

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Towne-Oller & Associates, Inc.	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 6/1/75-5/31/81.	:	

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 21st day of September, 1984, he served the within notice of Decision by certified mail upon Jerome J. Caulfield, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jerome J. Caulfield
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005

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 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
21st day of September, 1984.

David Parchuck

James A. H. H. H.
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Anna G. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 21, 1984

Towne-Oller & Associates, Inc.
200 Madison Ave.
New York, NY 10016

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
Jerome J. Caulfield
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
TOWNE-OLLER & 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 Period June 1, 1975	:	
through May 31, 1981.	:	

Petitioner, Towne-Oller & Associates, Inc., 200 Madison Avenue, New York, New York 10016, 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, 1981 (File Nos. 25639, 27229 and 37651).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on August 8, 1983 at 1:30 P.M. with all briefs to be filed on or before November 28, 1983. Petitioner appeared by Carter, Ledyard & Milburn (Jerome J. Caulfield, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner was required to collect and remit sales tax on its sales of reports to its customers.

II. Whether petitioner is liable for tax on its rental of a computer.

III. Whether the purchase by petitioner of graphic artwork is subject to sales and use tax.

IV. Whether the Audit Division properly rejected petitioner's application for a refund of sales and use tax on the ground that petitioner did not previously refund the tax to its customers.

FINDINGS OF FACT

1. On December 19, 1978 petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax for the quarter ended November 30, 1975 through the quarter ended November 30, 1978. The claim sought a refund in the amount of \$57,860.78. In essence, petitioner's claim for a refund was based on petitioner's position that its sales of information services were exempt from sales tax on the ground that its services were "personal and individual in nature" and not "substantially incorporated in reports furnished to other persons" within the meaning of Tax Law §1105(c)(1). The refund claim further stated that petitioner had collected and remitted sales tax since the inception of the New York State sales tax and that any refund granted to petitioner would "...in turn, be refunded to the clients who originally paid the tax."

2. In a letter dated July 18, 1979 petitioner was advised by the Audit Division that its claim for refund was denied, in full, for two reasons. First, the Audit Division concluded that the information service provided by petitioner did not fall within the exemption provided by section 1105(c)(1) of the Tax Law. Second, the Audit Division concluded that a refund or credit was inappropriate since no proof was submitted that petitioner had refunded the tax to its customers.

3. On March 12, 1979, as the result of a field audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1975 through August 31, 1978. The Notice assessed a tax due of \$9,432.10 plus interest of \$1,372.17 for a total amount due of \$10,804.27. The asserted tax liability arose from four items: \$4,268.70 arising from sales to customers; \$59.80 from fixed asset acquisitions;

\$2,435.52 from the rental of computer time; and \$2,668.08 from the purchase of graphic artwork and supplies. At the hearing, the Audit Division reduced the tax assessed on the purchase of graphic artwork and supplies resulting in a reduction of the total amount of the assessment in the Notice from \$9,432.10 to \$8,375.14.

4. On February 26, 1982 the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1978 through May 31, 1981 in the amount of \$13,316.00 plus interest of \$2,204.99 for a total amount due of \$15,520.99. On February 28, 1983, petitioner's president executed a form wherein both the Audit Division and petitioner agreed to withdraw a portion of the amounts in issue arising from the Notice dated February 26, 1982. That is, the Audit Division agreed to cancel \$1,475.20 and petitioner agreed that \$6,232.32 was due. Consequently, the additional amount asserted to be due by the Audit Division as a result of the Notice dated February 26, 1982 is \$5,608.48 plus interest at the minimum statutory rate. The amount currently in issue from the Notice dated February 26, 1982 arises from petitioner's rental of computer time from Universal Carloading & Distributing Co., Inc. ("Universal").

5. Petitioner utilizes warehouse shipment information known as a "warehouse withdrawal" to generate a report that allows it to identify distribution problems for the manufacturers of nonfood products which are sold in food stores.

6. Petitioner's customers are primarily the manufacturers of health and beauty aid products. Petitioner has about seventy-five to eighty customers.

