	:	
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 & 29 of	:	
the Tax Law for the Period September 1, 1972	:	
through June 30, 1976.	:	

Petitioner, Neptune Corporation (purchaser), presently located at 333 West 52nd Street, New York, New York 10019, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period September 1, 1972 through June 30, 1976 (File No. 25710).

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 9:15 A.M. Petitioner appeared by Sheldon Kaplan, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

I. Whether petitioner's purchase of equipment from Lab TV, Inc. constituted a sale in bulk, otherwise than in the ordinary course of business, according 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. 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 TV, Inc. executed consents extending the time within which to issue an assessment for sales and use taxes to December 20, 1977.

2. Also, on September 23, 1977, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against the petitioner, Neptune Corporation, 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. Lab TV, Inc. operated a motion picture film processing business at 723 Seventh Avenue, New York, New York until June 1976 when it ceased operations.

4. The petitioner, Neptune Corporation, was in the business of buying and selling new and used motion picture film processing equipment. During the Spring of 1976, the petitioner was commissioned to find a particular piece of equipment for a customer in California. On March 16, 1976, the petitioner purchased the equipment, a 16mm Additive Color Printer - Serial #1692 with 16mm Sound Head and Rectifier, from Lab TV, Inc. for \$17,000.00. The purchase price was equal to the fair market value of the equipment. Petitioner did not notify the Tax Commission of said purchase.

Pursuant to petitioner's request for a hearing dated September 27, 1977, outside of this transaction there had been no other purchases made by Neptune Corporation from Lab TV, Inc. Petitioner had during the ten year period 1966-1977 made approximately ten (10) sales of equipment to Lab TV, Inc.

5. The Audit Division performed a field audit of the books and records of Lab TV, Inc. The auditor found that Lab TV, Inc. 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.

6. The books and records of Lab TV, Inc. were adequate for the Audit Division to determine the exact tax liability.

7. It was the Audit Division's position that since Lab TV, Inc. was in the business of film processing, the sale of the above-mentioned equipment was not in the ordinary course of business of Lab TV, Inc., but rather such sale was the sale of a business asset. Therefore, the purchase of the equipment by petitioner constituted a bulk sale within the meaning and intent of section 1141(c) of the Tax Law; and petitioner was liable for the payment to the state of any taxes determined to be due from the seller up to an amount not in excess of the purchase price.

8. Petitioner argued that it was in the normal course of its business to make such a purchase, and it was believed that it was in the normal course of Lab TV, Inc.'s business to make such a sale in order to buy newer equipment to improve its operations. Petitioner therefore contended that the sale by Lab TV, Inc. was not a bulk sale within the meaning and intent of section 1141(c) of the Tax Law. Petitioner offered no evidence that the sale of the equipment by Lab TV, Inc. was done to make room for newer equipment.

9. Petitioner further argued that it had no knowledge of any taxes owed by the seller and that there was no intent to defraud the state in any way.

10. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law states that whenever a person required to collect tax shall make a sale in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser 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 provision, the purchaser shall be personally liable for the payment to the state of any taxes theretofore or thereafter determined to be due to the state from the seller limited to an amount not in excess of the purchase price or fair market value of the business assets sold, whichever is higher.

B. That the sale of equipment by Lab TV, Inc. to petitioner was a sale in bulk, otherwise than in the ordinary course of business, according to section 1141(c) of the Tax Law. Lab TV, Inc. sold a business asset on March 16, 1976 and subsequently ceased operations in June 1976. The petitioner failed to show that this sale was done in the ordinary course of business of Lab TV, Inc. and

not done for the purpose of discontinuing business. There is no evidence that the equipment was obsolete or that the sale was made to make room for newer equipment. In addition, this was petitioner's only purchase of equipment from Lab TV, Inc.

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 Neptune Corporation 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

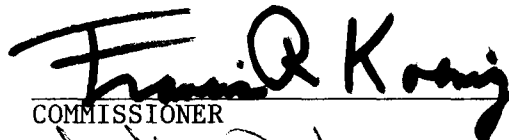
Taxes Due issued September 23, 1977 against Lab TV, Inc. in accordance with
Conclusion of Law "C" above.


DATED: Albany, New York

STATE TAX COMMISSION



ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

Sales Tax

New York Athletic
Club
**New York State Department of
TAXATION and FINANCE**

 Processing Division
 State Campus, Albany, New York 12227

**WAIVER, MODIFICATION, OR CANCELLATION OF PENALTY AND INTEREST
REQUIRING APPROVAL OF THE STATE TAX COMMISSION**

SS # OR ID #		
13-1096640		
TAXPAYER'S NAME		
New York Athletic Club		
STREET ADDRESS		
180 Central Park South		
CITY	STATE	ZIP CODE
New York	NY	10019

TAXING APPLICATION:

- ☐ Corporation Tax
☐ Personal Income Tax
☒ Sales Tax
☐ Withholding Tax
☐ Miscellaneous Tax:

ASSESSMENT NO.
D8110171445
FILING PERIOD
May 31, 1981

INTEREST AND PENALTY ASSESSED	
\$	21,148.93
INTEREST PAID	
\$	8,022.91
RECOMMENDED CANCELLATION	
\$	13,126.02

In accordance with established policy, approval of the State Tax Commission (*more than one member*) is required where the proposed cancellation of interest and/or penalty is for an amount in excess of \$5,000.00 or for a situation not covered in policy memoranda.

REASON FOR WAIVER, MODIFICATION OR CANCELLATION:

We recommend the abatement of penalty based on attached correspondence dated 2/26/82 and 10/27/81, and copy of bank statements.

Vendor claims the original return and check for May 1981 were timely mailed and lost in the mail. On receipt of delinquency bill, the vendor immediately submitted replacement check and copy of return. Vendor had sufficient balance continuously in checking account.

Approval Recommended By:		
NAME	TITLE	DATE
<i>Ronald L. Roth</i>	<i>Asst. Director, Tax</i>	<i>3/23/82</i>
Approval Recommended By:		
NAME	TITLE	DATE
<i>Robert L. Sullivan</i>	<i>Asst. Dir. of Tax</i>	<i>3-23-82</i>
Commissioner		
DATE: _____ APPROVED _____ DISAPPROVED _____		
Commissioner		
<i>Frank R. Koenig</i>	DATE: <i>4/20/82</i>	APPROVED <i>[Signature]</i> DISAPPROVED _____
Commissioner		
DATE: _____ APPROVED _____ DISAPPROVED _____		