

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

October 22, 1982

Lillian Vernon Corporation
c/o G. B. DeFilippo, Vice-President
510 S. Fulton Ave.
Mt. Vernon, NY 10550

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 Wachtell
Livingston, Wachtell & Co.
19 W. 44th St.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LILLIAN VERNON CORPORATION

DECISION

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, 1974
through February 28, 1978.

Petitioner, Lillian Vernon Corporation, 510 S. Fulton Avenue, Mt. Vernon, New York 10550 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, 1974 through February 28, 1978 (File No. 23876).

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 August 4, 1981 at 10:45 A.M. Petitioner appeared by George Wachtell, Accountant. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner was properly assessed sales tax on receipts designated as postage and handling.

FINDINGS OF FACT

1. On June 20, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Lillian Vernon Corporation covering the period September 1, 1974 through February 28, 1978. The Notice asserted tax due of \$16,380.55, plus penalties and interest of \$6,417.58, for a total of \$22,798.13 as a result of a desk audit.

2. Petitioner signed a consent to extend the period of limitation for assessment for the period December 1, 1974 through February 28, 1975 to June 20, 1978.

3. Petitioner is a retailer of merchandise soliciting orders by catalog or advertisements placed in magazines. Petitioner instructs its customers to add postage and handling charges to their orders based on the selling price of the merchandise ordered. A schedule of postage and handling charges appears on an order blank from its catalog as follows:

Orders to \$4.00 add 90¢
\$4.01 to \$8.00 add \$1.15
\$8.01 to \$12.00 add \$1.35
\$12.01 to \$15.00 add \$1.45
\$15.01 to \$25.00 add \$1.55
Over \$25.00 add \$1.75

Advertisements listed a specific amount to be included for postage and handling.

4. It was the Audit Division's position that the postage and handling charges included with petitioner's customers' orders were taxable receipts since the postage charge was not separately stated from the handling charge. During its desk audit of the petitioner, the petitioner stated that it had \$12,453.58 in postage and handling charges attributable to its New York sales for the quarterly period ended May 31, 1976. Petitioner also stated that this amount was included in gross sales but not in taxable sales for such quarter.

Based on this information, the Audit Division determined that postage and handling charges to New York residents were 7.91 percent of taxable sales reported by petitioner on its New York State Sales and Use Tax Return filed for the period March 1, 1976 through May 31, 1976. The Audit Division then applied the aforementioned ratio to taxable sales reported for the period

September 1, 1974 through February 28, 1978 and thereby determined additional sales tax due of \$16,380.55.

5. As a basis for the Notice issued, the Audit Division cited 20 NYCRR 526.5(g) as follows:

"Transportation. (1) The cost of transportation of tangible personal property, sold at retail, which is separately stated in the written contract, if any, and on the bill rendered to the purchaser is excluded from the receipts subject to the tax."

The Audit Division recognized postage but not handling charges as transportation. Since the postage was not separately stated from handling charges, the Audit Division determined that the entire receipts were subject to tax.

6. Petitioner argued that the postage and handling charges to its customers were for transportation. Petitioner further argued that it averaged mailing costs in an attempt to recover the cost of postage, and in the event that actual postage costs were less than charged, the term "postage and handling" was used by petitioner to eliminate any need for processing of a refund. Petitioner offered no evidence to support these arguments.

7. In a Newsletter issued March, 1973, the Department of Taxation and Finance advised that "postage and handling charges, when billed in a single amount, are subject to the sales tax. However, if the charge for postage is separately shown on a bill, it is exempt from the sales tax."

8. Based on the information supplied by petitioner and used by the Audit Division in the determination of postage and handling charges to New York residents (Finding of Fact "4", supra), nearly 40 percent of the charges constituted handling.

9. Petitioner did not argue the application of penalties or interest.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a sales tax on the receipts from every retail sale of tangible personal property; receipt being defined in section 1101(b)(3) as the amount of the sale price of any property and the charge for any service, excluding the cost of transportation of tangible personal property sold at retail where such cost is separately stated on the bill rendered to the purchaser.

B. That petitioner's charges for postage and handling included other elements aside from transportation as evidenced by the information provided by petitioner as found in Finding of Fact "8". That portion of the charges made in excess of transportation constituted an additional charge for tangible personal property subject to tax under section 1105(a) of the Tax Law.

C. That since petitioner did not separately state transportation charges to its customers, the entire receipt is taxable under section 1105(a) of the Tax Law.

D. That resort to the use of a test period as a 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 in the absence of evidence as to the petitioner's insufficiency of record keeping, the use of a test period was not warranted; therefore, any tax determined to be due is limited to the actual amount found in the test period.

E. That the petition of Lillian Vernon Corporation is granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand

for Payment of Sales and Use Taxes Due issued on June 20, 1978; and that,
except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 22 1982

STATE TAX COMMISSION


ACTING PRESIDENT



COMMISSIONER



COMMISSIONER



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Lillian Vernon Corporation	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 9/1/74-2/28/78.	:	

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 22nd day of October, 1982, he served the within notice of Decision by certified mail upon Lillian Vernon Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

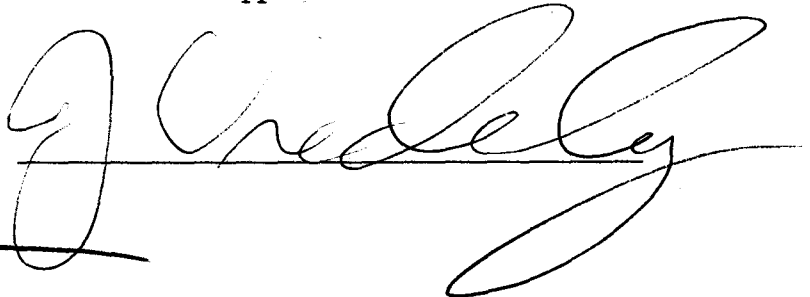
Lillian Vernon Corporation
c/o G. B. DeFilippo, Vice-President
510 S. Fulton Ave.
Mt. Vernon, NY 10550

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
22nd day of October, 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 :
Lillian Vernon Corporation :
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 9/1/74-2/28/78. :
:

State of New York
County of Albany

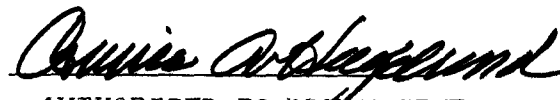
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 22nd day of October, 1982, he served the within notice of Decision by certified mail upon George Wachtell the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George Wachtell
Livingston, Wachtell & Co.
19 W. 44th St.
New York, NY 10036

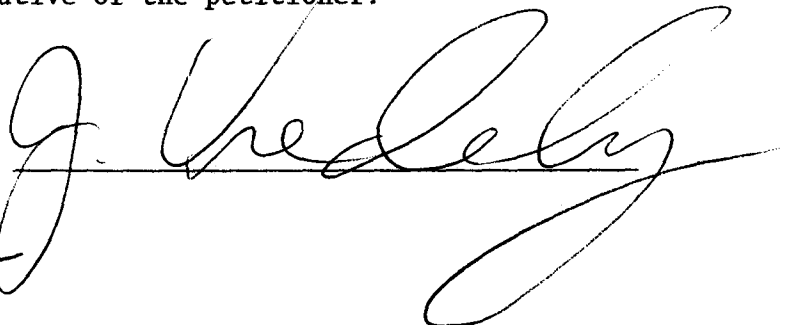
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
22nd day of October, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 844 137
RECEIPT FOR CERTIFIED MAIL

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

SENT TO		<i>George Thachtel</i>	
STREET AND NO.		<i>Stumpson, Thachtel & Co</i>	
P.O., STATE AND ZIP CODE		<i>19. 24. 244 St.</i>	
POSTAGE		<i>New York, N.Y. 10036</i>	
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	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 844 136
RECEIPT FOR CERTIFIED MAIL

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

SENT TO		<i>Delian Vernon Corp.</i>	
STREET AND NO.		<i>708 W. 11th St. Phila. Pa.</i>	
P.O., STATE AND ZIP CODE		<i>510 S. Parkton Rd. Mt. Vernon, N.Y. 10550</i>	
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	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976