7. Petitioner's customers purchase petitioner's service because it helps the customer identify distribution gaps involving the specific products they

manufacture. A distribution gap is a situation wherein a manufacturer will either not have an individual product in stock in all of its retail outlets, or the product will not be stocked in all of the warehouses which distribute the product. Grocery stores are the largest class of retailers of health and beauty aid products and the area where most distribution problems arise. Manufacturers utilize the information provided by petitioner since the information is not in their systems.

8. Generally, health and beauty aid products consist of shampoo, deodorant, toothpaste, over-the-counter drugs and cosmetics. Petitioner provides information on approximately twelve thousand categories of items. The categories are designated by brand name, type and size of the product.

9. The most important information provided by petitioner is the distribution by the "middlemen". That is, petitioner's information focuses on the warehouse withdrawal of the health and beauty aid products that are distributed to the food stores.

10. Petitioner utilizes a panel of fifty reporting warehouses, wholesalers or distributors that service approximately 45,000 food stores in the United States. The fifty reporting concerns are referred to as the "Towne-Oller panel". Approximately 12,000 categories of products are carried by all fifty of the reporting warehouses, wholesalers or distributors.

11. Petitioner obtains most of its information on computer tapes of purchases which are supplied by major retailing chains, wholesalers and distributors. The information is then processed, edited and analyzed and placed in a format which permits petitioner to locate distribution problems. Information that would be edited out would include, for example, shipping data to an outlet that is not a food store.

12. When a customer approaches petitioner, the first thing petitioner will do is develop a category. Petitioner will then try to analyze its information to discern specific distribution situations that are a problem. Petitioner will then create a special analysis that will help the manufacturer solve its particular problems.

13. The principle unit of sale for billing purposes is the category which the customer selects. That is, a customer purchases a category, however, the customer has the right and ability to design a category in any fashion he wishes.

14. Petitioner charges its customers a fixed fee on a one-year subscription basis. The charge is based on the number of categories ordered. All services are included in this fee.

15. If a manufacturer's representative discovers that a retailer who is not a part of the Towne-Oller panel is not stocking one of his products, that manufacturer can make a special request for assistance with a non-Towne-Oller panel member. Petitioner will then prepare a report for its customer containing facts which may be presented in order to induce a retailer to stock that manufacturer's product. There is no limit to the number of special non-Towne-Oller panel member studies that may be requested. These studies only go to the customers that request it.

16. One of the reports petitioner sends to its customers is a distribution opportunity study. This report identifies the specific retailers that do not stock the particular product which is the subject of the report. A manufacturer receives a distribution opportunity study pertaining to its products only and helps it to identify distribution gaps.

17. Petitioner also provides a product positioning study. This report advises the manufacturer how well its product is selling in relation to other products of the same type and how its sales compare to the sale of all health and beauty products. The product positioning study goes only to the manufacturer of that product.

18. Petitioner also supplies each of its customers with a sequential report. This report ranks by volume the sales of all of the items which petitioner keeps track of. The report is used as documentation for the specific reports which petitioner provides. However, the report provides no information insofar as distribution gaps are concerned.

19. Petitioner sends a category report to each of its customers. That is, each customer who subscribes to the same category and defines his category in the same manner receives the same report. In general, this report discloses the sales of the items within the category by amount and dollar volume.

20. Petitioner also provides a monthly sales report which is prepared on a category basis. For each item in the category, the report discloses the distribution and dollar sales volume for the month. This information is then summarized by the region of the nation. This information was also used as documentary support for suggestions made by petitioner regarding distribution problems. The sales reports must be supplemented by other reports to support a need for a change in distribution. The same report is sent to every customer subscribing to the same category.

21. Petitioner sends to each manufacturer requesting the same category a graph which discloses, on a yearly comparative basis, the market share of the manufacturers products and the trend in dollar sales. The information provided in this graph is available from other information provided by petitioner. This

graph does not provide any information on distribution problems other than an indication that certain brands are selling well.

22. In total, petitioner produces about twenty different reports. Generally, all reports rank products by sales in geographical regions.

23. It is theoretically possible but very unlikely for two customers to receive the same package of reports. Two customers would not receive an identical group of reports since petitioner provides services which are designed to meet an individual manufacturer's needs.

24. From June 1, 1975 until November 30, 1978, petitioner purchased certain graphic artwork. The artwork was then reproduced and included in reports.

25. Petitioner rented computer time, under an informal rental agreement, from Universal. Under this rental agreement petitioner would be permitted to utilize Universal's computer when Universal did not need to use it. Universal did not give petitioner a fixed period of computer time. There were instances when Universal agreed to allow petitioner to utilize the computer at a certain time and later reneged. There were other occasions when petitioner was told it could stay on the computer for a set period of time and Universal later required petitioner to cease using the computer before that time was over. The latter situation occurred about ten percent of the time petitioner used the computer. Petitioner paid Universal for the use of the computer by hour.

27. The computer rented from Universal was used to generate the reports which were discussed above. The operator of the computer during the rental periods was an employee of petitioner.

28. Petitioner stated at the hearing that if the claim for refund is granted, it will refund the amounts paid by New York State to its customers.

Petitioner also stated that it would be willing to post a bond or some other security.

29. In accordance with section 307(1) of the New York State Administrative Procedure Act petitioner's proposed findings of fact have been substantially adopted herein with the exception of proposed Finding of Fact "15" for which finding "23" has been substituted.

CONCLUSIONS OF LAW

A. That section 1105(c)(1) of the Tax Law imposes a sales tax on:

"(c) The receipts from every sale, except for resale of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal and individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news." (emphasis supplied)

B. That an information service is defined by 20 NYCRR 527.3(a)(2) as "[t]he collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons..."

C. That since petitioner collects, compiles and analyzes data, it engages in the furnishing of information and constitutes an information service within the meaning of respectively, section 1105(c)(1) of the Tax Law and 20 NYCRR 527.3(a)(2).

D. That the fact that some of the reports are prepared to a customer's specifications does not, in and of itself, render the reports personal and individual in nature within the meaning of Tax Law §1105(c)(1) (Matter of Twin Cost Newspapers v. State Tax Comm., ___ A.D.2d ___ [May 24, 1984]). The

information provided by petitioner is not of the uniquely personal nature that was contemplated by the exemption provided for in Tax Law §1105(c)(1) (see Matter of Twin Cost Newspapers v. State Tax Comm., supra). Accordingly, petitioner is not entitled to the exemption provided for in Tax Law §1105(c)(1).

E. That the purchase of the graphic artwork was subject to sales and use tax since it did not arise from the sale of tangible personal property for resale, as a physical component part of tangible personal property, or where the property sold is transferred to the purchaser of the service in conjunction with a service which is subject to tax [Tax Law §1101(b)(4)]. It is noted that 20 NYCRR 527.3(c)(1) is inapplicable since the graphic artwork was not transferred to petitioner's customers. In accordance with Finding of Fact "3", the amount of tax assessed in the Notice dated March 12, 1979 is reduced from \$9,432.10 to \$8,375.14.

F. That during the periods of time when petitioner's employee was operating the computer, petitioner had the right to use, control and direct the operation of the computer. Therefore, there was a transfer of possession, pursuant to the rental, which was subject to New York State sales and use tax (20 NYCRR 526.7(e)(4)(iii) and 526.7(e)(5)).


G. That in accordance with Conclusion of Law "D", the Audit Division properly concluded that the information service provided by petitioner did not fall within the exemption provided by section 1105(c)(1) of the Tax Law. In addition, since petitioner has not presented any evidence to establish that the tax sought in the refund application was previously refunded to its customers, the Audit Division properly decided that the refund application would not be considered by reason of section 1139(a) of the Tax Law.

H. That the petition of Towne-Oller & Associates, Inc. is granted to the extent of Conclusion of Law "E" and the Audit Division is directed to modify the Notice accordingly; the petition is, in all other respects denied. Petitioner's refund application is also denied.


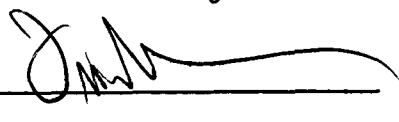
DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984


PRESIDENT


COMMISSIONER

 
COMMISSIONER

P 693 168 648

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	Jerome J. Caulfield	
Street and No.	Carter, Ledyard & Milburn	
P.O., State and ZIP Code	2 Wall St.	
Postage	NY, NY 10005	
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 693 168 647

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	Borne-Oller & Associates, Inc.	
Street and No.	200 Madison Ave.	
P.O., State and ZIP Code	NY, NY 10016	
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