

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

April 23, 1982

Rector Books, Inc.
Sal's Stationery
22-85 2nd Ave.
New York, NY 10035

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
Herald Fahringer
Lipsitz, Green, Fahringer, Roll, Schuller & James
540 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RECTOR BOOKS, INC.	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Tax under Articles 28 and 29	:	
of the Tax Law for the Period August 1, 1965	:	
through August 31, 1970.	:	

Petitioner, Rector Books, Inc., 105 West 42nd Street, New York, 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 August 1, 1965 through August 31, 1970 (File No. 01905).

A formal hearing was held before Paul B. Coburn, Hearing Officer at the offices of the State Tax Commission, Two World Trade Center, New York, New York on April 26, 1972 and continued on October 30, 1979 before William J. Dean, Hearing Officer. The petitioner appeared at the April 26, 1972 hearing by Lipsitz, Green, Fahringer, Roll, Schuller & James, Esqs. (Herold Price Fahringer, Esq., of counsel). The Audit Division appeared at the April 26, 1972 hearing by Saul Heckelman, Esq. (Solomon Sies, Esq., of counsel). The Audit Division appeared at the October 30, 1979 hearing by Ralph Vecchio, Esq. (Samuel J. Freund, Esq., of counsel). Petitioner failed to appear at the October 30, 1979 hearing.

ISSUES

I. Whether certain publications sold by petitioner Rector Books, Inc. are periodicals exempt from sales and use tax.

II. Whether the Audit Division correctly determined petitioner Rector Books, Inc.'s tax liability for the period August 1, 1965 through August 31, 1970.

FINDINGS OF FACT

1. On December 18, 1970, 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 petitioner, Rector Books, Inc. Said notice assessed additional sales tax of \$66,955.85, plus penalty and interest of \$23,319.96, for a total of \$90,275.81, for the period August 1, 1965 through August 31, 1970.

2. The notice was timely issued pursuant to a signed consent that extended the period of limitation for assessment to December 20, 1970.

3. Petitioner, by letter of February 5, 1971, timely made its application for a hearing to review the notice.

4. Petitioner was, for the period in review, involved in the operation of a book store at 105 West 42nd Street, New York, New York. Petitioner filed all the required sales and use tax returns. On the returns, petitioner reported taxable sales totaling \$245,741.19 and paid taxes totaling \$14,100.42.

5. On audit, the Audit Division reviewed a cash receipts journal, cash disbursements journal and general ledger. The auditor totaled purchases made during the period August 1, 1965 through August 31, 1968 and applied thereto a 200 percent markup for total audited sales. To this was applied an 85 percent taxable ratio for audited taxable sales. Audited taxable sales were placed over reported taxable sales for a percentage of unreported taxable sales. This percentage was applied to reported taxable sales in each quarter in the audit period and revealed additional taxable sales of \$1,260,620.00 and a tax liability of \$66,955.85, as assessed.

6. The audit finding that 85 percent of petitioner's sales were taxable was based on a sampling of twenty-one (21) adult type publications. The total selling price of all the publications was \$51.00. Three publications, Today's Nudist, Nudist Today and Nudism, were deemed by the auditor to be exempt. The total selling price of the exempted publications was \$7.50 or 15 percent of the total. Thus 85 percent of sales were considered taxable.

7. Three of the twenty-one publications are in evidence. They are Tip Top, Nude/Image and Nudist. Each was published at stated quarterly intervals under the same title. They were available to the general public at newstands and Tip Top had second class mailing priveleges. Tip Top and Nude/Image contained articles and other features prepared by different named individuals. Nudist contained an account of a field trip together with pictures thereof.

8. Petitioner never agreed that the twenty-one publications sampled was a fair sampling of all its sales. The distributor, Parliament News, furnished to petitioner during the period under review approximately fifty-four (54) publications described as nudist or "girlie" magazines. Other similar publications were furnished by the Columbia News Company and Central Magazine Sales of Baltimore, Maryland. Additionally, petitioner sold generally distributed magazines such as Mechanics Illustrated and Popular Mechanics.

9. No explanation was offered by the Audit Division as to how the sample was selected or why 200 percent was chosen as a markup to be applied to petitioner's purchases in order to arrive at gross sales.

10. The Audit Division failed to establish that petitioner's records were inadequate and that the exact amount of petitioner's liability could not be determined therefrom.

CONCLUSIONS OF LAW

A. That section 1115(a)(5) of the Tax Law provides exemption from sales and use tax to "[n]ewspapers and periodicals".

B. That the publications Tip Top and Nude/Image described in Finding of Fact "7" are periodicals within the meaning and intent of section 1115(a)(5) of the Tax Law. That the publication Nudist is tangible personal property and an information service, the sale of which is taxed under sections 1105(a) and 1105(c)(1) of the Tax Law.

C. That the burden of proof is upon the taxpayer. Petitioner herein has failed to demonstrate that the Audit Division erred in its determination of the taxable status of the remaining fifteen (15) publications included in its sample.

D. That although there is statutory authority for the use of a test audit 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.)

E. That since the Audit Division failed to establish such a foundation, the use of a test audit was not proper.

F. That the petition of Rector Books, Inc. is granted to the extent indicated in Conclusions of Law "B" and "E" above. The Audit Division is

hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 18, 1970. Except as so granted, the petition is in all other respects denied.

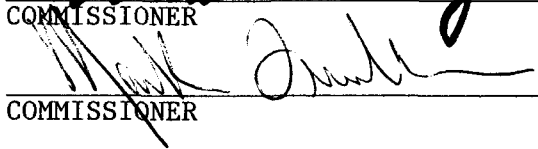
DATED: Albany, New York

APR 23 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Rector Books, 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:
8/1/65 - 8/31/70.

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 April, 1982, he served the within notice of Decision by certified mail upon Rector Books, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rector Books, Inc.
Sal's Stationery
22-85 2nd Ave.
New York, NY 10035

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 April, 1982.

Channie P. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Rector Books, 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 8/1/65 - 8/31/70.

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 April, 1982, he served the within notice of Decision by certified mail upon Herald Fahringer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

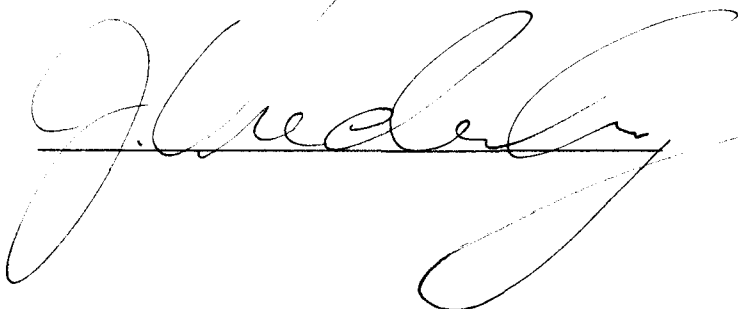
Herald Fahringer
Lipsitz, Green, Fahringer, Roll, Schuller & James
540 Madison Ave.
New York, NY 10022

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
23rd day of April, 1982.





P 230 842 499
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

SENT TO *Green Tahungii*
 STREET AND NO. *Ball Schuller & James*
 P.O., STATE AND ZIP CODE *540 Madison Ave. New York, NY 10022*

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	¢
		POSTAGE	
CERTIFIED FEE		¢	
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 842 498
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

SENT TO *Heater Books, Inc.*
 STREET AND NO. *Salt Stairway*
 P.O., STATE AND ZIP CODE *22-85 2nd Ave. New York, NY 10035*

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	¢
		POSTAGE	
CERTIFIED FEE		¢	
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Rector Books, Inc.

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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:
8/1/65 - 8/31/70.

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 May, 1982, he served the within notice of Decision by certified mail upon Rector Books, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

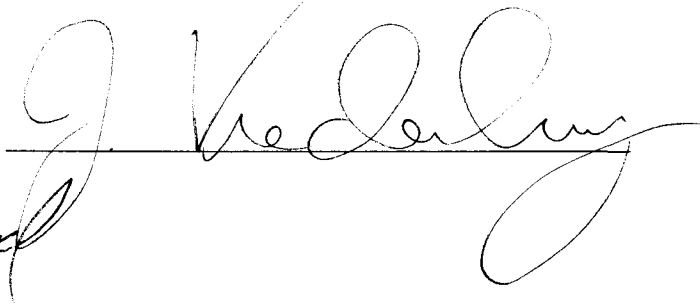
Rector Books, Inc.
Sal's Stationery
c/o Herald Fahringer
Lipsitz, Green, Fahringer, Roll, Schuller & James
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New York, NY 10022

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 May, 1982.





REQUEST FOR BETTER ADDRESS

Requested by <i>J. Vedenburg</i>	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>4-30-82</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number <i>NA.</i>	Date of Petition <i>FDC. 4-23-82</i>
Name <i>Rector Books, Inc.</i>	
Address <i>Sal's Stationery 22-85 2nd Avenue New York City, N.Y. 10035</i>	

Results of search by Files

<input type="checkbox"/> New address: <i>Called Rep 751-1000</i>	<i>to current address sent in c/o Rep.</i>
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	

Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK
No.

☐ HOLD

DATE

4/27/82
1ST NOTICE

2ND NOTICE

RETURN

Delivered
Per Form 100
Oct. 1981

Rector Books, Inc.
Sal's Stationery
22-85 2nd Ave.
New York, NY 10035

TAX APPEALS BUREAU
APR 30 1982

RECEIVED

Handwritten: 4/27/82
Signature: [illegible]

☒ Address left no address
☐ No such number
☒ Moved, not forwardable
☒ Address unknown