

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

January 18, 1984

Arnold Bernhard & Co., Inc.
711 Third Ave.
New York, NY 10017

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Richard E. Schneyer
Walter, Conston, Schurtman & Gumpel, P.C.
90 Park Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

ARNOLD BERNHARD & CO., 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 June 1, 1975 :
through May 31, 1978. :

Petitioner, Arnold Bernhard & Co., Inc., 5 East 44th Street, New York, New York 10017, 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, 1975 through May 31, 1978 (File No. 25269).

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 February 10, 1983 at 1:15 P.M., with all briefs to be submitted by May 16, 1983. Petitioner appeared by Walter, Conston, Schurtman & Gumpel (Richard E. Schneyer, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner filed a timely petition within the 90 days set forth under section 1138(a) of the Tax Law; and if so,

II. Whether the purchase of calculators made by petitioner were purchases at retail and thereby subject to tax imposed by section 1105(a) of the Tax Law, or whether such purchases were for resale to its subscribers and thereby excluded from such tax.

III. Whether penalties and interest in excess of the minimum rate set by statute should be abated.

FINDINGS OF FACT

1. On October 23, 1978, the Audit Division issued and effectively mailed a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Arnold Bernhard & Co., Inc. Said Notice covered the period June 1, 1975 through May 31, 1978. The Notice, issued as a result of a field audit, asserted additional tax due of \$14,076.16, plus penalty and interest of \$4,993.12, for a total of \$19,069.28.

2. Petitioner executed a consent to extend the period of limitation for the issuance of an assessment for the period June 1, 1975 through May 31, 1978 to December 20, 1978.

3. At the hearing, counsel for the department raised the jurisdictional issue of the timeliness of the petition. It was the position of counsel that pursuant to Tax Law §1147(a)(2) and 20 NYCRR 601.3(c), the petition was not timely filed in that the date of receipt, January 24, 1979, was beyond the 90-day period set forth by section 1138(a) of the Tax Law.

4. Testimony was offered regarding the circumstances of the mailing of the petition. The petition, with covering letter dated January 18, 1979, was mailed on Monday, January 22, 1979. The petition was supposed to have been sent by registered mail on Friday, January 19, 1979. Instead, it was sent by special delivery mail, with postage prepaid by machine metered stamp affixed to the envelope. The petition was received by the United States Post Office in Albany, New York, on January 23, 1979 and delivered to the Department of Taxation and Finance on January 24, 1979.

Petitioner was advised by letter on June 8, 1979, that its petition was not timely filed in that it was received 93 days beyond the date of the Notice issued. Counsel for petitioner discussed the facts relating to the filing of the petition with the Tax Appeals Bureau by telephone and was advised that the petition would be accepted. On June 29, 1979, the Tax Appeals Bureau acknowledged the receipt and acceptance of the petition in writing.

On January 30, 1980, a pre-hearing conference was held regarding only the substantive issue.

5. Petitioner publishes an investment advisory service, The Value Line Investment Survey, for individual and institutional investors containing statistical information concerning common stock in various industries.

Petitioner offers various subscription packages to the public. These include:

(a) The Value Line Investment Survey for one year for the subscription price of \$295.00 with payment deferred until petitioner bills the subscriber;

(b) The Value Line Investment Survey for one year plus a calculator for the subscription price of \$295.00 if full payment is sent with the order;

(c) The Value Line Investment Survey for a ten-week trial period for the subscription price of \$29.00 if full payment is sent with the order; and

(d) The Value Line Investment Survey for one year plus a calculator if a trial subscriber under (c) above extends his subscription for a full year by paying an additional \$266.00 (for a total price of \$295.00) with the order.

6. With each of the subscription options, the subscriber receives two bonuses. First, he receives Value Line's 2,400-page Investors Reference Service,¹ fully indexed and looseleaf-bound. Second, he receives a copy of Arnold Bernhard's book, Investing In Common Stock. The subscriber is entitled to keep this book even if he cancels the subscription and returns the other materials under the conditions of the thirty-day money-back guarantee.

A third bonus, the calculators at issue herein, are offered by petitioner as a "Special Extra Bonus". They are available only to subscribers who send full payment of the subscription price with the order.

Advertisements offered in evidence contained a coupon with the following option available regarding the "Special Extra Bonus":

"This famous-make pocket-size ELECTRONIC CALCULATOR (with full memory) given to you when you order The Value Line Investment Survey for one year -- and send payment now."

Solicitations mailed to trial subscribers contained the following reference to the "Special Extra Bonus":

"Your new-generation Electronic Calculator will be shipped to you at once -- entirely as a BONUS -- if you return the enclosed Renewal Form BEFORE THE EXPIRATION DATE of your current trial subscription to The Value Line Investment Survey."

7. On audit, the Audit Division held the purchase of the aforesaid calculators subject to use tax pursuant to Tax Law §1110 as a purchase at retail. It was the Division's position that these calculators were shipped into New York for petitioner's own use as an inducement to subscribers to pay for the service immediately and were not purchases made for resale. Additionally, the price of the calculator was not mentioned at all to the subscriber. The price of the subscription service was the same to all subscribers, except that

¹ The service is subsequently updated weekly with each industry being covered within a 13-week cycle.

only those who paid the full purchase price at the time of purchase received the calculator as a reward or bonus for doing so. The Audit Division cited 20 NYCRR 526.6(c)(4)(i) in support of its position.

8. Petitioner argued that the purchase of the calculators is statutorily excluded from sales and use taxes in that they were purchased for resale as such to certain subscribers of The Value Line Investment Survey who ordered a one-year subscription and paid the \$295.00 subscription price in full at the time of the order. It was contended that the calculators were not given away but rather were sold along with the advisory service. Petitioner reasoned that consideration given for the calculator was that part of the subscription price which represents the value of the use of the subscriber's money for the period between the date of the order and the date petitioner would have received payment after submission and collection of its bill. It was argued therefore that 20 NYCRR 526.6(c)(4)(i) did not apply to petitioner's situation.

In further support of its position, petitioner showed that subscribers who cancelled their subscription and did not return the calculator along with the material under the thirty-day money-back guarantee were charged \$20.00 to \$25.00 for the calculator. The cost of the calculator to petitioner was \$7.50 to \$9.00.

9. Petitioner failed to show what portion of the calculators held subject to use tax, if any, were shipped to subscribers outside New York State.

10. Petitioner acted in good faith. All sales and use tax returns were filed within the time requirements set forth by statute.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for 90 days after the giving of a notice of determination within which to apply for a hearing. That

although 20 NYCRR 601.3(c) provides that where a machine metered stamp is used in the mailing of a petition, the petition shall be deemed filed upon receipt, petitioner has shown by substantial evidence that the petition was mailed on Monday, January 22, 1979. That the 90th day for mailing of the petition fell on a Sunday; therefore, pursuant to Tax Law §1147(a)(3), the petition was timely filed.

B. That section 1101(b)(4) defines retail sale as a sale of tangible personal property to any person for any purpose other than for resale as such. That 20 NYCRR 526.6(c)(4) further explains the resale exclusion as follows:

"(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property." (Emphasis added.)

C. That the purchases of calculators by petitioner were retail sales within the meaning and intent of Tax Law §1101(b)(4) and 20 NYCRR 526.6(c)(4) and are therefore taxable under sections 1105(a) and 1110 of the Tax Law. That the calculators constituted promotional items as an inducement for the full payment of subscriptions. Moreover, petitioner is not in the business of retail sales of tangible personal property, its sales being those of services taxed under section 1105(c)(1) of the Tax Law.

D. That the penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the petition of Arnold Bernhard & Co., Inc. is granted to the extent indicated in Conclusion of Law "D" above; that the Audit Division is

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse) *Co. Inc.*

Sent to <i>Arnold Bernhardt</i>	
Street and No. <i>711 Third Ave.</i>	
P.O., State and ZIP Code <i>NY, NY 10017</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

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Richard E. Schneyer</i>	
Street and No. <i>90 Park Ave.</i>	
P.O., State and ZIP Code <i>NY, NY 10016</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