

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

January 29, 1982

Star Reporter Publishing Co., Inc.
Att: Roy A. Lindberg, President
6005 8th Ave.
Brooklyn, NY 11220

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
Michael J. Lauery
106 Perry St.
New York, NY 10014
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
STAR REPORTER PUBLISHING CO., 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 March 1, 1974 through	:	
August 31, 1977.	:	

Petitioner, Star Reporter Publishing Co., Inc., 6005 8th Avenue, Brooklyn, New York 11220, 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 March 1, 1974 through August 31, 1977 (File No. 22368).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 16, 1980 at 1:15 P.M. Petitioner appeared by Michael J. Lavery, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioner's sales and use tax liability for the period March 1, 1974 through August 31, 1977 based on a one month test period.

II. Whether certain publications printed by petitioner constitute periodicals.

III. Whether the Audit Division timely issued an assessment of sales and use taxes for the period March 1, 1974 through February 28, 1975.

FINDINGS OF FACT

1. Petitioner, Star Reporter Publishing Co., Inc., is engaged in type-setting and printing services, as well as publishing newspapers.

2. On June 5, 1978, 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 for the period March 1, 1974 through August 31, 1977 for taxes due of \$7,890.46, plus minimum statutory interest of \$1,769.95, for a total of \$9,660.41.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the period March 1, 1974 through February 28, 1977 to May 20, 1978.

4. On audit, the Audit Division disallowed six of petitioner's reported nontaxable sales for February, 1977 on the basis that petitioner did not have proper exemption certificates on file from the purchaser. Said sales totaled \$1,473.30 and represented 22.25 percent of reported nontaxable sales for the entire month. This percentage was applied to nontaxable sales reported for the audit period of \$444,599.00 to determine additional taxable sales of \$98,921.00.

The Division also examined expense purchases for February 1977 and found that petitioner failed to pay a sales or use tax on purchases of \$27.80. Said purchases were related to gross sales for the same period to determine a percentage of .00373 which was applied to gross sales for the audit period to arrive at additional taxable purchases of \$1,806.00.

5. The six sales at issue referred to in Finding of Fact "4" were to the following customers:

a) Bay Ridge Minerva Lodge	\$ 73.06
b) Mayer Chemtob Knitting Mill	25.70
c) Catholics United for Education	62.70
d) Scandinavian-American Bulletin	451.84
e) Millionaires Newsletter	60.00
f) The Homeowners Bulletin	800.00

Petitioner conceded that the sales indicated in a, b and c, above, were subject to tax and that it failed to collect the same. Moreover, petitioner reviewed its books and records back to January 1974 to ascertain other sales made to these organizations. This review revealed that petitioner failed to collect taxes of \$316.07 from Bay Ridge Minerva Lodge, and that there were no other sales to Mayer Chemtob Knitting Mill or Catholics United for Education. With respect to the three remaining sales, petitioner argued that its sales of the Scandinavian-American Bulletin and the Homeowners Bulletin were sales of periodicals, and thus it was not required to collect any tax. Petitioner submitted a resale certificate issued by Morris Strauss, Inc., the publisher of the Millionaires Newsletter.

6. The Scandinavian-American Bulletin is a monthly publication which contains articles on the activities of Scandinavian-Americans, as well as news of development in travel and culture in Scandinavia. It is available to the public and has continuity as to title and general nature of content from issue to issue.

7. The Homeowners Bulletin is a monthly publication devoted entirely to real estate advertising. It does not contain any articles, news or editorial comments.

8. Petitioner offered no substantial evidence to show that the purchases referred to in Finding of Fact "4" were not subject to tax or that tax was paid at the time of purchase.

9. Notwithstanding petitioner's preceding arguments, petitioner contended that the exact amount of any sales and use taxes due were readily discernible from its books and records for the entire period under audit and, therefore, concluded that the taxes determined due for February, 1977 should be limited to that month.

10. Petitioner maintained adequate books and records from which the Audit Division could have determined the exact amount of petitioner's sales and use tax liability.

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). That since petitioner maintained adequate books and records from which the Audit Division could have determined the exact amount of tax due on nontaxable sales and expense purchases, the use of a one month test period as the basis for determining petitioner's sales and use tax liability for the period March 1, 1974 through August 31, 1977 was not proper.

B. That in accordance with Finding of Fact "5", petitioner is liable for taxes of \$323.15 on its sales to Bay Ridge Minerva Lodge, Mayer Chemtob Knitting Mill and Catholics United for Education.

C. That the Scandinavian-American Bulletin constituted a periodical within the meaning and intent of section 1115(a)(5) of the Tax Law; therefore, petitioner is not liable for failure to collect tax on such sales. That the Homeowners Bulletin is not a periodical within the meaning and intent of

section of 1115(a)(5) of the Tax Law and, therefore, petitioner is liable for the tax imposed on said sale which it failed to collect, pursuant to section 1133(a) of the Tax Law.

D. That petitioner was furnished with an exemption certificate with respect to its sale of the Millionaires Newsletter and thus has sustained the burden of proof required by section 1132(c) of the Tax Law.

E. That based on Conclusion of Law "A", petitioner is liable only for the exact amount of taxes determined due as follows:

\$323.15	(Finding of Fact "5")
64.00	Homeowners Bulletin
<u>2.24</u>	Expense Purchases
\$389.39	

Therefore, the issue regarding the timeliness of the notice of determination is moot.

F. That the petition of Star Reporter Publishing Co., Inc. is granted to the extent that the additional sales and use taxes due are reduced to \$389.39 so as to conform with Conclusion of Law "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 5, 1978; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Star Reporter Publishing Co., Inc.
Att: Roy A. Lindberg, President : 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:
3/1/74-8/31/77.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Star Reporter Publishing Co., Inc., Att: Roy A. Lindberg, President the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

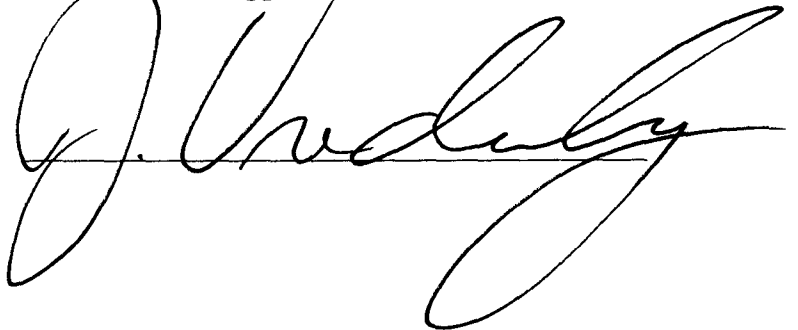
Star Reporter Publishing Co., Inc.
Att: Roy A. Lindberg, President
6005 8th Ave.
Brooklyn, NY 11220

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 January, 1982.


Annie P. Haymond



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Star Reporter Publishing Co., Inc. :
Att: Roy A. Lindberg, President :

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 3/1/74-8/31/77.

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

Michael J. Lauery
106 Perry St.
New York, NY 10014

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 January, 1982.

Ernie A. Haglund

J. Vredenburg

P 230 841 996
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Michael J. Lavery	
STREET AND NO.		106 Perry St	
P.O., STATE AND ZIP CODE		N.Y. N.Y. 10014	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		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	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

P 230 841 995
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Star Reporter Publishing Co. Inc.	
STREET AND NO.		6005 8th Ave	
P.O., STATE AND ZIP CODE		Brooklyn N.Y. 11220	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		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	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			