

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of
Koscot Interplanetary, Inc. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 9/1/75 - 11/30/77. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 26th day of July, 1984, he served the within notice of Decision by certified mail upon Koscot Interplanetary, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Koscot Interplanetary, Inc.
ATTN: A.M. Hochstadt
8850 Southwest 123rd Ct.
Miami, FL 33186

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
26th day of July, 1984.

David Parchuck

James G. Shepard

Authorized to administer oaths
pursuant to Tax Law section 174

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

July 26, 1984

Koscot Interplanetary, Inc.
ATTN: A.M. Hochstadt
8850 Southwest 123rd Ct.
Miami, FL 33186

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
KOSCOT INTERPLANETARY, 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 September 1, 1975 :
through November 30, 1977.

Petitioner, Koscot Interplanetary, Inc., ATTN: A.M. Hochstadt, 8850 Southwest 123rd Court, Suite H 405, Miami, Florida 33186, 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, 1975 through November 30, 1977 (File No. 28501).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 9, 1983 at 9:15 A.M., was continued before the same Hearing Officer at the same location on April 27, 1983 at 9:40 A.M., and was continued to conclusion before the same Hearing Officer, at the same location on April 29, 1983 at 9:45 A.M., with all briefs to be submitted by November 5, 1983. Petitioner appeared at all times by its President, A.M. Hochstadt. The Audit Division appeared on the February 9, 1983 hearing date by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel), and on the two subsequent hearing dates by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner is liable for additional sales tax assessed against it as the result of a field audit performed by the Audit Division.

II. Whether the Audit Division's denial of petitioner's claim for credit or refund of sales tax was proper.

FINDINGS OF FACT

1. On July 31, 1978, the Audit Division issued to petitioner, Koscot Interplanetary, Inc. ("Interplanetary"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1975 through November 30, 1977, assessing additional sales tax due in the amount of \$8,209.35, plus interest.

2. The above-noted assessment was the result of a field audit of Interplanetary's records conducted during February, 1978 by Audit Division auditor Leo Rutkowski.

3. Interplanetary was incorporated in or about 1967 under the laws of Florida. Its founder and then-president was Glen W. Turner. Interplanetary commenced operations by selling "distributorships" to individual purchasers. These distributorships, representing the right to sell Interplanetary's products, were sold at various prices ranging up to \$5,000.00. The amount paid for a distributorship determined the percentage of discount to be allowed to that distributor on the purchase of Interplanetary's products.

4. At the time of its incorporation, and for the subsequent years through approximately 1972, Interplanetary sold only distributorships and, by 1972, Interplanetary had sold, nationwide, in excess of 30,000 distributorships. Its product line, consisting of cosmetics and other health and beauty items, was not developed and available for sale prior to approximately late 1972.

5. Interplanetary's basic marketing system essentially consisted of a pyramid structure, with Interplanetary manufacturing and supplying products for its independent distributors who, in turn, sold the products to individuals,

called beauty advisors, recruited by the distributors to sell the products to the general public. Various distributor levels or layers in the marketing chain existed, based on the number of persons recruited by the distributor, the amount paid for the distributorship and the volume of products ordered. As stated in testimony by petitioner's president, "[w]hen you brought somebody in, you got a percentage of their sales or you got a percentage of the bodies that they brought in."

6. Interplanetary's "Distributor Business Handbook" given to the various individual distributors describes Interplanetary's marketing plan as follows:

- "1. Koscot honors orders only from its distributors.
2. Distributors will purchase their product from Koscot at the established wholesale price depending upon the item or group of items.
3. All Distributors will have their organization (Beauty Advisors, etc.) send all of their orders for merchandise to them. They will in turn order this product from the home office of Koscot.
4. Distributors may recruit for his or her organization any number of beauty advisors to sell product, as he or she can manage.
5. Distributors will sell to his or her organization such merchandise, as they order, at a beauty advisor wholesale price.
6. The difference between a Beauty Advisor wholesale price and the Distributor wholesale price will be the basic income of the distributor.
7. The Beauty Advisor should in turn sell the product she orders at suggested retail price. The difference between the beauty advisor wholesale price and the suggested retail price will be the basic income of the beauty advisor.
8. Each Distributor, as an independent business person, will be required to have his or her retail sales tax number on file with Koscot.

9. Each Distributor will be expected to collect and submit retail sales tax on all sales by his or her organization, unless individual beauty advisors have a sales tax number.
10. The Distributor may sell his products anywhere that he or his organization is properly licensed within the continental United States and its possessions.
11. It is recommended that each Distributor should have an ample supply of merchandise on hand for immediate delivery to their beauty advisors.
12. The suggested consumer marketing methods include: home service routes, beauty shows (party plan), individual demonstrations, gift and boutique shops, beauty salons."

7. It was noted that Interplanetary's marketing plan was changed from time to time over the years. Such changes were not specifically detailed. However, it appears that beauty advisors (the "retail level sellers") were, at some point, termed "directors", and that distributors were termed "senior directors" and "senior regional directors" (depending on their level in the marketing hierarchy). Furthermore, and contrary to quoted statement number "1" contained in Finding of Fact "6" (supra), it appears that Interplanetary did accept orders directly from the retail level sellers, but used order forms on such orders which differed from those used for distributor orders.¹

8. In or about late 1972, Interplanetary shifted the focus of its business activities from the sale of distributorships to its purported primary business function of the development, manufacture and sale of cosmetics.

¹ In this regard, it appears the retail level sellers ordered on a Form #9000 while others (distributors) ordered on a Form #8020, and that the former ordered at petitioner's suggested retail prices while the latter ordered at petitioner's wholesale prices, as these respective prices were reflected on the order forms or booklets. Furthermore, on direct orders by retail level sellers, tax was to be remitted on the suggested retail prices, notwithstanding the freedom to sell the products to the public at any given price.

9. In or about 1972, several of the individuals who had purchased distributorships from Interplanetary raised complaints alleging the loss of their money based on their purchase of the right to distribute products which, in turn, were not in existence. Thereafter, in the wake of such complaints, the Attorneys General of 41 states, including New York, and the Securities and Exchange Commission ("S.E.C.") commenced actions against Interplanetary to stop the company from its operation of selling distributorships without a product line for its distributors to sell. On April 19, 1973, Interplanetary's method of operations (the selling of distributorships) was held not to involve the sale or offer of the sale of securities under federal securities laws [Securities & Exch. Com'n v. Koscot Interplanetary, Inc., 365 F.Supp. 588 (N.D. Ga., 1973)]. However, this holding was appealed by the S.E.C. and was reversed by a July 15, 1974 decision of the Fifth Circuit Court of Appeals [Securities & Exch. Com. v. Koscot Inter., Inc., 497 F.2d 473 (5th Cir., 1974)].

10. Interplanetary's line of cosmetics was ultimately developed by the company and the products were sold to the various distributors and to the general public commencing in or about 1973 and continuing thereafter through the years at issue and beyond.

11. In the early part of 1973, Mr. A.M. Hochstadt, Interplanetary's current president and representative in these proceedings, was asked by Max F. Morris, who was the business and financial consultant to Interplanetary's founder, Glen W. Turner, to review and analyze the various business problems facing Interplanetary's operation. Mr. Hochstadt extensively reviewed Interplanetary's entire operation and books and records and made various recommendations, including the recommendation that Interplanetary seek protection under Chapter XI of the Bankruptcy Act (arrangement proceedings; 11 U.S.C. §701 et seq.).

Interplanetary thereafter did enter into arrangement proceedings under the jurisdiction of the United States Bankruptcy Court for the Middle District of Florida (Paskay, J.) on or about July 3, 1973.

12. Interplanetary allegedly remained in bankruptcy proceedings from July 3, 1973 through July 28, 1977 at which time a plan of arrangement, as adopted, was confirmed by the court.² Under the terms of the plan of arrangement, as explained by Mr. Hochstadt, a new corporation, called Tradition, Inc. ("Tradition"), was created, to which Interplanetary's assets were transferred. Tradition's charter contained authority for Tradition to use the name of and do business as Koscot, Inc. ("Koscot"), for purposes of market identification with the product (i.e. products identified as Koscot Interplanetary, Inc. cosmetics). Tradition d/b/a Koscot was to take over Interplanetary's marketing activities. Interplanetary was not, however, dissolved when Tradition d/b/a Koscot was created, or thereafter.

13. On or about March 27, 1978, following events characterized by Mr. Hochstadt as a "power play" between Max Morris (Tradition's president) and Donald Monroe (Interplanetary's president), an agreement was reached whereby all of Tradition's business and marketing rights, including exclusive product distribution rights, were sold to We Care, Inc. ("We Care"), a corporation created by Donald Monroe. This agreement allegedly resulted, in part, from Donald Monroe's dissatisfaction with the financial condition of Interplanetary following the bankruptcy proceedings, and included the right by which We Care would be allowed to buy out Tradition d/b/a Koscot's inventory at cost plus one percent.

² The plan was asserted to have been initially confirmed by court order on July 14, 1977, but was later amended to correct an (unspecified) technical error made by the court and was allegedly finally confirmed on July 28, 1977.

14. Mr. Hochstadt became president of Interplanetary on or about December 3, 1978 and immediately repudiated the aforementioned agreement with We Care.

15. On or about February 6, 1978, Audit Division auditor Leo Rutkowski arrived at 4805 Sand Lake Road, Orlando, Florida to perform an audit of Interplanetary's books and records. The Audit was performed between February 6, 1978 and February 9, 1978. Mr. Rutkowski's field audit report lists Donald R. Monroe and Kenneth A. Kilgast as president and secretary/treasurer, respectively, of Interplanetary. Mr. Rutkowski testified that he met with one Dudley Morris and worked with Mr. Morris on the audit, but could not recall any other individuals he spoke to while performing the audit, nor could he recall any persons other than Dudley Morris who provided him with access to Interplanetary's records.

16. Mr. Rutkowski performed a detailed audit for the test period February 28, 1977 through March 25, 1977. He testified that this test period was agreed upon between himself and Interplanetary's personnel and that such test period was reflective of an average cycle for the business (no peaks or low points in sales compared to other periods).

17. Mr. Rutkowski reviewed purchase invoices submitted to Interplanetary during the test period, which invoices also served as Interplanetary's sales invoices for the period, and made recomputations in two major areas, as follows:

- (a) Interplanetary had reported and paid sales tax in the amount of \$273.90 as submitted to it by its distributors during the test period. Some of the distributors had computed the tax based on wholesale prices rather than on retail prices (presumably suggested wholesale and retail prices as reflected on the faces of the invoices) and also had failed to remit any tax on "selling aids"³ sold and billed by Interplanetary to the distributors. Mr. Rutkowski recomputed by adjusting all invoice

³ "Selling aids" were described as smaller sized packages, jars or vials of Interplanetary's products (i.e. samples), used by the distributors to promote the various products.

amounts to selling prices (suggested retail prices) and computing tax due on these prices, plus tax due on the selling aids, to arrive at total audited tax due of \$350.48.⁴ The \$76.58 difference between tax per returns as reported (\$273.90) and audited tax due (\$350.48) represented an understatement of 28%, which when projected against tax as reported per returns for the entire period at issue resulted in additional tax due of \$3,565.33;

- (b) Invoices reflecting claimed exempt sales (here sales for resale), for which Interplanetary could not produce exemption certificates, were totalled (at suggested retail selling prices) and tax due thereon was computed to be \$101.53. This additional amount, when compared to tax as reported per returns (\$273.90), represented an understatement of 37%, which when projected against tax as reported for the entire period at issue resulted in additional tax due of \$4,673.02.

Auditor Rutkowski also noted that sales taxes had not been reported properly according to the varying rates among the different jurisdictional regions within New York, and he adjusted his computations to correct for this situation.

18. By a letter from Dudley Morris dated February 9, 1978, Interplanetary protested the aforementioned assessment. By this letter and subsequent correspondence, several grounds of invalidity were asserted. Among such grounds was the assertion that Mr. Rutkowski may not have been shown all of Interplanetary's records, including all exempt certificates and invoices for the test period, due to the chance that he dealt with individuals, including Dudley Morris, who were allegedly not authorized to represent Interplanetary at the time of the audit and who might not have given their full interest to the potential results of an audit of Interplanetary. No additional exempt certificates or invoices, or other evidence of unreviewed records were submitted by Interplanetary at or after the hearing.

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In effect, Mr. Rutkowski imposed tax upon the "distributors' discount", i.e. the difference between wholesale prices and suggested retail prices, plus the selling aids upon which no tax had ever been charged.

19. Interplanetary also asserts that its distributors were independent, that the responsibility for taxes was theirs and not Interplanetary's, that no sales were made in New York by Interplanetary and that sales tax was, in fact, never properly payable to New York by Interplanetary. Mr. Hochstadt asserted that "ignorance" and "stupidity" led Interplanetary to file returns and remit taxes to New York. Interplanetary further asserts, in this vein, that it could not possibly have known the ultimate retail price at which its distributors sold the products, that it was prohibited by an order of the Federal Trade Commission dated November 18, 1975 from establishing set prices at which its products ultimately had been sold and thus it could not have known the proper amount of sales tax to collect and remit. Finally, Interplanetary also maintains that it was under the jurisdiction of the bankruptcy court, that all claims arising during the pendency of such proceedings should have been filed within one year after the completion of the arrangement proceedings, that the Audit Division was aware of the proceedings and filed a claim which Interplanetary paid and thus that the instant assessment is barred as untimely.

20. Interplanetary filed an Application for Credit or Refund of State and Local Sales or Use Tax, dated October 30, 1981 and received by the Audit Division on November 6, 1981, claiming a refund for "[a]ll periods prior to 7/1/73 including but not limited to 12/1/70 to 11/30/72" in the amount of \$181,220.17 plus interest. Interplanetary's claim for refund was based upon the following four assertions:

- " - Koscot Interplanetary, Inc. were (sic) manufacturers. All sales were made to independent distributors who in turn resold the cosmetics through independent cosmetic salesmen and women to the general public.
- Prior to July 3, 1973 Koscot Interplanetary, Inc. sold multi-level distributorships to persons residing within New York State. Those sales were erroneously reported as

taxable sales on Form ST-100 New York State and Local Sales and Use Tax Return for periods including but not limited to Dec. 1, 1970-Feb. 28, 1971 (\$34,187.94), March 1, 1971-May 31, 1971 (\$30,078.61), June 1-August 31, 1971 (\$22,407.59), Sept. 1-Nov. 30, 1971 (\$14,895.46); Dec. 1, 1971-February 28, 1972 (\$14,648.10), March 1, 1972-May 31, 1972 (\$25,940.84), June 1, 1972-Aug. 31, 1972 (\$13,856.69), Sept. 1, 1972-Nov. 30, 1972 (\$23,934.28 + \$1,270.60 penalty).

- The Fifth Circuit Court of Appeals of the United States has ruled that the sale of multi-level distributorships by Koscot Interplanetary, Inc. is the sale of a security (sic).
- No State nor local sales or use tax is payable on the sale of securities."

21. By a letter dated January 22, 1982, the Audit Division denied Interplanetary's claim for refund on the basis that such claim was not timely filed, that no proof was presented to substantiate the claim that the tax was paid or, if paid, represented tax collected on sales of distributorships and that no proof was presented that any tax collected on the sale of distributorships was refunded to Interplanetary's customers.⁵

22. At the hearing, Mr. Hochstadt asserted Interplanetary did not collect any tax from its customers on the sale of distributorships but rather collected a fixed sum for each distributorship and calculated sales tax on such fixed amount itself and paid the tax (assertedly "out of its own pocket" and "in the nature of an income tax"). Thus Interplanetary maintains it owes no refund of sales tax to its customers. Interplanetary further asserts that prior to the decision of the 5th Circuit Court of Appeals (see Finding of Fact "9", supra) it could not have known its distributorships were to be treated as securities not subject to sales tax, and thus maintains it is inequitable to deny

⁵ Interplanetary protested the denial of its refund claim via its perfected petition. Such denial is treated in this proceeding at Interplanetary's request, with the concurrence of the Audit Division's representative and in the interest of avoiding undue hardship and travel expense to Interplanetary.

Interplanetary's refund claim on the basis of timeliness.

23. Interplanetary did not and has not paid New York Stock Transfer Tax [Tax Law Article 12] with regard to the distributorships deemed securities by the decision of the 5th Circuit Court of Appeals.

24. Mr. Hochstadt noted that the claim for refund is based solely on the sale of distributorships during the period December 1, 1970 through November 30, 1972 and not on the sale of products. He asserted, in line with Interplanetary's position that it was never properly subject to the imposition of sales tax by New York State, that Interplanetary paid over sales tax collected on the sale of products from November 30, 1972 through and including the period at issue and beyond and that all taxes for such period should be refunded. No refund claim for such periods was filed nor were any particular dollar amounts of refund specified or substantiated. Interplanetary has made no refund to its customers of any sales tax collected on the sale of products.

25. Letters written by Dudley Morris on February 9, 1978 and April 13, 1978 protesting the audit results were submitted on the stationery of Koscot, Inc. and not on Interplanetary's stationery.

26. Interplanetary asserts that after July 28, 1977, Tradition d/b/a Koscot and not Interplanetary was responsible for sales, and thus any sales tax found to be due from July 28, 1977 through November 30, 1977 (the end of the audit period) would be due from Tradition d/b/a Koscot and not from Interplanetary.

27. Interplanetary remitted to New York all sales tax remitted to it by its distributors. A December 12, 1970 letter from Clifford Foltz, Interplanetary's then tax manager, stated Interplanetary's procedure regarding sales tax was to have their representatives remit taxes to Interplanetary at the time orders

were placed. A November 29, 1972 letter from the Audit Division to Interplanetary acknowledges Interplanetary was granted permission to file as a "co-vendor" and, specifically, was to collect tax from its distributors on the suggested retail price of the merchandise.

28. A letter received by the Audit Division on October 9, 1975 from Ken Kilgast, written on the stationery of Executive Consultants, indicated that Interplanetary would collect and remit tax on orders received directly from beauty advisors, (direct orders) but would expect its distributors and not Interplanetary to collect and remit tax on distributors' orders.

29. Sales and use tax returns were filed in the name of Interplanetary (as opposed to Tradition d/b/a Koscot) during and prior to the period at issue.

30. Retail and wholesale price lists for Koscot, Inc., effective as of January, 1978, were introduced in evidence. No such price lists for Interplanetary were provided. Mr. Rutkowski used the invoices themselves to calculate the amount of discount upon which additional tax was imposed (his method of determining "full price") and did not resort to any price lists in conducting his audit. The Koscot, Inc. price lists contained the following quote:

"The prices quoted herein are suggested regular prices only. Independent distributors are free to determine for themselves their own resale prices."

31. Mr. Hochstadt was unsure of whether New York State was specifically notified of either the bankruptcy proceedings or of the change of corporate identity (from Koscot Interplanetary, Inc. to Tradition, Inc. d/b/a Koscot, Inc.). Interplanetary, however, alleges that New York State had notice of the bankruptcy proceedings, filed a claim therein and was paid, and thus Interplanetary's debts were discharged as of the July 28, 1977 alleged confirmation date of the plan of arrangement. Interplanetary further asserts that notwithstanding the

returns filed in the name of Interplanetary, New York State knew that Tradition d/b/a Koscot was responsible for all marketing activities and sales after July 28, 1977.

32. Interplanetary's distributor manual contained a sample invoice which reflected three different prices labelled "D", "S" and "RM", increasing respectively from lowest to highest price for the individual merchandise items listed. Though not specifically explained in the manual or by testimony, it appears that the various prices reflect the different amounts of discount available depending on the particular distributor's level of discount.

33. Mr. Hochstadt asserted he could provide records to show that Tradition d/b/a Koscot rather than Interplanetary made all sales after July 28, 1977. No such records were produced at or after the hearing.

34. Five resale certificates were provided to Mr. Rutkowski during the audit regarding sales where no tax was collected by the particular distributor or remitted to Interplanetary. No further resale certificates were provided by Interplanetary during or after the audit with respect to test period invoices which had reflected no tax and which had been assessed as fully taxable by Mr. Rutkowski.

35. Interplanetary asserts that since the percentage of "full price" invoices versus the percentage of "discounted price" invoices was not specified, the audit projections are inaccurate. No evidence to support this specific assertion was provided. Petitioner maintains the method of dividing audited additional tax due on unsubstantiated exempt sales (\$101.53) into tax per returns for the test period (\$273.90), resulting in a 37 percent rate of undercollection, was improper, and that audited additional tax due (\$101.53) should have been divided into audited tax asserted as due (\$101.53 + 273.90) to arrive at a proper error rate for projection. However, the auditor's 37

percent error rate was projected against total tax per returns, while the error rate resulting from Interplanetary's suggested method would have to have been projected against audited total tax asserted as due for the entire audit period, an unknown figure.

36. Interplanetary asserts a check from it, dated August 5, 1976 and payable to the New York State Department of Taxation, signed by Donald Monroe, which contained as its return address "Koscot Interplanetary, Inc., Debtor in Possession", sufficed, together with alleged considerable publicity surrounding the bankruptcy proceedings to give the Audit Division proper notice of such proceedings.

37. Dudley Morris was employed as vice-president of operations for Interplanetary during 1977, allegedly was, as of February 9, 1978, vice-president of operations for Tradition d/b/a Koscot, and allegedly was, on and after March 27, 1978, vice president of finance for We Care. Kenneth Kilgast signed the September through November, 1973 quarterly tax return on behalf of Interplanetary as its vice-president of finance.

38. Selling aids were sold by Interplanetary to its distributors at specific prices and were not sold for resale, as such, but rather were intended to be used as samples for promotional purposes.

37. Mr. Hochstadt did not specify whether the alleged claim in bankruptcy made by New York State was for pre-bankruptcy taxes or for taxes which accrued during the tenure of arrangement proceedings.

40. Interplanetary was allowed an extended period of time after conclusion of the hearing to submit the following specific documents:

- (a) a copy of the claim in bankruptcy allegedly filed by New York State against Interplanetary;

- (b) proof of payment to New York State on the bankruptcy claim;
- (c) the Bankruptcy Court's order and modified order confirming the plan of arrangement;
- (d) the plan of arrangement;
- (e) the written agreement between Koscot and We Care (refer Finding of Fact "13");
- (f) sales records of Tradition d/b/a Koscot concerning sales made after July 28, 1977 (refer Finding of Fact "33").

None of these documents have been submitted by Interplanetary.

CONCLUSIONS OF LAW

A. That for purposes of Article 28 of the Tax Law the term "vendor" includes, by definition:

"[A] person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;..." [Tax Law §1101(b)(8)(C); emphasis added].

Tax Law section 1101(a) includes, inter alia, "corporations" within the definition of the term "person" for purposes of Article 28. Accordingly, Interplanetary, though utilizing independent distributors in New York State to effect the sale of its products, was nonetheless a vendor subject to the imposition of sales tax [see 20 NYCRR 526.10(a)(3)]. As such, Interplanetary was required to collect sales tax on the products it sold [20 NYCRR 526.10(d) and (e)].⁶

B. That 20 NYCRR 526.10(f) provides as follows:

"(f) Co-vendor. (1) Every person operating a club or similar merchandising plan, or operating as an independent

⁶ The noted regulations were adopted on September 1, 1976.

contractor representing a particular supplier selling tangible personal property is a vendor for sales tax purposes and must collect tax on merchandise sold by him.

(2)(i) Such person shall undertake all of the responsibilities of a vendor, as listed in subdivision (b) of this section. The person supplying the merchandise to him is also deemed to be a vendor, and shall undertake all of the responsibilities, as listed in subdivision (b) of this section.

(ii) Both the representative and his supplier shall be jointly responsible for the collection and remitting of the taxes and filing of returns.

(3)(i) A person supplying merchandise to a club plan secretary or independent vendor shall collect in advance from the club plan secretary or independent contractor a tax based on the retail selling price of the property at the tax rate in effect where possession of the property is taken by the club secretary or independent contractor.

(ii) A club plan secretary or independent contractor whose supplier has registered and is complying with the responsibilities of a vendor shall not be required to register as a vendor." (emphasis added).

C. That Interplanetary's status as a co-vendor with its distributors is supported by the letter of November 29, 1972 (see Finding of Fact "27"), and no evidence to refute such status was produced. As a co-vendor, Interplanetary was responsible for collecting from its distributors sales tax on the retail selling price of the products or, alternatively, obtaining proper certificates of exemption from the distributors evidencing sales by Interplanetary for resale. Some resale certificates were produced by Interplanetary on audit and no sales tax was assessed on the related invoices. However, some invoices, for which no resale certificates were produced, nevertheless reflected no tax due. In addition, other invoices reflected sales tax computed on discounted or wholesale prices rather than on retail prices. In each of these instances, the auditor imposed sales tax using Interplanetary's suggested retail prices as reflected on Interplanetary's own invoices. It is true that such prices could

ultimately have differed from the final retail price at which the products were sold. However, in such instances, the distributor(s) could have sought a refund from Interplanetary (if the ultimate retail price were lower than the suggested retail price) with Interplanetary then obtaining a refund from the Audit Division or, conversely, any additional tax due could have been collected from the retail customer and remitted (if the ultimate retail price were higher than the suggested retail price). Thus, calculation of tax upon Interplanetary's own suggested retail prices per its invoices was proper, especially in light of the lack of any other means of determining the retail selling price.

D. That regarding the other assertions raised concerning the audit and its methodology, it is noted that Interplanetary produced no evidence that specific records available during the test period were not reviewed, or that the test period was not consented to or did not accurately reflect the general operation of the business. Furthermore, the Audit Division's 37 percent error rate, determined as specified in Finding of Fact "35", was the proper method of determination and projection. Interplanetary's suggested method would require projection of a determinable error rate against an unknown figure (audited total tax due) which method must be rejected. The unknown figure is, in fact, the figure sought to be determined by audit.

E. That neither the plan of arrangement, or proof of the date of its confirmation and termination of bankruptcy proceedings, nor evidence of payment of the instant assessment was produced by Interplanetary. Likewise, there is no proof that the Audit Division was given notice of the bankruptcy proceedings or of the various changes in corporate identity. One check, indicating on the address portion that Interplanetary was a "Debtor-in-Possession", without more, does not suffice as adequate notice of the bankruptcy proceedings. In fact,

the corporate offices remained at the same location throughout the period in question and sales and use tax returns continued to be filed under the name of Interplanetary through and beyond the alleged July 28, 1977 date when Tradition d/b/a Koscot assumed the marketing aspects of the business. No records or other evidence reflecting Tradition d/b/a Koscot and not Interplanetary as the marketing/selling entity after July 28, 1977 have been provided. In sum, there is insufficient evidence to support Interplanetary's assertions regarding the bankruptcy termination date or the takeover of marketing activities by Tradition d/b/a Koscot, or to warrant cancelling the assessment based on the Audit Division's failure to assert the instant claim in the bankruptcy proceedings.

F. That section 1139(a) of the Tax Law provides, in relevant part, as follows:

"Sec. 1139. Refunds. -- (a) In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article. Such application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer."

G. That Interplanetary's refund claim for taxes paid on the sale of multi-level distributorships for the period December 1, 1970 through November 30, 1972 was dated October 30, 1981 and received on November 6, 1981, and is clearly beyond the statutory three year period of limitation. Interplanetary asserts it could not have known it was entitled to a refund until the ruling of


the Fifth Circuit Court of Appeals (see Finding of Fact "9" supra). However, such decision was issued on July 15, 1974, yet Interplanetary's refund claim was not filed until over seven years later. Moreover, questions regarding the propriety of Interplanetary's business, and, specifically, the sale of distributorships, had surfaced as early as 1972. A refund claim could have been filed at such time by Interplanetary to protect its claim pending the outcome of the litigation. Interplanetary asserts it, and not the customer, paid the tax on the distributorships and thus there is no need to refund any tax on distributorships sold as a prerequisite to obtaining a refund (see Finding of Fact "22"). This assertion is not supported and is rejected.


H. That the petition of Koscot Interplanetary, Inc. is hereby denied and the Notice of Determination and Demand dated July 31, 1978 is sustained. Furthermore, the Audit Division's denial of Interplanetary's October 31, 1981 claim for credit or refund is sustained.

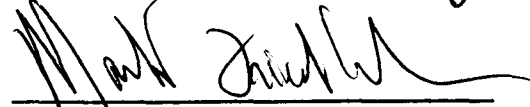
DATED: Albany, New York

JUL 26 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 977 232

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Post Interplanetary</i>	
Street and No. <i>8850 Southwest 123rd St</i>	
P.O. State and ZIP Code <i>Gaines, FL 33186</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