

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

May 27, 1983

Boardman, Ltd.
833 Broadway
Albany, NY 12201

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
John M. Cholakis
Tabner, Carlson, Farrell & Cholakis
90 State St.
Albany, NY 12207
AND
John J. Flax
Urbach, Kahn & Werlin
66 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BOARDMAN, LTD.	:	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 September 1, 1974	:	
through November 30, 1977.	:	

Petitioner, Boardman, Ltd., 833 Broadway, Albany, New York 12201, 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 September 1, 1974 through November 30, 1977 (File No. 22424).

A formal hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on August 25, 1982 at 1:15 P.M. Petitioner appeared by Tabner, Carlson, Farrell and Cholakis (John M. Cholakis, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether catalogs purchased and delivered to petitioner in New York State are subject to use tax imposed by clause A of section 1110 of the Tax Law.

FINDINGS OF FACT

1. On May 29, 1978, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Boardman, Ltd., for taxes due of \$78,941.09, plus interest of \$12,413.77, for a total amount due of \$91,354.86 for the period September 1, 1974 through November 30, 1977.

2. The petitioner executed consents extending the period of limitation for issuing an assessment for the period at issue to June 20, 1978.

3. As the result of a pre-hearing conference on January 10, 1979, tax in the amount of \$12,293.92 attributable to expense purchases and fixed asset purchases was agreed to by petitioner, and tax in the amount of \$8,991.22 attributable to purchases of newspaper inserts and catalogs mailed out of state was cancelled. The balance of tax in the amount of \$57,655.95 on the purchase of catalogs remains at issue.

4. During the period at issue, petitioner operated thirteen catalog showroom houses throughout New York State in the Albany, Binghamton, Syracuse and Utica areas. Mr. Selwyn D. Davis, petitioner's witness, testified that the methodology by which catalog showroom dealers operate is through the use of a catalog. "(The catalog) is the 'bible' of the type of operation we are in, and this is the thing that thus we believe sells for us."

5. The copy or final composition for the catalog is prepared by petitioner's staff in Albany and forwarded to Foote and Davies in Atlanta, Georgia for printing. All the finished catalogs are delivered by Foote and Davies to the Albany store, which is the main store, plus other major Boardman showrooms in the State. The catalogs are then distributed by petitioner's employees to other showrooms and to industrial concerns, hospitals, insurance companies, colleges and State office buildings in its operating areas.

6. Approximately fifty percent of the catalogs are distributed to establishments other than showrooms. The catalogs are left at the dock or receiving area of such establishments. According to Mr. Davis, the petitioner does not direct the establishments as to how to distribute the catalogs and there is no charge made for the catalogs. The remaining fifty percent of the catalogs are

left in petitioner's showrooms for distribution to prospective customers. These are also distributed free of charge to the customer.

7. Mr. Davis further testified that the catalogs are a direct cost of the merchandise sold. Approximately two-thirds of the advertising budget of the petitioner goes into the catalog cost.

CONCLUSIONS OF LAW

A. That section 1110 of the Tax Law provides, in part:

"Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state...(A) of any tangible personal property purchased at retail..."

B. That "use" is defined in section 1101(b)(7) of the Tax Law as follows:

"Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property."
(emphasis added)

C. That petitioner did purchase and "receive" within New York State catalogs which are subject to use tax under section 1110(A) of the Tax Law.


In the Matter of the Application of Ford Motor Company (September 15, 1976), the Tax Commission determined that Ford Motor Company lacked real control over the catalogs once they were deposited outside of New York State with the common carrier. Theoretical ownership is not in itself sufficient reason to justify the assessment of use tax where no right or power over material is exercised within New York State (Bennett Brothers, Inc. v. State Tax Commission, 62 A.D.2d 614).


D. That the petition of Boardman, Ltd. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 29, 1978, as modified (Finding of Fact "3"), is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Boardman, Ltd. :
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 - 11/30/77. :
_____ :

AFFIDAVIT OF MAILING

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Boardman, Ltd., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Boardman, Ltd.
833 Broadway
Albany, NY 12201

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, 1983.

David Parchuck

Quinn O'Halloran

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Boardman, Ltd.	:	
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 - 11/30/77.	:	

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon John M. Cholakakis the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John M. Cholakakis
Tabner, Carlson, Farrell & Cholakakis
90 State St.
Albany, NY 12207

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 May, 1983.

David Parchuck

James A. Hupland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Boardman, Ltd. :

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 - 11/30/77. :

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 27th day of May, 1983, he served the within notice of Decision by certified mail upon John J. Flax, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Flax
Urbach, Kahn & Werlin
66 State St.
Albany, NY 12207

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 May, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 481 207 858

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to John M. Cholakis	
Ebner Carlson, Farrell & Cholakis	
Street and No.	
90 State St.	
P.O. State and ZIP Code	
Albany, NY 12207	
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 481 207 856

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Boardman, Ltd.	
Street and No.	
833 Broadway	
P.O. State and ZIP Code	
Albany, NY 12201	
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

PS Form 3800, Feb. 1982

Sent to John J. Flax	
Urbach, Kahn & Werlin	
Street and No.	
66 State St.	
P.O. State and ZIP Code	
Albany, NY 12207	
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	

(See Reverse)

P 481 207 859

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL