

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

May 6, 1983

Black Jack Distributors, Inc.  
& Alfred Scotti, Individually and as Officer  
210 W. 42nd St.  
New York, NY 10036

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 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 Price 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

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In the Matter of the Petition  
of  
BLACK JACK DISTRIBUTORS, INC.  
and  
ALFRED SCOTTI, Individually and as an 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 June 1, 1974  
through May 31, 1977

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DECISION

Petitioners, Black Jack Distributors, Inc., and Alfred Scotti, individually and as an officer, 210 West 42nd Street, New York, New York 10036, 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 June 1, 1974 through May 31, 1977 (File No. 21914).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 24, 1980, at 9:15 A.M. Petitioners appeared by Lipsitz, Green, Fahringer, Roll, Schuller and James, Esqs., (Herald Price Fahringer, Esq., of counsel.) The Audit Division appeared by Ralph J. Vecchio, Esq., (Ellen Purcell, Esq., of counsel).

ISSUES

1. Whether petitioners sustained their burden of proof that the publications sold by Black Jack Distributors, Inc. were "periodicals" within the meaning of Section 1115(a)(5) of the Tax Law.
2. Whether the revenue from the operation of the film viewing machines was sufficiently identified in the revenues received by petitioners so as to be properly excluded from taxable receipts.

FINDINGS OF FACT

1. Petitioners, Black Jack Distributors, Inc. ("Black Jack"), and Alfred Scotti, received from the Audit Division a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated January 24, 1978, in the amount of \$49,073.46 exclusive of penalties and interest for the period from June 1, 1974 through May 31, 1977.

2. Black Jack executed a consent extending the period of limitations for assessment of sales and use taxes to June 20, 1978.

3. Black Jack is a registered vendor which operates a bookstore at 210 West 42nd Street, New York, New York 10036. Alfred Scotti is an officer of Black Jack, which during the periods herein involved was engaged in the retail business of selling books, novelties, films, rubber supplies and devices, and publications. Black Jack offered its patrons, for a price, the use of film viewing machines, commonly known as peep shows.

4. Petitioner Black Jack Distributors, Inc., filed Sales and Use Tax Returns for the audit period herein involved, reporting taxable sales of \$64,809.00, which was somewhat less than 10% of the gross sales reported on its federal income tax returns for the period herein involved. Black Jack's gross sales for that period were \$704,118.00.

5. An audit of Black Jack's records found them to be incomplete and required an auditor to use a test period to determine the amount of tax. The auditor found that 32.9% of the purchases were devices and novelties conceded by petitioners to be taxable. Petitioner Black Jack had reported such purchases to be 10%. Upon audit, purchases of newspapers were found to be 8.4%, of which half were allowed as tax exempt, including "Screw" magazine. The remaining purchases, approximately 60%, were of items which consisted of purchases of

items which petitioners view as exempt publications. The sales tax audit determined that Black Jack's taxable sales were \$674,545.00, nearly 96% of the gross sales.

6. Black Jack's revenues from the film viewing machines on its premises were not segregated as such on its books and records.

7. Dr. Charles Winich, an expert in sociology and pornography, testified on behalf of petitioners. Petitioners did not qualify Dr. Winich as an expert on the common law definition of "periodicals", nor as to the application of such definition to publications asserted by petitioners to be sales tax exempt "periodicals."

#### CONCLUSIONS OF LAW

A. That petitioners, Black Jack Distributors, Inc., and Alfred Scotti were duly notified of the Determination and Demand by the Audit Division that additional sales taxes were due for the periods from June 1, 1974 through May 31, 1977.

B. That the Notice of Determination and Demand being duly received in evidence, jurisdiction in this matter was established.

C. That as applied to the issue herein involved, the common law definition of a "periodical" is found to be:

- a. It must be published at stated intervals;
- b. It must have the element of general availability to the public;
- c. It must have continuity as to title and general nature of content from issue to issue;
- d. It must not, either singly, or when successive issues are put together, constitute a book; and
- e. Each number must contain a variety of original articles by different authors devoted either to general literature, the sciences or the arts, some special industry, profession, sport or other fields of endeavor.

D. Petitioners failed to prove that the items asserted to be "publications" contained a variety of original articles by different authors. Accordingly, petitioners have not sustained their burden of proof that the publications sold by Black Jack were "periodicals" within the meaning of Section 1115(a)(5) of the Tax Law.

E. That application of the common law definition of the word periodical used in Section 1115(a)(5) of the Tax Law to Black Jack's business, does not raise first ammendment or equal protection issues.

F. That petitioners did not sustain their burden of proof to show that the revenues from the operation of the peep show machines was sufficiently separated from other revenues so as not to be includable in taxable sales.

G. That in accordance with Conclusions of Law "C" and "D", the petition is denied in all respects, and the Notice of Determination and Demand issued January 24, 1978 is sustained, with penalties and interest to the date of payment.

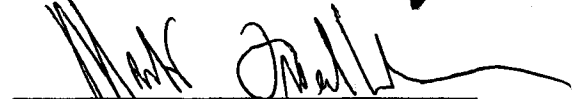
DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Black Jack Distributors, Inc. :  
& Alfred Scotti, 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 :  
6/1/74-5/31/77. :

State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Black Jack Distributors, Inc. & Alfred Scotti, Individually and as Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Black Jack Distributors, Inc.  
& Alfred Scotti, Individually and as Officer  
210 W. 42nd 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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of May, 1983.

David Parchuck

Francis A. Highland

**AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174**

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Black Jack Distributors, Inc. :  
& Alfred Scotti, 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 6/1/74-5/31/77. :

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State of New York  
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Herald Price Fahringer the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herald Price 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  
6th day of May, 1983.

David Parchuck

James R. Heglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

P 481 207 711

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Herald Price Fahringer</u> <u>Lipshitz, Green, Fahringer, Roll,</u> <u>Schuller &amp; James</u>	
Street and No. <u>540 Madison Ave.</u>	
P.O., State and ZIP Code <u>New York, NY 10022</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 207 710

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Black Jack Distributors, Inc.</u> <u>&amp; Alfred Scott, Individually and</u> <u>as officer</u>	
Street and No. <u>210 W. 42nd St.</u>	
P.O., State and ZIP Code <u>New York, NY 10036</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982



TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



Black Jack Distributors, Inc.  
& Alfred Scotti, Individually and as Officer  
210 W. 32nd St.  
New York, NY 10036

CERTIFIED

P 481 207 710

MAIL

RECEIVED  
JUN 11 1973  
JUN 11 1973  
JUN 11 1973

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

May 6, 1983

Black Jack Distributors, Inc.  
& Alfred Scotti, Individually and as Officer  
210 W. 42nd St.  
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Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Herald Price 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

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BLACK JACK DISTRIBUTORS, INC.	:	DECISION
and	:	
ALFRED SCOTTI, Individually and as an Officer	:	
for Revision of a Determination or for Refund	:	
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of the Tax Law for the Period June 1, 1974	:	
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D. Petitioners failed to prove that the items asserted to be "publications" contained a variety of original articles by different authors. Accordingly, petitioners have not sustained their burden of proof that the publications sold by Black Jack were "periodicals" within the meaning of Section 1115(a)(5) of the Tax Law.

E. That application of the common law definition of the word periodical used in Section 1115(a)(5) of the Tax Law to Black Jack's business, does not raise first ammendment or equal protection issues.

F. That petitioners did not sustain their burden of proof to show that the revenues from the operation of the peep show machines was sufficiently separated from other revenues so as not to be includable in taxable sales.

G. That in accordance with Conclusions of Law "C" and "D", the petition is denied in all respects, and the Notice of Determination and Demand issued January 24, 1978 is sustained, with penalties and interest to the date of payment.

DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION

Roderick A. Cline  
PRESIDENT

Frank R. Koenig  
COMMISSIONER

[Signature]  
COMMISSIONER