

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Rich Products Corp.

:

:

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 5/31/78 - 11/30/80.

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 12th day of June, 1986, he/she served the within notice of Decision by certified mail upon Rich Products Corp. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rich Products Corp.
1150 Niagara St.
Buffalo, NY 14213

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
12th day of June, 1986.

Janet M. Snay

Daniel J. Randall
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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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 12th day of June, 1986, he served the within notice of Decision by certified mail upon Paul Comeau, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Comeau
Hodgson, Russ, Andrew, Woods & Goodyear
1800 One M & T Plaza
Buffalo, NY 14203

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
12th day of June, 1986.

Janet M. Snay

Daniel J. Rancalli
Authorized to administer oaths
pursuant to Tax Law section 174

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

June 12, 1986

Rich Products Corp.
1150 Niagara St.
Buffalo, NY 14213

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:
Paul Comeau
Hodgson, Russ, Andrew, Woods & Goodyear
1800 One M & T Plaza
Buffalo, NY 14203

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| RICH PRODUCTS CORP. | : | 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 Periods Ended May 31, | : | |
| 1978 through November 30, 1980. | : | |

Petitioner, Rich Products Corp., 1150 Niagara Street, Buffalo, New York 14213, 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 periods ended May 31, 1978 through November 30, 1980 (File No. 46002).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on June 18, 1985 at 9:15 A.M., with all briefs received by October 11, 1985. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Victor T. Fuzak, Esq., Paul R. Comeau, Esq. and Mark S. Klein, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether certain reports purchased by petitioner constitute taxable information services, the receipts of which are subject to the tax imposed by section 1105(c)(1) of the Tax Law.

FINDINGS OF FACT

1. On June 1, 1983, the Audit Division issued to petitioner, Rich Products Corp., a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due for the periods ended May 31, 1978 through November 30, 1980 inclusive, asserting additional tax due in the amount of \$20,271.16 exclusive of interest. Consents extending the period of limitation for assessment concerning the above periods were properly completed and filed.

2. Petitioner is a manufacturer of frozen dairy and dessert products.

3. An audit was performed upon petitioner's books and records, which records were considered to be complete. Certain portions of the audit were agreed to by petitioner on or about September 24, 1981 and are not at issue herein. The disagreed portion of the audit concerns the purchases of certain reports by petitioner from Selling Areas Marketing, Inc. ("SAMI").

4. The petitioner, on audit, authorized the use of a test period. However, the notice of determination at issue herein is based upon petitioner's total actual purchases for the audit period from SAMI considered as taxable and is not based upon a projection of or estimate from the selected test period.

5. The receipts subjected to tax on audit represented approximately 180 invoices from SAMI to petitioner for the following reports and services:

- (a) frozen dinner bread and rolls;
- (b) coffee creamers;
- (c) frozen sweet rolls;
- (d) frozen sweet goods;
- (e) frozen and refrigerated puddings;
- (f) puddings;
- (g) frozen foods;
- (h) 15 category overview;
- (i) muffin mix;

(j) scan service (apparently with respect to several of the previously enumerated categories);

(k) frozen top 200;

(l) frozen and refrigerated CST (category, size and trend).

6. Although some of the services and reports enumerated in Finding of Fact "5" involved oral presentations, in all instances written reports were provided in conjunction with each of the services therein listed.

7. SAMI is involved in the business of providing information concerning marketing and sales activities to customers.

8. Every four weeks, SAMI receives information concerning warehouse product shipments from approximately 774 independent and chain grocery product warehouses in 54 SAMI marketing areas. The information concerns product shipments from the warehouses to retail stores of approximately 230,000 items. Approximately 6,000,000 pieces of information are received each four weeks, usually computer coded on tapes or disks.

9. The information is checked for coding errors and anomalies, such as heavy sales of barbecue charcoal in northern states in the middle of the winter, are cross-checked and verified.

10. The warehouses do not necessarily encompass 100 percent of the warehouses in a particular marketing area, so the received information may be "projected" to reflect the marketing area. Likewise, the 54 marketing areas do not reflect the total of the United States and projections may be made to reflect total United States product movement.

11. The received and verified information forms the data base from which SAMI draws the information supplied to its customers.

12. SAMI's customers are grocery manufacturers. None of SAMI's customers provide the information used to build SAMI's data base.

13. SAMI reports bear the following notations:

"This report is confidential and is not available to the public. It has been distributed on a restricted basis pursuant to contract by Selling Areas-Marketing, Inc. for the sole and confidential use of the limited number of persons designated in such contract. All persons with access to this report, whether authorized or unauthorized are subject to liability for any unauthorized use, reproduction publication or divulgence of this report or any portion thereof."

