

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PLAYMOR AMUSEMENT CO., INC.
and HAROLD KAUFMAN, Individually
and as 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 May 31, 1972 and December 1, 1972
through May 31, 1976.

DECISION

In the Matter of the Petition
of
MUSICAL DISTRIBUTORS CORP.
and HAROLD KAUFMAN, Individually
and as 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 Period December 1,
1972 through October 26, 1976.

Petitioners, Playmor Amusement Co., Inc., 1161 Rogers Avenue, Brooklyn, New York and Harold Kaufman, 189 Falmouth Street, Brooklyn, New York, 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 periods March 1, 1972 through May 31, 1972 and December 1, 1972 through May 31, 1976 (File No. 18822).

Petitioners, Musical Distributors Corp., 1161 Rogers Avenue, Brooklyn, New York and Harold Kaufman, 189 Falmouth Street, Brooklyn, New York, 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 December 1, 1972 through October 26, 1976 (File No. 18823).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 23 and 24, 1980. Petitioners appeared by Jesse B. Hecht, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether the Audit Division, based on its audit of the books and records of Playmor Amusement Co., Inc. and Musical Distributors Corp., correctly determined the additional taxes due from said corporations.

II. Whether Harold Kaufman is personally liable for the additional taxes determined due from Playmor Amusement Co., Inc. and Musical Distributors Corp.

III. Whether the notices of determination and demand for payment of sales and use taxes due were timely issued against Harold Kaufman.

FINDINGS OF FACT

1. Petitioners, Playmor Amusement Co., Inc. and Musical Distributors Corp. (hereinafter "Playmor" and "Musical") were corporations of which Harold Kaufman was the president. The corporations sold and serviced coin-operated amusement devices and vending machines.

2. Consents to extend the period in which to issue an assessment for sales and use taxes were executed by Harold Kaufman for Playmor and Musical. The time to assess Playmor for the periods March 1, 1972 through May 31, 1972 and December 1, 1972 through November 30, 1975 was extended to March 20, 1977. The time in which to assess Musical for the periods ended February 28, 1973 through November 30, 1975 was extended to January 20, 1977.

3a. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against Playmor on January 24, 1977 and against Harold

Kaufman on February 18, 1977 asserting a tax due of \$33,181.86 for the periods March 1, 1972 through May 31, 1972 and December 1, 1972 through May 31, 1976.

b. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against Musical on January 19, 1977 and Harold Kaufman on February 18, 1977 asserting a tax due of \$22,934.25 for the period December 1, 1972 through October 26, 1976.

c. The notices issued against Harold Kaufman were based on Mr. Kaufman being an officer of Playmor and Musical. Both penalty and interest were assessed on the notices to Harold Kaufman.

4. The aforementioned notices resulted from the field audit of Playmor and Musical's books and records including sales tax returns, cancelled checks, income tax returns, general ledgers, cash receipts journals, cash disbursements journals, general journals, sales journals, sales invoices and expense invoices.

5a. On audit of Playmor, the Audit Division tested Playmor's auto expenses for May 1975 and found tax had not been paid on \$1,975.00 or 1.51 percent. The 1.51 percent error rate was projected over the audit period to arrive at use tax due on auto expenses of \$624.23. The Division tested non-taxable sales for March 1, 1974 through May 31, 1974 and April 1, 1975 through May 31, 1975 and disallowed \$35,674.15 or 21.353 percent due to lack of substantiation. The error rate was projected to arrive at sales tax due on unsubstantiated sales of \$24,759.16. The Division tested the reporting of sales to taxing jurisdictions for April 1, 1975 through May 31, 1975 and found \$4,975.00 or 18.78 percent of the sales reported to Nassau and Suffolk counties were actually New York City sales. They further found that of the sales reported to Westchester County, \$1,345.00 or 8.85 percent were City of Mount Vernon sales, \$1,050.00 or 6.91

percent were New York City sales and \$3,515.00 or 23.12 percent were City of Yonkers sales. The error rates were projected to arrive at sales tax due on erroneous jurisdiction reporting of \$888.33.

b. The Audit Division disallowed \$100,062.70 in bad debts written off by Playmor for the fiscal years ended March 31, 1974 and 1975. This resulted in sales tax due on disallowed bad debts of \$7,004.39. The Division further determined \$9,395.00 in taxable sales were omitted from the sales and use tax return filed for the quarter ended May 31, 1976. This resulted in sales tax due on delinquent returns and payments of \$751.60.

6a. The Audit Division similarly audited Musical. It tested Musical's non-taxable sales for March and May 1975 and disallowed \$5,527.71 or 9.815 percent which was projected to arrive at sales tax due on unsubstantiated sales of \$9,782.92. It tested the reporting of sales to taxing jurisdictions for May 1975. This test revealed that \$5,894.95 or 18.023 percent of the reported Nassau and Suffolk counties sales were New York City sales. It also revealed that the reported Westchester County sales, \$1,395.00 or 10.936 percent were City of Yonkers sales and \$1,395.00 or 10.936 percent were City of White Plains sales. The error rates were projected to arrive at sales tax due on erroneous jurisdiction reporting of \$1,076.20.

b. The Division determined Musical had not paid tax on fixed assets amounting to \$5,591.13 which resulted in a sales tax due on fixtures and equipment of \$437.56. It disallowed \$14,584.71 in bad debts written off by Musical which resulted in sales tax on disallowed bad debts of \$1,020.93. It further determined that \$306,327.82 in taxable sales had not been reported resulting in sales tax due on delinquent returns and payments of \$23,856.36.

c. The additional sales and use tax determined due from Musical as a result of the audit was \$36,173.17. The notice issued to Musical asserted a sales and use tax due of \$22,934.25. The difference of \$13,239.72 is attributable to period ended August 31, 1976. It is apparent that a Notice and Demand for Payment of Sales and Use Taxes Due was issued for said period since a tax due no remittance return was filed for the same dollar amount.

7. Subsequent to the audit, Playmor and Musical presented to the Audit Division documentation that supported the non-taxable status of sales made to Roth Novelty, T & M Distributors, Vanderveer Senior Center and George Staab. The Division conceded that the taxes assessed based on the audit of Playmor are to be reduced from \$33,181.86 to \$28,410.45 and the taxes assessed based on the audit of Musical are to be reduced from \$22,934.23 to \$14,088.51.

8. An alleged non-taxable sale disallowed by the Audit Division on its audit of Playmor involved a transaction with a New Jersey company named Leisureland Amusement. The merchandise sold in said transaction totaled \$5,139.00 and was delivered to a business location of Leisureland in the State of New Jersey.

9. The Audit Division disallowed alleged non-taxable sales made by Playmor to MRB Enterprises of Rhode Island. The merchandise sold was delivered to a warehouse on Hempstead Avenue in New York City. Playmor has commenced a lawsuit to recover the sales tax owed on the taxable sales to MRB. During the audit period, Playmor made sales totalling \$46,670.00 to MRB.

10. The Audit Division disallowed the bad debts claimed by Musical and Playmor on the premise that the first monies collected were sales tax monies.

11. Musical offered no substantial evidence to support a finding that the sellers of the fixed assets had themselves paid the applicable New York State and local sales and use tax.

12. Both Playmor and Musical maintained books and records that were sufficient for the Audit Division to determine the exact amount of sales and use tax due.

13. In October, 1976 Playmor and Musical entered into an assignment for the benefit of creditors. In either January or February, 1977 an involuntary petition in bankruptcy was filed against each corporation.

14. Harold Kaufman acted in good faith at all times.

CONCLUSIONS OF LAW

A. 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).

B. That in accordance with Finding of Fact "12" petitioners Playmor Amusement Co., Inc. and Musical Distributors Corp. each maintained complete and adequate books and records from which the Audit Division could have determined the exact amount of tax due with respect to auto expenses, non-taxable sales and jurisdictional errors.

C. That the sales and use taxes due on auto expenses and jurisdictional errors is accordingly limited to the periods of the tests as shown in Findings of Fact "5a" and "6a".

D. That section 1132(c) of the Tax Law provides that "it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five... are subject to tax until the contrary is established; and the burden of proving that any receipt...

is not taxable hereunder shall be upon the person required to collect the tax..."

E. That in accordance with Finding of Facts "7" and "8" sufficient evidence has been brought forward to establish the non-taxable status of sales to Roth Novelty, T & M Distributors, Vanderveer Senior Center, George Staab and Leisureland Amusement. All said sales fall within the period tested by the Audit Division.

F. That the sales tax due from Musical Distributors Corp. on non-taxable sales is limited to the amount found due in the test period. That the sales tax due from Playmor Amusement Co., Inc. on non-taxable sales shall also be limited to the amount found due in the test period with the exception of sales to MRB Enterprises which will be limited to \$46,670.00 (Taxpayer's Exhibit No. 20).

G. That under a regulation which provides that where the proceeds of a sale have been ascertained to be uncollectable the vendor may exclude such receipts from his sales tax return, it is unreasonable to require allocation of a partial payment on such a sale first to payment of the sales tax computed on the full purchase price. (Abraham & Straus v. Tully, 47 NY2d 207, 417 NYS2d 881).

H. That the Audit Division was mistaken in its disallowance of bad debts on the premise that first money collected was sales tax money. The taxes determined due on bad debts is cancelled.

I. That the burden of proof is on the initiating party in an administrative proceeding. (Section 306.1 of the State Administrative Procedure Act.)

J. That in accordance with Finding of Fact "11" Musical Distributors Corp. failed in its burden of proving that sales tax had been paid on certain fixed assets acquired by it.

K. That section 1133(a) of the Tax Law provides that every person required to collect tax "shall be personally liable for the tax imposed collected or required to be collected." In addition, section 1131(1) of the Tax Law defines the term "person required to collect tax" to include "any officer or employee of a corporation... who is under a duty to act for such corporation in complying with any requirement of this article."

L. That in accordance with Finding of Fact "1" Harold Kaufman is personally liable for the taxes of Playmor Amusement Co., Inc. and Musical Distributors Corp.

M. That section 1147(c) of the Tax Law provides that prior to the expiration of the period for the assessment of additional tax, a taxpayer may consent in writing to an extension of the period within which additional tax due may be determined.

N. That in accordance with Finding of Fact "2" Harold Kaufman in his capacity as president signed consents to extend the statute of limitations on Playmor Amusement Co., Inc. and Musical Distributors Corp. Such consent by a corporation extends the liability of its corporate officers required to collect tax under sections 1131(1) and 1133(a) of the Tax Law for the period consented to by the corporation. That, therefore, Harold Kaufman is liable for the taxes that are lawfully due and owing by Playmor. His liability with respect to Musical is however limited to three years from the issuance of the Notice of Determination against him since said notice was not timely issued.

O. That the penalty assessed against Harold Kaufman is cancelled and interest shall be computed at the minimum statutory rate.

P. That the petitions of Playmor Amusements Co., Inc., Musical Distributors Corp. and Harold Kaufman are granted to the extent indicated in Conclusions of Law "C", "E", "F", "H" and "N" above. The Audit Division is directed to accordingly modify the notices of determination and demand issued on January 19, 1977, January 24, 1977 and February 18, 1977. Except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

SEP 27 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

P 230 842 934

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO		<i>Medical Distributors Corp</i>	
STREET AND NO.		<i>Harold Kaufman Ind. Office</i>	
P.O., STATE AND ZIP CODE		<i>1161 Rogers Ave.</i>	
POSTAGE		<i>Brooklyn NY 11226</i>	
CERTIFIED FEE			
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	€
		RESTRICTED DELIVERY	€
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	€
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	€
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 842 933

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO		<i>Playman Entertainment Co Inc</i>	
STREET AND NO.		<i>4 Herald Square Ind. Office</i>	
P.O., STATE AND ZIP CODE		<i>1161 Rogers Ave.</i>	
POSTAGE		<i>Brooklyn NY 11222</i>	
CERTIFIED FEE			
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	€
		RESTRICTED DELIVERY	€
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	€
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	€
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 842 935
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO		<i>Harold Kaufman</i>	
STREET AND NO.		<i>189 Falmouth St</i>	
P.O., STATE AND ZIP CODE		<i>Brooklyn NY</i>	
POSTAGE			
CERTIFIED FEE			
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	€
		RESTRICTED DELIVERY	€
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	€
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	€
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

PS Form 3800, Apr. 1976

CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES		CERTIFIED FEE	POSTAGE
	RETURN RECEIPT SERVICE			
	SPECIAL DELIVERY	€	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	€
	RESTRICTED DELIVERY	€		
	SHOW TO WHOM AND DATE DELIVERED	€		
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€			
TOTAL POSTAGE AND FEES		\$		
POSTMARK OR DATE				

(See Reverse)

P 230 842 936
RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Musical Distributors Corp. :
& Harold Kaufman, Individually and 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 :
12/1/72 - 10/26/76. :

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 27th day of September, 1982, he served the within notice of Decision by certified mail upon Musical Distributors Corp., & Harold Kaufman, Individually and as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Musical Distributors Corp.
& Harold Kaufman, Individually and as Officer
1161 Rogers Ave.
Brooklyn, NY 11226

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
27th day of September, 1982.

James A. Hegeland
JAY VREDEBURG
GIVEN UNDER OATH TO THE NEW
STATUTE 1982

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Musical Distributors Corp. :
& Harold Kaufman, Individually and 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 12/1/72 - 10/26/76. :

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 27th day of September, 1982, he served the within notice of Decision by certified mail upon Jesse B. Hecht the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

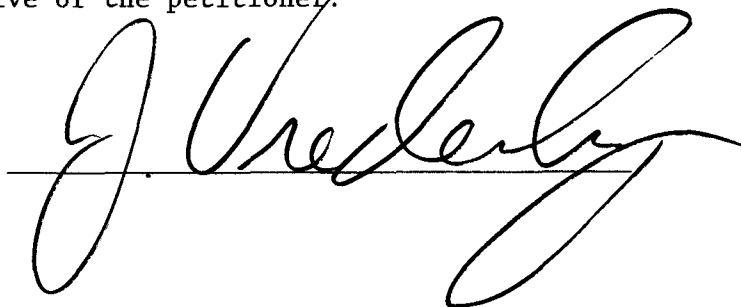
Jesse B. Hecht
299 Broadway
New York, NY 10007

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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
27th day of September, 1982.





STATE OF NEW YORK

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Musical Distributors Corp. :
& Harold Kaufman, Individually and as Officer : AFFIDAVIT OF MAILING
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for Redetermination of a Deficiency or a Revision :
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State of New York
County of Albany

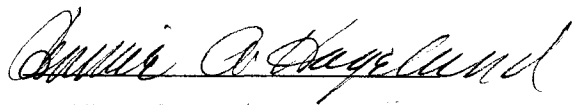
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Harold Kaufman
189 Falmouth St.
Brooklyn, NY

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
27th day of September, 1982.



AUTHORIZED SIGNATURE
OF THE COMMISSIONER
OF THE STATE TAX COMMISSION



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

September 27, 1982

Musical Distributors Corp.
& Harold Kaufman, Individually and as Officer
1161 Rogers Ave.
Brooklyn, NY 11226

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
Jesse B. Hecht
299 Broadway
New York, NY 10007
and
Harold Kaufman
189 Falmouth St.
Brooklyn, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Playmor Amusement Co., Inc. :
and Harold Kaufman, Individually and 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 :
3/1/72-5/31/72 & 12/1/72-5/31/76. :

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 27th day of September, 1982, he served the within notice of Decision by certified mail upon Playmor Amusement Co., Inc., and Harold Kaufman, Individually and as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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and Harold Kaufman, Individually and as Officer
1161 Rogers Ave.
Brooklyn, NY 11226

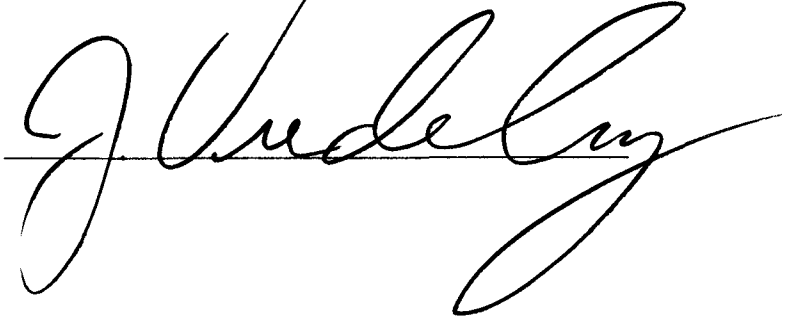
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Sworn to before me this
27th day of September, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Playmor Amusement Co., Inc. :
and Harold Kaufman, Individually and as Officer : AFFIDAVIT OF MAILING
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299 Broadway
New York, NY 10007

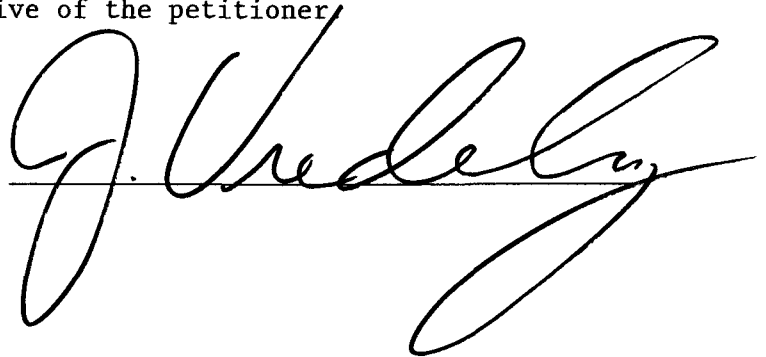
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AUTHORIZED TO ADMINISTER
AS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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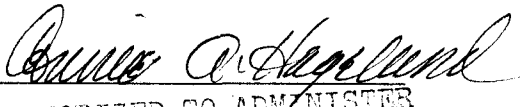
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Brooklyn NY

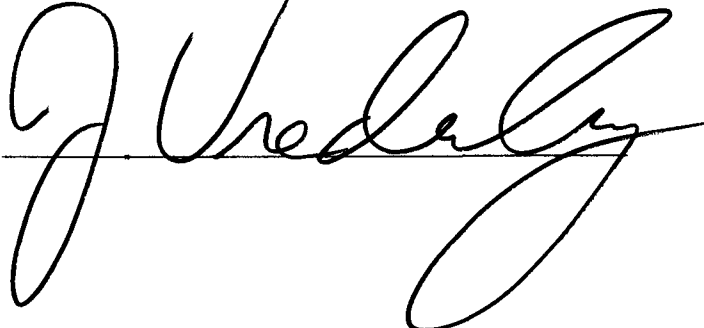
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AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

September 27, 1982

Playmor Amusement Co., Inc.
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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jesse B. Hecht
299 Broadway
New York, NY 10007
and
Harold Kaufman
189 Falmouth St.
Brooklyn, NY
Taxing Bureau's Representative