

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

February 11, 1983

Saphar & Associates, Inc.  
175 Gibbs St.  
Rochester, NY 14605

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  
Peter L. Faber  
Harter, Secrest & Emery  
700 Midtown Tower  
Rochester, NY 14604  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Saphar & Associates, 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:  
7/1/72-6/30/75 & 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Saphar & Associates, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Saphar & Associates, Inc.  
175 Gibbs St.  
Rochester, NY 14605

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  
11th day of February, 1983.

David Parchuck

Cherie R. Haglund

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

Saphar & Associates, Inc.

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales & Use Tax :  
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Period 7/1/72-6/30/75 & 12/1/76-11/30/79.

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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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Peter L. Faber the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter L. Faber  
Harter, Secrest & Emery  
700 Midtown Tower  
Rochester, NY 14604

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  
11th day of February, 1983.

David Parchuck

Bonnie A. Haglund

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	:	
SAPHAR & ASSOCIATES, 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 Periods July 1, 1972	:	
through June 30, 1975 and December 1, 1976	:	
through November 30, 1979.	:	

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Petitioner, Saphar & Associates, Inc., 175 Gibbs Street, Rochester, New York 14605, 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 periods July 1, 1972 through June 30, 1975 and December 1, 1976 through November 30, 1979 (File Nos. 30360 & 32534).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on January 19, 1982 at 9:15 A.M. Petitioner appeared by Peter L. Faber, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

- I. Whether petitioner's purchases of materials such as typography, mechanicals and photographs were for resale to customers.
- II. Whether petitioner purchased typography, mechanicals and photographs as an agent for tax exempt organizations.
- III. Whether certain charges to petitioner by independent artists are subject to tax.

FINDINGS OF FACT

1. Petitioner, Saphar and Associates, Inc., is an advertising agency engaged in the preparation and production of advertising materials for its clients and also prepares and places media advertisements.

2. On July 29, 1975, petitioner filed an application for a refund of sales taxes of \$2,339.12 paid on purchases of materials and supplies such as typography and mechanicals for the period July 1, 1972 through June 30, 1975. Said claim was based on petitioner's position that such purchases were made as agent for various tax exempt organizations.

3. On June 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 petitioner covering the period December 1, 1976 through November 30, 1979 for taxes due of \$4,149.04, plus minimum statutory interest of \$505.61, for a total of \$4,654.65.

4. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1976 through February 28, 1977, to June 20, 1980.

5. On January 21, 1981, the Audit Division denied petitioner's refund claim on the grounds that the purchases were for petitioner's own use.

6. On audit, the Audit Division examined purchase invoices for the year 1979 and found that petitioner did not pay sales or use tax on purchases of materials and supplies used in connection with advertising projects for exempt organizations. In addition, sales or use tax was not paid on services performed by independent artists. These purchases totaled \$34,729.00 for 1979. The Audit Division computed a margin of error of 661 percent based on the above purchases compared to purchases subject to use tax reported on returns filed for the same

period. The margin of error was used to project the tax liability for the remainder of the audit period.

7. 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.

8. The materials and supplies at issue consist of typography, mechanicals, photographs and photostats.

The stages involved in producing the advertising materials are as follows. An artist (independent or staff) designs a format for an ad or brochure which pulls together various components. These include composing the wording for the ad which is expressed in printed letter form or drawn lettering. The artist picks the kind of type, etc. and arranges for typography (the master proof of the wording to appear in the ad) to be produced. Wording can also be depicted by artist drawings. Ideas for photographs to be used are conceived and photographers are hired to take the appropriate pictures. The artist may want pictorial material to be expressed as line drawings instead of photographs. When the various components are ready, the artist arranges the typography and sometimes line drawings on a cardboard sheet. The typography is placed on the board in the form of a photostat (a picture of the master typography proof). Blank spaces are left for photographs. The cardboard sheet with the different pieces arranged upon it is called a mechanical (a rough facsimile of the ad or brochure). A printer takes the mechanical and the photographs and uses them to create a printing plate by various photographic processes. The printing plate is then used to print copy.

9. The materials and supplies are purchased in the preparation of a brochure or ad for a specific customer. Petitioner charges its customers for

materials and supplies separately from the charges for services. The materials and supplies become the property of the customer. The customer may take actual possession of the materials, or he may request petitioner to retain or destroy them.

10. The Audit Division requires that the following conditions must be met in order to establish a principal - agency relationship:

1. The advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent,
2. the advertising agency must obtain, prior to the acquisition, and retain written evidence of agent status with the client, and
3. the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may make no use of the property for its own account, such as charging the item to the account of more than one client.

Petitioner's suppliers are not always informed of the name of the client for whom petitioner is working. Petitioner never entered into a written agency agreement with its clients. The price charged by petitioner for the materials and supplies exceeded its cost.

11. Petitioner took the position that the materials and supplies were purchased with the intention of being resold as such to its customers. In the alternative, petitioner argued that the materials and supplies were purchased on behalf of tax exempt organizations. With respect to the charges by independent artists, petitioner argued that it pays the artist for performing artistic services for consulting and for the design of advertising campaigns and that such services are not enumerated services under section 1105(c) of the Tax Law.

CONCLUSIONS OF LAW

A. That the purchases of typography, mechanicals, photographs and photostats were used by petitioner in the production of advertising materials for sale to its customers or in the preparation of a completed advertisement prior to any transfer of title or possession thereto; therefore, they were not purchased for resale as such or as a physical component part of tangible personal property within the meaning and intent of section 1101(b)(4) of the Tax Law (Matter of Baronet Lithograph Co., STC August 25, 1978, Matter of Harrison Services, Inc., STC January 16, 1981, Laux Advertising, Inc. v. State Tax Commission, 67 A.D.2d 1066).

B. That petitioner did not make purchases of typography, mechanicals, photographs and photostats as agent on behalf of a principal.

C. That the services performed by independent artists described in Finding of Fact "8" constitute producing, fabricating or processing tangible personal property not purchased by petitioner for resale and are subject to the tax imposed under section 1105(c)(2) of the Tax Law. (Matter of Harrison Services, Inc., supra.)

D. That typography, mechanicals, photographs and photostats used to produce a brochure or other similar tangible personal property for sale by petitioner constitute equipment exempt from the imposition of New York State and local sales and use taxes under sections 1115(a)(12) and 1210(a)(1) of the Tax Law. (Matter of Harrison Services, Inc., supra.)

That said use of typography, mechanicals, photographs and photostats is distinguished from such materials and supplies used by petitioner to place advertisements in publications for its customers. Under these circumstances, petitioner is not producing tangible personal property for sale but rather is



rendering advertising services and as such, materials and supplies purchased for use in this manner are subject to the retail sales tax (Laux Advertising, Inc. v. State Tax Commission, supra).

E. 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 NYS2d 41). That since petitioner maintained adequate books and records as indicated in Finding of Fact "7", the Audit Division's use of a one year test period as the basis for determining petitioner's tax liability for three years was not proper. Accordingly, petitioner is liable only for the actual amount of tax found due for 1979.

F. That the petition of Saphar & Associates, Inc. is granted to the extent indicated in Conclusions of Law "D" and "E"; that the Audit Division is hereby directed to determine the amount of the refund for which petitioner is entitled for the period July 1, 1972 through June 30, 1975 and also modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

*Robert A. [Signature]*  
PRESIDENT

*Frank R. Koenig*  
COMMISSIONER

*[Signature]*  
COMMISSIONER

P 389 758 588  
 RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Saphar & Associates, Inc.	
Street and No.	
175 Gibbs St.	
P.O., State and ZIP Code	
Rochester, NY 14605	
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 389 758 589  
 RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Peter L. Faber	
Harter, Secrest & Emery	
Street and No.	
700 Midtown Tower	
P.O., State and ZIP Code	
Rochester, NY 14604	
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