Said reports also appear to bear a copyright.

14. A SAMI customer representative dealing with one customer is not permitted to act as a SAMI representative with respect to any other manufacturer in marketplace competition with that representative's customer.

15. SAMI customer representatives are not permitted to show reports prepared for one customer to any other customer or to other SAMI customer representatives, nor are they even permitted to discuss what information a particular customer has requested.

16. SAMI's customers expect that SAMI is not going to disclose to the customer's competitors that information that the customer has requested because, in doing so, the customer's particular marketing strategy could be determined and its competitiveness in the marketplace damaged. SAMI representatives likewise testified that it could not retain its customers if it failed to provide for such confidentiality.

17. SAMI produced non-customized "off-the-shelf" reports. Any manufacturer may purchase these reports and the same report is sold to each such customer.

18. The "frozen top 200" report and the "frozen and refrigerated CST" report are examples of off-the-shelf reports.

19. Petitioner conceded at hearing that receipts from the off-the-shelf reports are subject to the sales tax.

20. Other reports sold by SAMI and at issue herein are prepared based upon the client's defined universe and a customer profile.

21. A customer must first decide what product information it desires. Thus it may determine, in defining "frozen sweet" goods, whether or not pies, eclairs/cream puffs, or shortcakes are to be either included or excluded in determining the information it seeks.

22. SAMI customers may also choose, inter alia, among the following variables:

(a) Geography - Information may be received concerning any one or combination of SAMI markets and SAMI may also customize a market area (i.e. sales region) for a customer.

(b) Measurement - Marketing information can be conveyed in terms of dollar volumes, cases or unit equivalencies (i.e., conversions equating units of frozen and powdered products).

(c) Time Periods - Yearly segments (fiscal and annual), four-week segments, twenty-week segments, year-to-date to past year-to-date and other time segments may be compared.

(d) Calculations - Marketing information on the movement of various products may be compared.

23. Though a SAMI representative works with a customer to explain the variables concerning the information a customer may request, it is the customer which determines the information to be received, apparently limited only by the limitations of the information stored by SAMI and the number of variables which may be programmed.

24. SAMI does not provide the raw material (the data base) to its customers.

25. Due to the variables involved, determinations as to universe (which products does a customer want information on and consider equivalent or competing), market area, measurement (comparison per dollar volume, case, etc.), time frame(s), etc. which make up a customer's "profile", it is unlikely that a SAMI report prepared for one customer will be the same as a report furnished another customer.

26. SAMI is currently working with approximately 12,000 client profiles.

27. Manufacturers of products similar to those produced by petitioner may have requested information similar to that requested by petitioner; however, since such requests would vary (i.e., different profile due to different universe, measurement, geographical area, etc.), the reports furnished would be different.

28. As part of the audit process, on September 10, 1981, petitioner applied for an advisory opinion concerning the taxability of the services and reports it purchased from SAMI. The advisory opinion issued on March 16, 1983 (prior to issuance of the notice of determination and demand) determined that the services and reports purchased by petitioner from SAMI were taxable information services. Said advisory opinion apparently concluded that the SAMI services were an information service and that, although the service appeared to meet the first half of the exclusion provided in section 1105 from the imposition of tax, i.e., personal and individual in nature, it was not shown that the information is not or may not be incorporated into reports furnished to others thereby satisfying the second part of the exclusion.

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 or 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 [of] information of any kind or nature and the furnishing [of] reports thereof to other persons...".

C. That the regulation (20 NYCRR §527.3[a][3]) further provides that, "[a]mong the services which are information services are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys."

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

E. That section 171 of the Tax Law provides, in pertinent part:

"The State Tax Commission shall...

* * *

Twenty-fourth. Be required to render advisory opinions with respect to taxes administered by the tax commission within ninety days of the receipt of a petition for such an opinion.... Such advisory opinion shall be rendered to any person subject to a tax or liability under this chapter or claiming exemption from such tax or liability. Such advisory opinions, which shall be published and made available to the public, shall not be binding upon the tax commission except with respect to the person to whom such opinion is rendered provided, however, that a subsequent tax commission modification of such an advisory opinion shall operate prospectively only..."

F. That with respect to the application of the advisory opinion to this determination, it should be noted that were the advisory opinion to have

advised petitioner that it was not subject to tax, and petitioner had relied thereon, and it was further determined that the facts as presented in the request for advisory opinion were found to be the same at hearing, Tax Law section 171(24) appears to provide that this body would be bound by such advice. However, the advisory opinion advised the petitioner that it was subject to tax. Petitioner has obviously not relied upon such opinion to its detriment and, likewise, this body is not bound by such advice of taxability, otherwise petitioner's due process and hearing rights would be lost. Likewise, the statute's admonishment that modifications to advisory opinions have only prospective application is designed to prevent retroactive imposition of taxes upon a petitioner which had proceeded in some manner in reliance upon the advice given to it in an advisory opinion. Said advisory opinion having been solicited after the period for which additional taxes are asserted, any modification to such opinion, though prospective only, has no retroactive application as there was no advice therein upon which petitioner has detrimentally relied. Likewise, a change therein will not accrue to petitioner any greater tax liability than it may already face. Thus, under the limited facts and circumstances described herein and for the purposes of the determinations to be made in this proceeding, the Commission is not bound by the conclusions of law in the advisory opinion.

G. That the confidentiality language embossed by SAMI on its reports (Finding of Fact "13") is in protection of SAMI's proprietary rights to the information it has compiled. It prohibits the customer who or which has purchased a report from SAMI from sharing that report with other potential customers of SAMI. It prohibits the customer from incorporating the information into other reports without SAMI's permission. It does not, however, prohibit

the vendor of such reports, SAMI itself, from selling that same information to others and in fact inherently contemplates the same.

H. That the confidential relationship developed between SAMI and its customers, i.e., no SAMI representatives may work for competing customers, SAMI representatives may not disclose reports for one customer to other SAMI representatives and reports for one customer are never shown to other customers (Findings of Fact "14", "15" and "16"), are likewise in protection of the proprietary and competitive interest of the customer. Knowing "what" a person is looking at could give away marketing strategy. However, in this regard it is the fact of the report and the parameters of the report that are confidential. There are no prohibitions or confidentiality with respect to the actual information contained in such reports. SAMI may sell the information on how in any marketing area a particular product is doing vis-a-vis other particular competing products or on its own to other customers. Thus, while there is a prohibition against disclosing what information a client requested, there is no prohibition against disclosing the same information to other customers.

I. That the statutory test for exclusion from the tax on information services is not whether the fact of the report is not or may not be incorporated into reports furnished other persons, not whether the report itself is shown to other persons, nor whether portions of the report are lifted and incorporated into reports which are or may be furnished others. The test for exclusion is whether the information contained in the reports is or may be incorporated into reports furnished to others.

J. That clearly the information contained in any report furnished by SAMI to one customer, i.e., how much of any particular product or products was shipped from warehouses to grocery stores in any market, for any period, in any

amount (be it dollar volume, quantity, etc.), may be incorporated in reports furnished others and is in fact incorporated in reports to other manufacturers of like products.

K. That in accordance with Conclusion of Law "F", it is important to note that the mere fact that information is provided to a customer pursuant to the customer's request or that a report is customized to a customer's specifications does not render the information personal or individual. The report may be customized or individualized to a customer's desires but the information provided in such report is not necessarily personal or individual. As previously noted herein, it could be said that the reports requested by petitioner are individualized and are in fact personal to petitioner, both in the sense of the confidential relationship as to the fact and parameters of the report (Conclusion of Law "H") and the statistical improbability of another client choosing the exact same universe and profile (Finding of Fact "25"). However, the actual information imparted as to the market movement of any particular products is no more personal or individual to petitioner as it may be to any other competing manufacturer. The statutory exclusion does not require customized, individualized reports; it requires the information to be of a unique, personal, individual nature and, under the circumstances herein, it is not (see Matter of Twin Coasts Newspapers, Inc. v. State Tax Commission, 101 A.D.2d 977, appeal dismissed 64 N.Y.2d 874).

L. That in accordance with the concession and stipulation at hearing (Finding of Fact "19"), the petitioner's purchases of the "frozen top 200" report and the "frozen and refrigerated CST" report are subject to tax.

M. That the other services and reports purchased by petitioner are taxable information services which do not qualify for the exclusion from tax


requiring that the information be personal and individual and is not or may not be substantially incorporated in reports furnished to others.

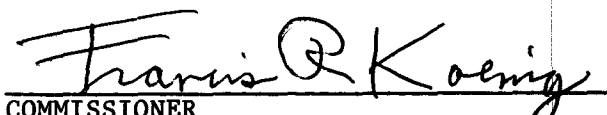
N. That the petition of Rich Products Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained in full, together with applicable interest as by law allowed.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER