STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Allied Paper Products Co.	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 6/1/75-5/31/78.	

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Allied Paper Products Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allied Paper Products Co.
99 Linnet St.
Bayonne, NJ 07002

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
6th day of February, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Allied Paper Products Co. 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 6/1/75-5/31/78.	AFFIDAVIT OF MAILING

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Michael J. Mella, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael J. Mella
12-45 River Rd.
Fairlawn, NJ 07410

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
6th day of February, 1985.

David Parchuck

Annie Ostergaard
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

Allied Paper Products Co.
99 Linnet St.
Bayonne, NJ 07002

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
Michael J. Mella
12-45 River Rd.
Fairlawn, NJ 07410
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALLIED PAPER PRODUCTS CO.	:	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, Allied Paper Products Co., 99 Linnet Street, Bayonne, New Jersey 07002, 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. 27750).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 9, 1984 at 2:30 P.M. with all briefs to be submitted by April 23, 1984. Petitioner appeared by Michael J. Mella, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether an estimated assessment premised upon petitioner's failure to open its books and records to the Audit Division for audit may be sustained.

FINDINGS OF FACT

1. On June 20, 1979, the Audit Division issued to petitioner, Allied Paper Products Co. ("Allied"), a Notice of Determination and Demand For Payment of Sales and Use Taxes Due for the periods ended August 31, 1975 through May 31, 1978 in the aggregate amount of $120,000.00, plus penalty and interest.

2. The above notice reflected tax due in the amount of $10,000.00 for each of the quarterly periods at issue and provided the following explanation for the issuance of the assessment:

> "[s]ince you have not submitted your records for audit as required by section 1142 of the Tax Law, the following taxes are determined to be due in accordance with the Tax Law, and is (sic) based upon available records and information".

3. Petitioner is a New Jersey corporation located at 99 Linnet Street, Bayonne, New Jersey, and is engaged in the business of selling paper products, including paper plates, napkins, etc.

4. On May 7, 1979, the Audit Division assigned auditor Jack Weiner to perform an audit of petitioner's books and records. On the same date, Mr. Weiner telephoned petitioner to make an appointment to commence the audit, but was advised by petitioner that an audit of its books and records would not be allowed.

5. On June 4, 1979, a letter was sent to petitioner's representative asserting that petitioner had made sales in New York State and had filed sales and use tax returns and thus was properly subject to audit. Included with this letter was a consent to extend the statutory period of limitation on assessment for the quarters in issue, together with the advice that if the consent was not signed and returned before June 20, 1979 an assessment against petitioner would be issued. Petitioner's representative responded in a letter dated June 19, 1979, stating that since petitioner had filed returns showing no tax due, the only assessment against petitioner could be an assessment showing no tax due. The consent with respect to the statute of limitations was not returned by petitioner (or its representative).

6. Mr. Weiner discussed the situation with his supervisors and was advised to issue an estimated assessment against petitioner in the amount of

$10,000.00 for each of the quarters during the period in question, plus penalty and interest. Such assessment was issued and is the assessment at issue in this proceeding.

7. Mr. Weiner testified that the $10,000.00 per quarter assessment was "simply the amount his superiors instructed him to assess per quarter, was not based on an examination of petitioner's books and records or any other information and was issued to forestall the statutory period to assess." He testified that he had personally visited petitioner's business premises and had been refused access to petitioner's books and records. No attempt was made to subpoena petitioner's records.

8. Mr. Weiner testified that he had no personal knowledge of any sales or deliveries of products made by petitioner in New York State, but that a Vendee Information Sheet given to Mr. Weiner indicated sales were made by petitioner to another entity, Magic Pan, Inc., in New York State. This information sheet stemmed from a review of Magic Pan, Inc.'s purchase invoices during the course of an audit of that entity, which invoices allegedly reflected purchases of petitioner's goods by Magic Pan, Inc. This sheet is dated April 7, 1979, lists Magic Pan, Inc. 50 Francisco Street, San Francisco, California as vendee, lists petitioner as vendor, and contains the following statement under the heading "Remarks":

> "Numerous sales invoices (sic) indicates deliveries made by vendor's truck and salesman, to Magic Pan Restaurants in N.Y.C.".

This document bears the signature D.J. Rejolk as examiner.

9. No purchase invoices as described above were provided or offered in evidence.

10. A one page document, written in pencil and unsigned but bearing the initials "PKC" and the date "7/12/79", was offered in evidence by the Audit

Division. This document was titled "Sales From Allied Paper Products To Magic Pan Inc. San Francisco 7/77-2/78". It reflects three columns, with the respective headings "Invoice Date", "Invoice #", and "Invoice Amount", under which are listed twenty different dates, numbers and amounts. The column entitled "Invoice Amount" is summed to the total amount of $5,038.20.

11. On or about April 23, 1971, petitioner was issued a vendor identification number (NY-7387658) by the Audit Division although petitioner never sought such a number or filed for a certificate of authority to become registered in the State of New York. The Audit Division issued this identification number after Allied remitted to the State of New York a check for sales taxes Allied had collected sometime in early 1971.

12. Sales and Use Tax Returns for the quarter 6/1/75 through 8/31/75 and for the annual periods 6/1/75 through 5/31/76 and 6/1/76 through 5/31/77, respectively, were filed by petitioner reflecting zeros in all categories including sales, taxable sales and sales tax due.

13. Petitioner asserts it made no sales or deliveries of its products in New York State, does not do business in New York State, owes no sales or use tax to New York State and thus is not subject to an audit of its books and records by New York State.

14. There was no testimony or other evidence produced by petitioner at the hearing. Petitioner's Perfected Petition provides, in part, as follows:

> "d) Petitioner does not do business in the State of New York and any goods shipped to New York are shipped by carrier.
>
> e) Responsibility for any taxes due the State of New York resulting from any business done by the petitioner with New York customers would be a use tax payable by customers and not collectible or payable by the petitioner.".

CONCLUSIONS OF LAW

A. That section 1101(b)(8)(i)(A) of the Tax Law provides that the term "vendor" includes "...(a) person making sales of tangible personal property..., the receipts from which are taxed by... (Article 28 of the Tax Law)". Section 1131(1) of the Tax Law defines "(p)ersons required to collect tax" and "person required to collect any tax imposed by (article 28)" to include every vendor of tangible personal property or services. Finally, section 1101(b)(5) of the Tax Law defines a sale as any transfer of title or possession, or both, of tangible personal property for a consideration [see 20 NYCRR 526.7(a)(1)].

B. That 20 NYCRR 526.10(a)(1)(ii) provides, in part, as follows:

> "[a] vendor shall be deemed to be making sales of tangible personal property in the State if he regularly makes deliveries into the State other than by common carrier or mail or regularly engages in the servicing of property in the State.
>
> Example 5: A company in Ohio makes weekly deliveries of business forms in leased trucks to its customers in New York. The forms were ordered through the mail or over the telephone. The company is deemed to be a vendor making sales of tangible personal property in New York." [See also 20 NYCRR 526.10(e)(2) (Example "4")].

C. That there existed a sufficient basis for the Audit Division to have sought to conduct an audit of petitioner's books and records. Petitioner, on at least one occasion, remitted sales tax to the State of New York (see Finding of Fact "10") and, as a result thereof, was registered as a vendor, albeit by the Audit Division rather than on its own request or initiative. Petitioner filed sales tax returns for a portion of the period

at issue[1]. Furthermore, there is the Vendee Information Sheet with its reference to New York City deliveries by petitioner's truck and salesman (see Finding of Fact "8"). Finally, and significantly, the petition asserts that "[p]etitioner does not do business in the State of New York and any goods shipped to New York are shipped by carrier" (see Finding of Fact "13"; emphasis supplied). Petitioner admits thereby the sale of goods to New York customers but alleges shipment by (common) carrier. Given the above evidence, it was reasonable for the Audit Division to have raised the issue of whether petitioner was a vendor subject to tax and to have sought to audit petitioner's books and records for the purpose of so determining.

D. That in the face of a vendor's refusal to submit to audit or supply information, resort to external indices is permissable in arriving at and issuing an estimated assessment [Tax Law §1138(a), Matter of George Korba v. New York State Tax Comm., et. al., 84 A.D. 2d 655]. However, the instant assessment was not based upon resort to any "external indices" of petitioner's sales in New York or elsewhere (such as a projection of tax due on the Magic Pan, Inc. invoices, third party information regarding other New York purchasers of petitioner's products, etc.). The auditor's testimony supports this conclusion and indicates, moreover, that the assessment was issued to forestall the statute of limitations on assessment [see Finding of Fact "7"]. Issuance of an assess-

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[1] Contrary to petitioner's assertion (see Finding of Fact "5"), returns filed by petitioner showing only zeros does not preclude an assessment other than one reflecting no tax due. In fact, where a return is not filed, or is filed but is incorrect or insufficient, the amount of tax due may be determined and assessed based on available information, including estimates utilizing external indices [Tax Law §1138(a)].

ment solely because of the impending expiration of the statute of limitations is not valid and must be cancelled [Matter of C.A.L. Restaurant, Inc. d/b/a The Other End, State Tax Comm., September 21, 1984; citing Brown v. New York State Tax Commission, 199 Misc. 349, aff'd 279 A.D. 837, aff'd 304 N.Y. 651].

E. That the petition of Allied Paper Products Co. is hereby granted.

DATED: Albany, New York

FEB 0 6 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 470 316 474

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Allied Paper Products Co.	
Street and No. 99 Bennet St.	
P.O., State and ZIP Code Bayonne NJ 07002	
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 470 316 475

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Michael J. Mella	
Street and No. 12-45 Lime Rd.	
P.O., State and ZIP Code Fair Lawn NJ 07410	
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