

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kumax Corporation :
(formerly Melody Productions, 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 :
9/1/75-2/28/79. :

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Kumax Corporation (formerly Melody Productions, Inc.), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kumax Corporation
(formerly Melody Productions, Inc.)
205 W. 48th St.
New York, NY 10036

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
18th day of February, 1986.

Doris E. Steinhardt

Jean Corigliano
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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(formerly Melody Productions, Inc.)	:	AFFIDAVIT OF MAILING
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under Article 28 & 29 of the Tax Law for the	:	
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State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 18th day of February, 1986, he served the within notice of Decision by certified mail upon Robert Konove, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Konove
Konove & Konove, P.C.
60 E. 42nd St.
New York, NY 10165

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
18th day of February, 1986.

Doris E. Steinhardt

[Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Kumax Corporation
(formerly Melody Productions, Inc.)
205 W. 48th St.
New York, NY 10036

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
Robert Konove
Konove & Konove, P.C.
60 E. 42nd St.
New York, NY 10165
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
KUMAX CORPORATION	:	DECISION
(formerly Melody Productions, Inc.)	:	
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 February 28, 1979.	:	

Petitioner, Kumax Corporation (formerly Melody Productions, Inc.), 205 West 48th Street, New York, New York 10036, 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 February 28, 1979 (File No. 44335).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 8, 1985 at 9:15 A.M. Petitioner appeared by Konove & Konove, P.C. (Robert Konove, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael Glannon, Esq., of counsel).

ISSUES

- I. Whether petitioner is entitled to a refund of taxes paid.
- II. Whether an erroneous conclusion of a conferee estops the State Tax Commission from denying petitioner's application for refund.

FINDINGS OF FACT

1. During the audit period in issue, petitioner, Kumax Corporation (doing business at that time as Melody Productions, Inc. and hereinafter referred to as "Kumax") operated a burlesque show consisting primarily of strip acts done

to recorded music. Kumax filed no sales tax returns taking the position that its shows were musical arts performances which fell within the exclusion provided by section 1105, subdivision (f)(1) of the Tax Law.

2. On October 4, 1979, the Audit Division issued to Kumax a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting taxes of \$76,000.16 plus statutory penalty and interest for the period September 1, 1975 through February 28, 1979. The asserted tax liability arose from three sources: (1) Fixed asset accounts were examined and showed acquisitions of \$163,000.00. Because petitioner was unable to substantiate payment of sales tax at the time of acquisition, tax was assessed in the amount of \$13,064.00. (2) The auditor found that Kumax sold a small number of calendars and records; receipts from the alleged sale of these items were combined with the proceeds from the sale of admission tickets. (3) All sales receipts were treated as taxable on the theory that theatrical exhibitions of a pornographic nature did not come within the exclusion for dramatic or musical arts performances.

3. Petitioner filed a timely petition and, on October 7, 1981, a pre-hearing conference was held in the New York District Office. The Conferee proposed a cancellation of all tax assessed on admission charges but sustained that portion of the assessment based upon fixed asset acquisitions (or leasehold improvements) and the alleged sale of calendars and records. Following the conference, petitioner submitted proof of payment of tax on some of the fixed assets purchased. On this basis, the Audit Division issued a Notice of Assessment Review asserting an adjusted tax due of \$10,843.84 plus minimum statutory interest.

4. The petitioner, by its attorney, signed a Withdrawal of Petition and Discontinuance of Case dated April 14, 1982 agreeing to the revised tax. A

deferred payment agreement was entered into between petitioner and the Tax Compliance Bureau. As of February 10, 1983 payments amounting to \$11,913.90 were made pursuant to this agreement.

5. At the pre-hearing conference, the Audit Division had cited a State Tax Commission decision, Matter of Flah's of Syracuse, Inc., State Tax Commission, November 28, 1980, as controlling authority to support its position that petitioner's fixed asset acquisitions were subject to sales tax. In December 1982, petitioner wrote to the Audit Division to bring to its attention the decision of the Appellate Division, Third Department in Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729, annulling the determination of the State Tax Commission. In effect, the petitioner requested a refund of taxes paid on the basis that the Audit Division's position and the withdrawal of petition were grounded in a mutual mistake of law.

6. The Audit Division denied petitioner's request for refund explaining that such a request was barred by the statutory time limitations set forth in section 1139 of the Tax Law. Thereafter, petitioner filed a timely petition protesting the refund denial, and a pre-hearing conference was held on February 9, 1984. Ignoring the issue of timeliness, the conferee concluded that petitioner's leasehold improvements should not have been subjected to sales tax. On the basis of the conferee's representation that taxes paid would be refunded, petitioner, by its president, signed a second withdrawal of petition dated October 29, 1984 which stated, inter alia:

"I understand that all refund claims are subject to the approval of the Comptroller. Accordingly, this withdrawal and continuance is conditioned upon the granting of such approval and the payment of the refund."

6. Petitioner's refund request was denied by the Comptroller on the grounds that the request was barred by statutory time limitations.

CONCLUSIONS OF LAW

A. That pursuant to section 1139, subdivision (a)(ii) of the Tax Law, an application for refund of taxes paid must be made within three years from the date when such taxes were payable under the Tax Law. Petitioner requested a refund of taxes paid for the period November 30, 1975 through February 28, 1979. Sections 1136(b) and 1137(a) of the Tax Law required that sales taxes for the last quarter of this audit period be paid by March 29, 1979. Consequently, petitioner's request for refund, made on or about December 3, 1982, was barred by the three year statutory time limitation.

B. That section 1139, subdivision (c) of the Tax Law provides that a person shall not be entitled to a refund of a tax determined to be due pursuant to section 1138 of the Tax Law where he has had a hearing or failed to avail himself of his right to a hearing as provided for in section 1138. Following a pre-hearing conference, petitioner voluntarily agreed to pay a revised assessment of \$10,843.84 and executed a Notice of Withdrawal of Petition and Discontinuance of Case on April 14, 1982. In thus choosing not to pursue the administrative remedies provided by law, petitioner forfeited any entitlement he may have had to a refund of taxes paid.

C. That where a conferee proposes a resolution of a controversy which entails a refund, approval of the Comptroller is necessary [20 NYCRR 601.4(c)(3)]. Moreover, the State Tax Commission Rules of Practice and Procedure (20 NYCRR 601.4) make it clear that the conferee's authority to resolve disputes is confined by the framework of the Tax Law [20 NYCRR 601.4(c)(1)]. Neither the Comptroller nor the State Tax Commission is bound by a resolution which is in direct conflict with the Tax Law.

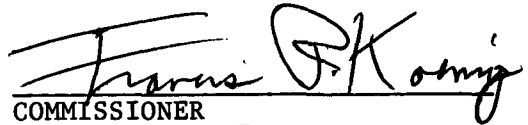
D. That the petition of Kumax Corporation (formerly Melody Productions, Inc.) is denied in all respects.


DATED: Albany, New York

FEB 18 1936

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 684 313 317

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to	<i>Kumax Corp</i>
Street and No.	<i>Family Melody Road</i>
P.O., State and ZIP Code	<i>205 W 48th St</i>
Postage	<i>New York NY 10036</i>
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	

P 684 313 318

RECEIPT FOR CERTIFIED MAIL

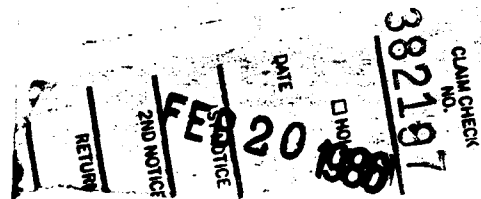
NO INSURANCE COVERAGE PROVIDED
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(See Reverse)

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PS Form 3800, Feb. 1982

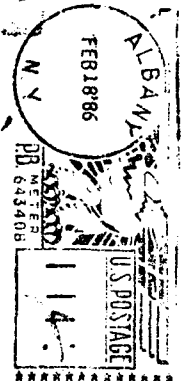
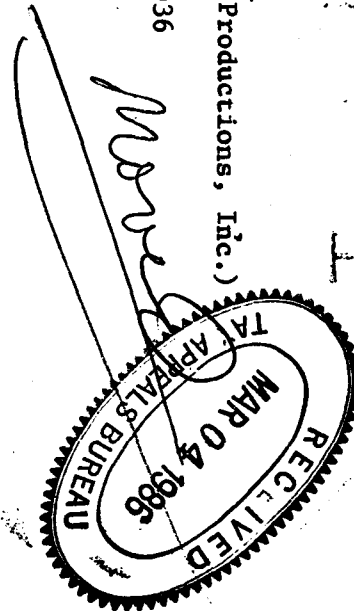
Sent to	<i>Rt Knoxville</i>
Street and No.	<i>Knoxville & Knoxville</i>
P.O., State and ZIP Code	<i>Co E 42 St</i>
Postage	<i>New York NY 10036</i>
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	



TA-26 (7/85)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
W. A. Harriman Campus
ALBANY, N. Y. 12227



Kumax Corporation
(formerly Melody Productions, Inc.)
205 W. 48th St.
New York, NY 10036



S.T.

REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 3/6/86
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition Dec. 2/18/86
Name Humax Corporation	
Address (formerly Melody Productions, Inc.) 205 W. 48th St. New York, N. Y. 10036	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	mailed

Searched by	Section	Date of Search

PERMANENT RECORD

FOR INSERTION IN TAXPAYER'S FOLDER

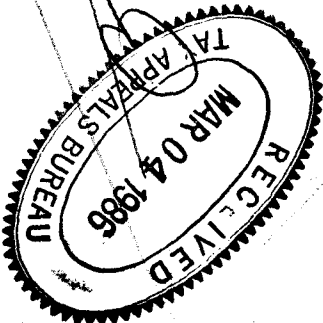
TA-26 (7/85)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
W. A. Harriman Campus
ALBANY, N.Y. 12227

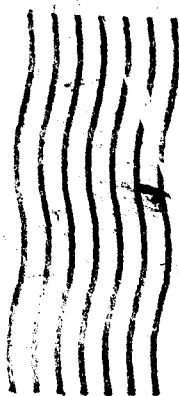
CERTIFIED

P 684 313 317

MAIL

Kumax Corporation
(formerly Melddy Productions, Inc.)
205 W. 48th St.
New York, NY 10036





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

February 18, 1986

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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
Robert Konove
Konove & Konove, P.C.
60 E. 42nd St.
New York, NY 10165
Taxing Bureau's Representative

STATE OF NEW YORK

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"I understand that all refund claims are subject to the approval of the Comptroller. Accordingly, this withdrawal and continuance is conditioned upon the granting of such approval and the payment of the refund."

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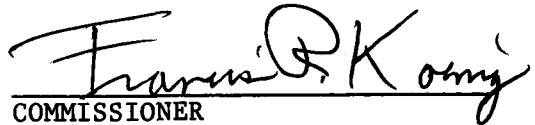
D. That the petition of Kumax Corporation (formerly Melody Productions, Inc.) is denied in all respects.

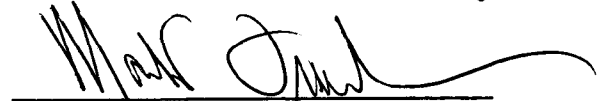
DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER