

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

May 27, 1983

MCT Information Systems, Inc.
8 Stanley Circle
Latham, NY 12110

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
David L. Evans
Urbach, Kahn & Werlin, P.C.
66 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MCT Information Systems, Inc. :
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 12/1/76-11/30/79. :
_____ :

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 MCT Information Systems, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

MCT Information Systems, Inc.
8 Stanley Circle
Latham, NY 12110

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

Bruce R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MCT Information Systems, 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 12/1/76-11/30/79. :

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 David L. Evans the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David L. Evans
Urbach, Kahn & Werlin, P.C.
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.

David Parchuck

James P. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MCT INFORMATION SYSTEMS, 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 December 1, 1976	:	
through November 30, 1979.	:	

Petitioner, MCT Information Systems, Inc., 8 Stanley Circle, Latham, New York 12110, 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 December 1, 1976 through November 30, 1979 (File No. 41499).

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 12, 1982 at 9:15 A.M. Petitioner appeared by Urbach, Kahn & Werlin, PC (David L. Evans, Esq.). The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Audit Division accurately determined the sales and use tax liability of petitioner, MCT Information Systems, Inc., for the period December 1, 1976 through November 30, 1979.

II. Whether the penalties imposed pursuant to section 1145(a) of the Tax Law and interest in excess of the minimum statutory rate should be waived.

FINDINGS OF FACT

1. Petitioner, MCT Information Systems, Inc. (hereinafter "MCT") is a New York corporation engaged in selling computer hardware and software.

2. On April 20, 1980, 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 MCT asserting a tax due of \$48,822.71, plus penalty and interest of \$17,244.83, for the period December 1, 1976 through November 30, 1979.

3. The Notice was issued under section 1138(a)(1) of the Tax Law inasmuch as MCT failed to file sales and use tax returns for the quarterly periods December 1, 1976 through November 30, 1979. The amount of tax due was determined from available sales records since MCT failed to keep records as required by section 1135 of the Tax Law.

4. MCT has taken issue with 13 sales listed on the audit workpapers for the reasons stated in the summary that follows:

<u>Sale</u>	<u>Sales Price</u>	<u>Objection</u>
Dunn Geoscience	\$15,195.00	Sale for resale
Ashton Companies	10,000.00	Custom software
Loiterstein & Cohan	18,200.00	Out-of-state sale
Saxton	12,500.00	Sale for resale
Dynamic Fuel, Inc.	15,190.00	Sale for resale
Sillerman & Morrow	17,325.00	Out-of-state sale
Coffee Systems	27,000.00	Sale for resale
Ackner Fuels	40,400.00	Not MCT sale
Congress Gas & Oil	36,090.00	Duplication
Rist Frost	49,705.00	Duplication
Ackner Fuels	113.00	Duplication
Fred Collins	150.00	Duplication
Riverside/Congress & Glens Falls Distributing	1,990.00	Duplication

5. Properly completed resale certificates were submitted at the hearing for the Dunn Geoscience and Dynamic Fuel, Inc. sales. A resale certificate tendered by Multi-State Leasing Corporation and an exempt use certificate denoting resale and prepared by General Electric Credit Corporation were submitted for the Saxton and Coffee Systems sales respectively. No adequate documentary evidence was presented to show that the sales listed on the audit worksheet were other than to Saxton and Coffee Systems.

6. A "Sale Agreement" with Ashton Companies, Inc. was presented which shows the sale of software for accounts receivable, degree day scheduling, accounts payable, general ledger, payroll and inventory control invoicing for the amount of \$10,000.00. The software was specifically tailored to fit the customer's specific data processing requirements.

7. MCT contended that the Loiterstein & Cohan sale involved a delivery to the State of Vermont and that the Sillerman & Morrow sale involved a delivery to the State of New Jersey. No documentary evidence was offered to verify said out-of-state deliveries.

8. MCT argued that the Ackner Fuels sale was the sale of another company made prior to MCT's existence and that it inherited the obligation to service the computer hardware sold to Ackner Fuels. The sale to Ackner Fuels took place on February 28, 1977, which was prior to MCT's incorporation on or about September 14, 1977. The sale was, however, invoiced upon MCT letterhead. Said invoice was preserved as a business record in the files maintained by MCT.

9. It was shown that the Congress Gas & Oil sale of hardware and software in the amount of \$36,090.00, the Ackner Fuels sale of ribbons and disc cartridges in the amount of \$113.00 and the Fred Collins sale of maintenance in the amount of \$150.00 had been duplicated on the audit workpapers.

10. The audit workpapers exhibit a Rist Frost sale on April 3, 1978 of computer hardware for \$49,705.00 and a Rist Frost sale on April 23, 1979 of a computer for \$51,950.00. There further appears a Congress sale on December 16, 1977 of a basic display, a Congress sale on February 28, 1979 of a CRT device, a Glens Falls Distributing sale on December 27, 1977 of a basic display, and a Riverside sale on December 27, 1977 of a basic display, each in the amount of \$1,990.00. No evidence was presented to show that these were duplicated sales.

11. MCT was, for the period under review, aware of its sales and use tax obligations. MCT, in fact, collected the tax on selected transactions. MCT did not, however, register as a vendor for sales tax purposes, file the required tax returns or remit the tax that it had collected.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that a vendor shall not be responsible for collection of tax where the purchaser furnishes a certificate of resale in proper form.

B. That the tax determined due on the Dunn Geoscience and Dynamic Fuel, Inc. sales is cancelled since MCT received properly completed resale certificates from these purchasers. MCT is responsible for the tax on the Saxton sale for the certificate it received was from Multi-State Leasing Corporation. MCT is responsible for the tax on the Coffee Systems sale for the certificate it received was from General Electric Credit Corporation.

C. That section 1105(a) of the Tax Law imposes a sales tax upon every retail sale of tangible personal property.

D. That since the software sold to Ashton Companies, Inc. was developed specifically for the customer's use, the software constitutes intangible personal property and is not subject to the tax.

E. That 20 NYCRR 525.2(a)(3) provides that the sales tax is a destination tax and as such the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls the tax incident.

F. That the sales to Loiterstein & Cohan and Sillerman & Morrow were delivered in New York State. That the petitioner failed to sustain the burden of proof required to show that the tangible personal property was delivered to the customer outside of New York State.

G. That the determination of additional tax due was decided "from such information as may be available" in accordance with section 1138 of the Tax Law and the burden of proving that an error exists in the determination is upon MCT.

H. That MCT has established the existence of error in the determination. The Congress Gas & Oil sale of \$36,090.00, Ackner Fuels sale of \$113.00 and the Fred Collins sale of \$150.00 were recorded twice on the audit workpapers and, consequently, tax was assessed a second time on these sales. MCT failed to establish that there was a duplication of the Rist Frost, Riverside, Congress or Glens Falls Distributing sales.

I. That generally, an organization which has held itself out as a corporation is estopped from denying the legality of its corporate existence. (See In re Gold Depository Unlimited of America, 106 Misc.2d 992. See also United States v. Theodore, 479 F.2d 749, 753.) Petitioner entered into a taxable transaction with Ackner Fuels under petitioner's corporate name prior to its actual incorporation and filing with the Secretary of State. Such holding itself out as a corporation now estops petitioner from denying its corporate existence in order to escape its sales tax liability. Petitioner presented no evidence to demonstrate that it was not the vendor in the aforesaid sale. Therefore, the Ackner Fuels contract was properly included in computing petitioner's tax liability.

J. That section 1145 of the Tax Law provides that under appropriate circumstances the Tax Commission may remit all or any part of penalty and that portion of interest in excess of the minimum statutory interest. However, there is no authority, either judicial or statutory, requiring such a reduction (Matter of C. H. Heist Corp. v. State Tax Commission, 66 A.D.2d 499, modified on other grounds 50 N.Y.2d 438).


K. That the reduction of penalty and interest is unwarranted in view of Finding of Fact "11".

L. That the petition of MCT Information Systems, Inc. is granted to the extent indicated in Conclusions of Law "B", "D" and "H" 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 April 20, 1980; and that except as so granted, the petition is in all other respects denied.

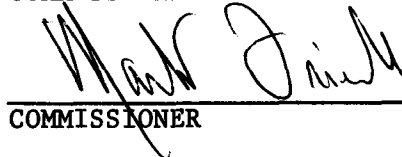
DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 891

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
MCT Information Systems, Inc.	
Street and No.	
8 Stanley Circle	
P.O., State and ZIP Code	
Latham, NY 12110	
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 481 207 892

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(See Reverse)

Sent to	
David L. Evans	
Urbach, Kahn & Werlin, P.C.	
Street and No.	
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Albany, NY 12207	
Postage	\$
Certified Fee	
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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