

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

September 30, 1983

Valerie Publishing, Inc.
204 W. 20th St.
New York, NY 10011

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
Warren M. Burd
1539 Franklin Ave.
Mineola, NY 11501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Valerie Publishing, 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:
3/1/76-2/28/79.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon Valerie Publishing, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Valerie Publishing, Inc.
204 W. 20th St.
New York, NY 10011

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
30th day of September, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Valerie Publishing, 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 3/1/76-2/28/79.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 30th day of September, 1983, she served the within notice of Decision by certified mail upon Warren M. Burd the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Warren M. Burd
1539 Franklin Ave.
Mineola, NY 11501

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
30th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
VALERIE PUBLISHING, 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 March 1, 1976	:	
through February 28, 1979.	:	

Petitioner, Valerie Publishing, Inc., 204 West 20th Street, New York, New York 10011, 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 March 1, 1976 through February 28, 1979 (File No. 29021).

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 December 1, 1982 at 9:15 A.M. Petitioner appeared by Stewart Buxbaum, CPA and Warren M. Burd, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Alfred Rubinstein, Esq., of counsel).

ISSUES

I. Whether charges billed petitioner on a weekly basis were for tangible personal property or whether the charges were for reproduction rights.

II. Whether the artwork used in the production of petitioner's publication constituted machinery or equipment exempt from New York State sales and use tax.

FINDINGS OF FACT

1. On January 18, 1980, 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 the petitioner, Valerie Publishing, Inc., assessing \$5,228.00 in tax, plus \$974.84 in interest, for the period March 1, 1976 through February 28, 1979.

2. Petitioner, Valerie Publishing, Inc., executed a consent to extend the period of limitation for assessment of sales and use taxes for the period March 1, 1976 through February 28, 1979 to December 20, 1980.

3. During the period under review, petitioner was the publisher of an adult publication known as Pleazure. Said publication was published weekly and was sold at newsstands throughout New York City.

4. During the audit period, petitioner was billed for design, typesetting, photos and mechanicals (hereinafter referred to as "artwork") by Brill and Waldstein. This artwork was used in the production of petitioner's publication and was prepared expressly for petitioner.

5. On audit, the auditor for the Audit Division considered that the transaction between petitioner and Brill and Waldstein constituted a sale of tangible personal property. The auditor therefore applied the combined New York City and New York State tax rate against the artwork billed during the audit period totalling \$65,350.00 to arrive at tax due of \$5,228.00.

6. At the hearing, the petitioner argued that it had purchased a reproduction right. Affidavits were submitted by both petitioner and Brill and Waldstein that possession and title never transferred to petitioner. Petitioner's witnesses, an accountant and an attorney, were unfamiliar with and had no personal knowledge of what actually transpired. A corporate officer or employee familiar with the transaction or business operation failed to appear.

7. No substantial evidence was offered by petitioner to show that the artwork was used for the sole and exclusive purpose of reproduction or that it

did not have the right to make alterations or modifications to the artwork. Petitioner did not submit any evidence to show the type of contractual arrangement it had with Brill and Waldstein or exactly in what capacity Brill and Waldstein acted for petitioner.

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.

B. That 20 NYCRR 526.7(f)(1) provides that "(t)he granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a ... sale, and is not taxable...".

C. That section 1132(c) of the Tax law provides that "(f)or the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property ... mentioned in subdivision (a) ... of section eleven hundred five ... are subject to tax until the contrary is established, and the burden of proving that any receipt ... is not taxable hereunder shall be upon the person required to collect tax or the customer...".

D. That petitioner has failed to meet its burden of proof. Neither the petitioner nor its witnesses demonstrated that the transaction was the granting of a reproduction right pursuant to 20 NYCRR 526.7(f)(1). Therefore, the receipts for the purchase of the artwork are taxable as a sale of tangible personal property under section 1105(a) of the Tax Law.

E. That section 1115(a)(12) of the Tax Law exempts from the New York State sales and use taxes "(m)achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property ... for sale by manufacturing...".

F. That the artwork used in the production of petitioner's publication for sale are exempt from the New York State tax under section 1115(a)(12). That the artwork is subject to the New York City tax imposed under section 1107 of the Tax Law.

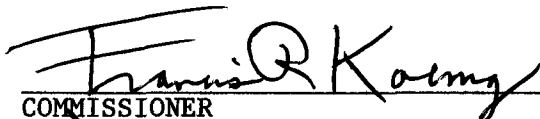
G. That the petition of Valerie Publishing, Inc. is granted to the extent indicated in Conclusion of Law "F" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 18, 1980; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 30 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Valerie Publishing, Inc.</i>	
Street and No. <i>204 W. 20th St.</i>	
P.O., State and ZIP Code <i>New York, NY 10011</i>	
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 470 316 046

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Warren M. Burd</i>	
Street and No. <i>1539 Franklin Ave.</i>	
P.O., State and ZIP Code <i>Mineola, NY 11501</i>	
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