

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

The Present Company, Inc.

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 9/1/77 - 5/31/81.

:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, 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 20th day of November, 1986, he/she served the within notice of Decision by certified mail upon The Present Company, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Present Company, Inc.
82 St. Paul Street
Rochester, NY 14604

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
20th day of November, 1986.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

The Present Company, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
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under Article(s) 28 & 29 of the Tax Law for the :
Period 9/1/77 - 5/31/81.
_____ :

State of New York :

ss.:

County of Albany :


David Parchuck/Janet M. Snay, 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 20th day of November, 1986, he served the within notice of Decision by certified mail upon Peter L. Faber, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter L. Faber
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, NY 10022

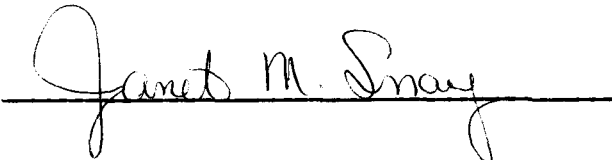
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
20th day of November, 1986.



Authorized to administer oaths
pursuant to Tax Law section 174



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

November 20, 1986

The Present Company, Inc..
82 St. Paul Street
Rochester, NY 14604

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Peter L. Faber
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, NY 10022

STATE TAX COMMISSION

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1985 at 1:30 P.M., with all briefs to be submitted by February 28, 1986. Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler (Peter L. Faber, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether payments to petitioner represented a rebate or a reduction in the price of catalogs purchased by it or a distribution of advertising revenues.

FINDINGS OF FACT

1. On December 14, 1981, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, The Present Company, Inc. (the "Company"), assessing sales and use taxes due in the amount of \$21,273.03, plus interest of

\$3,533.34, for a total amount due of \$24,806.37 for the period September 1, 1977 through May 31, 1981.

2. On December 5, 1980, the Company executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through February 28, 1978 to June 20, 1981. A second consent was executed on June 5, 1981, extending the period of limitation for assessment of sales and use taxes for the period September 1, 1977 through May 31, 1978 to September 20, 1981. A third consent was executed on September 15, 1981 which extended the period of limitation for assessment of sales and use taxes for the period September 1, 1977 through August 31, 1978 to December 20, 1981.

3. The Company was engaged in the catalog showroom business. The merchandise catalogs distributed to the public by the Company were purchased from Merchandisers' Association, Inc. ("MAI"). MAI was a not-for-profit corporation located in Illinois. Its members included the Company and twelve other companies engaged in the business of selling merchandise by catalog. MAI's sole activity was the production of catalogs for its members.

4. The audit revealed that the Company had failed to pay sales or use tax on its catalog purchases. Using billing invoices from MAI to the Company, the auditor calculated total taxable catalog purchases of \$958,620.23 for the audit period. The Company conceded that use tax was owed on its catalog purchases; however, it maintained that its purchases should be reduced by payments of \$303,900.41 made to the Company by MAI, since it took the position that the payments represented a refund of a portion of the catalog purchase price. The Audit Division treated those payments as revenue to the Company from advertising.

The assessment under consideration reflects use tax imposed on the disputed amount of \$303,900.41 only.

5. In the fall of each year, MAI entered into contracts with printers, lithographers and other persons necessary for catalog production. The following January, the Company would transmit to MAI its catalog needs for the upcoming year. MAI would then begin issuing billing invoices to the Company based on projected catalog production costs, including MAI's operating expenses.

6. MAI also executed contracts with vendors and manufacturers who paid MAI for listing their products in the members' catalogs. Payments from these vendors and manufacturers were made directly to MAI and became part of its general fund. These funds were not segregated for the benefit of members and were subject to the claims of MAI creditors.

7. MAI owned the copyrights on the catalogs it produced and granted its members the right to use them. MAI realized no profit on its operations. When MAI determined that its receipts were greater than its combined production and operating costs, the excess receipts were distributed to its members in proportion to the number of catalogs which the member had purchased.

8. The auditor treated payments made by MAI to the Company as advertising revenues, having their basis in the funds collected by MAI from the vendors and manufacturers listed in member catalogs. The Company presented conflicting testimony regarding the nature of these payments. On the one hand, the payments were characterized as adjustments or refunds in the purchase price of the catalogs, reflecting changes in projected production costs. However, it was conceded by the Company that the source of these payments was funds received by MAI from vendors and manufacturers.

9. The billing invoices utilized by the Audit Division in determining the Company's taxable catalog purchases took into account only the costs of production.

The projected cost of producing the catalogs was not adjusted to take into consideration anticipated revenues from advertising. The billing invoices did not reflect the distribution of funds from MAI to the Company.

CONCLUSIONS OF LAW

A. That Tax Law §1110 imposes a use tax for the use within New York State of any tangible personal property purchased at retail except to the extent that such property may be subject to sales tax under Articles 28 and 29 of the Tax Law. The tax is imposed upon "the consideration given or contracted to be given for such property" (Tax Law §1110). For purposes of the use tax, the regulations define the term "consideration," in part, as "the amount paid for any property...valued in money." (20 NYCRR 531.2[a].)

B. That the funds paid to the Company by MAI represent a reduction to the purchase price of the catalogs. The essence of the transaction between the buyer and the seller is that petitioner pays actual production cost: the projected cost less the refund. The amount of consideration, therefore, was the net cost to MAI of producing the catalogs, and the funds paid to the Company were necessary to balance MAI's net costs with the Company's payments on the billing invoices.


C. That the petition of The Present Company, Inc. is hereby granted, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 14, 1981 is cancelled.

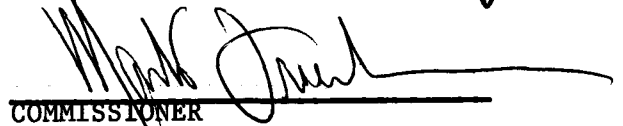
DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 376 842

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

PS Form 3800, June 1985

★ U.S.G.P.O. 1985-480-794

Sent <u>Peter L. Faber</u>	
<u>Kaye, Scholer, Fierman,</u>	
<u>Supel and Co. + Handler</u>	
<u>425 Park Ave.</u>	
P.O., State and ZIP Code <u>New York, N.Y. 10022</u>	
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	

P 319 376 841

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

PS Form 3800, June 1985

★ U.S.G.P.O. 1985-480-794

Sent <u>The Present Company Inc.</u>	
<u>82 St. Paul Street</u>	
<u>Rochester, N.Y. 14604</u>	
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	

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

W. A. Harriman Campus

ALBANY, N.Y. 12227

CERTIFIED

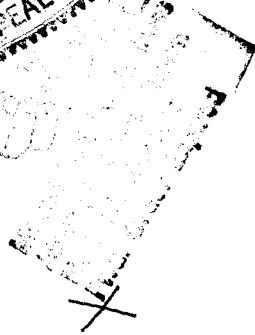
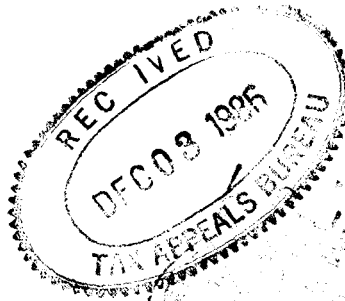
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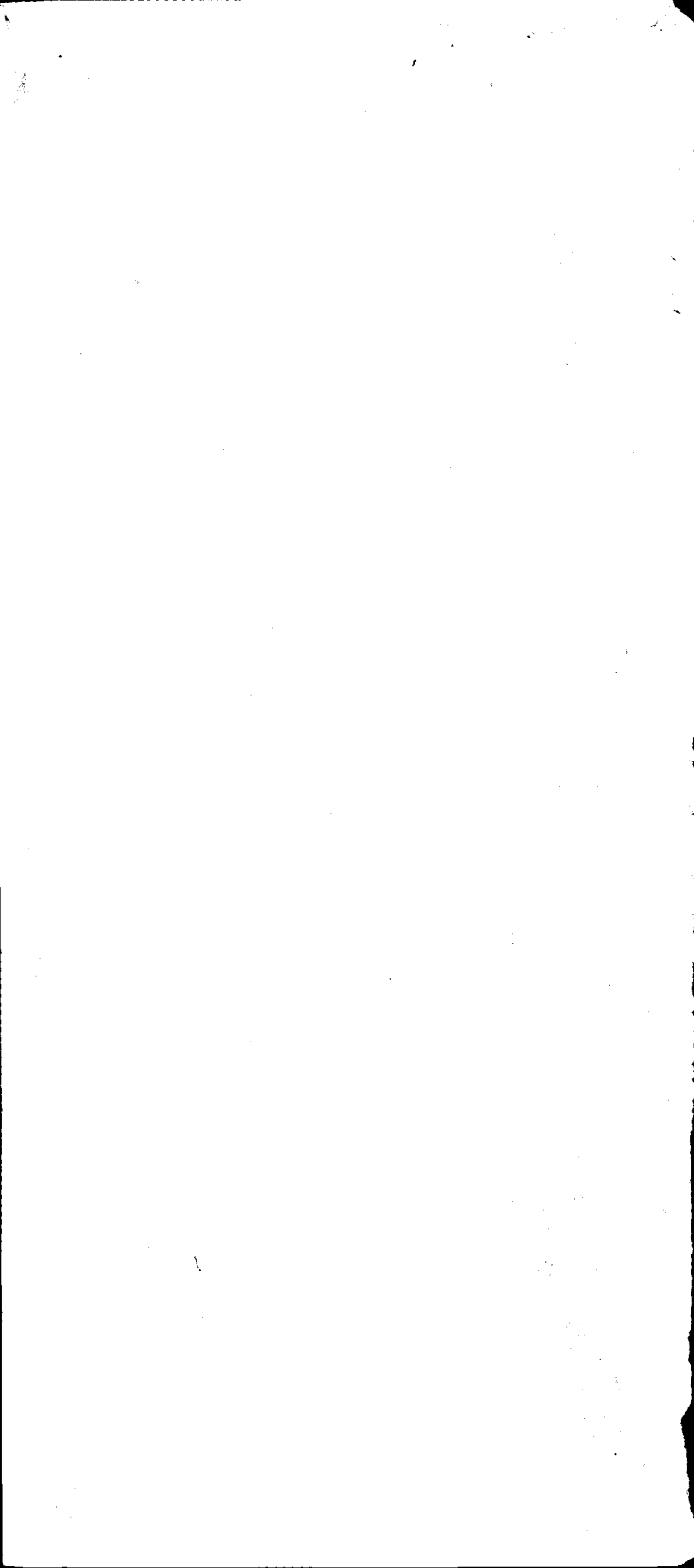
MAIL

The Present Company, Inc.

84 Sp. Paul Street

Rochester, NY 14604





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

November 20, 1986

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NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Peter L. Faber
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, NY 10022

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THE PRESENT COMPANY, 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, 1977	:	
through May 31, 1981.	:	

Petitioner, The Present Company, Inc., 82 St. Paul Street, Rochester, New York 14604, 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, 1977 through May 31, 1981 (File No. 36713).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1985 at 1:30 P.M., with all briefs to be submitted by February 28, 1986. Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler (Peter L. Faber, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

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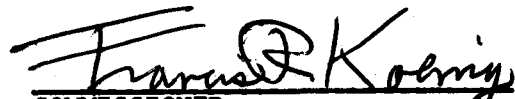
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DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER