STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of INTERCONTINENTAL AUDIO & VIDEO, 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 March 1, 1982 through May 31, 1985.	:	DETERMINATION DTA NO. 807037

Petitioner, Intercontinental Audio & Video, Inc., 41-51 Main Street, Flushing, New York 11355, 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 March 1, 1982 through May 31, 1985.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 22, 1991 at 1:30 P.M., and was continued to conclusion before the same Administrative Law Judge at the same location on January 16, 1992 at 1:30 P.M. At petitioner's request, and with the consent of the Division of Taxation, the record remained open for an extended period of time to allow petitioner to pursue proceedings in Superior Court, Middlesex County, Massachusetts for the purpose of obtaining the testimony of a non-party witness located there and unwilling to appear in New York. After extended proceedings in Massachusetts, said testimony was taken on December 17, 1993 before the Honorable Patrick Brady, Superior Court Judge, Middlesex County, Massachusetts, with a transcript thereof submitted on February 2, 1994. Petitioner, appearing at all times by Schupbach, Williams & Pavone, Esqs. (Paul Williams, Esq., of counsel), submitted a brief on March 16, 1994. The Division of Taxation, appearing at all times byWilliam F. Collins, Esq. (Michael B. Infantino, Esq., of counsel), submitted a responding brief on May 9, 1994. Petitioner's reply brief was submitted thereafter on June 13, 1994.

ISSUES

I. Whether petitioner has established that certain sales treated upon audit as subject to tax were, in fact, nontaxable as (a) sales for resale (wholesale sales), (b) sales made to exempt organizations, and (c) sales made to diplomatic personnel.

II. Whether, assuming tax is due, petitioner has nonetheless established sufficient basis to warrant abatement of penalty imposed.

FINDINGS OF FACT

Petitioner, Intercontinental Audio & Video, Inc., was during the period in question engaged in the business of importing and selling consumer electronic audio and video equipment and accessories within the New York metropolitan area. Petitioner's business operations included retail sales of consumer electronic equipment as well as video tape rentals and associated video tape rental club membership sales. In addition, petitioner was engaged in wholesale selling (sales for resale) of its consumer electronic equipment. The types of merchandise carried by petitioner included small appliances such as fans, radios, small televisions, Sony "Walkman" players, etc.

At the commencement of the audit, the Division of Taxation's ("Division") auditor requested that petitioner produce its records for audit review. Petitioner does not dispute the adequacy of the Division's request for records, or the fact that there were no cash register tapes, bank deposit slips, purchases journal, sales journal, or invoices for the video tape rental and video tape rental club memberships available. However, petitioner did have merchandise sales invoices available for review, including invoices pertaining to its claimed nontaxable sales. It is noted in this regard that such invoices were not prenumbered.

Petitioner's method of accounting for sales receipts and preparing and filing its sales tax returns was based on its deposits to two bank accounts. One account (a Bank of Baroda account in Manhattan) was used primarily for the resale and wholesale portion of petitioner's business, while the other (an account with a branch office of Manufacturers Hanover located near petitioner's Queens, New York premises) was used for the retail portion of petitioner's

business.[1]

As described, petitioner's sales per its books and its sales tax returns were based on petitioner's bank deposits. The auditor noted (and petitioner did not dispute) that approximately 25% of petitioner's cash receipts were not deposited in the bank, but rather were kept on hand to pay expenses. As a result, such amounts not deposited in petitioner's bank account(s) were not reported on petitioner's sales tax returns. Such unreported cash receipts were derived mainly from video tape rentals and from sales of video tape rental club memberships. In addition, petitioner operated on a net credit card receipt basis (i.e., reimbursement by the credit card company less expenses for credit card handling) such that the

handling expense deducted in netting petitioner's credit card receipts was also not deposited in petitioner's bank account(s) or reported on its sales tax returns. Petitioner does not dispute the proper taxability of such receipts and, as described infra, petitioner agreed to pay the tax due on such unreported amounts ($8,662.44 on video tape rentals and memberships and $1,093.47 on credit card handling fees).

The auditor also reviewed and disallowed a total of $19,938.49 of petitioner's claimed nontaxable out-of-country sales. This disallowance was based on the fact that said items were picked up in New York State (more specifically, delivered to a recipient at an airport as opposed to delivered out of the United States), and tax due thereon totalled $1,644.92. In addition, the auditor's review of petitioner's fixed asset acquisitions revealed the acquisition of $7,487.83 worth of fixed assets with no proof of tax paid thereon, resulting in a use tax liability of $617.74. In sum, the auditor calculated tax due in the aggregate amount of $12,018.57 on video

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[1]Petitioner's owner and founder testified that the Manufacturers Hanover account, which was used for retail sales receipts, was occasionally also used for the deposit of resale or wholesale receipts. However, in such instances a check was thereafter drawn to allow transfer of such deposit amounts over to petitioner's resale/wholesale bank account. Petitioner explained this practice was followed due to petitioner's owner's unwillingness to carry large sums of cash via subway from petitioner's location in Queens, New York to its resale/wholesale bank in Manhattan.

tape rental club memberships, video tape rentals, out-of-country sales disallowed and fixed asset acquisitions. Petitioner chose to apply for and was granted amnesty with respect to those sales tax quarterly periods eligible for amnesty (the sales tax quarterly periods spanning March 1982 through November 1984).[2] Accordingly, petitioner paid $7,286.88 under amnesty, thus leaving a balance of $4,731.69 as unpaid (since not eligible for amnesty) but not challenged and admitted as due.

As to its gross sales of merchandise, petitioner agreed with the auditor's selection of a test period review covering the months of June, July and August of 1982 and June of 1983. In turn, gross sales as reported by petitioner were not challenged by the auditor except for the unreported cash amounts relating to video tape rentals, rental club memberships and credit card netting amounts, as described above. In addition to the foregoing, the auditor reviewed petitioner's claimed nontaxable sales (i.e., sales for resale, sales to exempt organizations and sales to diplomatic personnel). This review resulted in a finding that $77,931.00 in receipts for items allegedly sold to exempt organizations and diplomats were denied exempt status for lack of properly completed exemption certificates. Furthermore, sales totalling $723,010.00 made to two businesses located in Massachusetts (T. Sack Company, Inc. - Electronic Distributor and Audio and Video Unlimited, Inc. ["TS/AVU"]) were disallowed based on the claim that delivery of merchandise took place in New York State without a properly completed out-of-state resale permit. Finally, the auditor initially disallowed, for lack of properly completed resale certificates, claimed sales for resale to other businesses (other than the Massachusetts businesses) in the aggregate amount of $2,681,489.00. Accordingly, the auditor's initial disallowance totalled $3,482,430.00 in claimed nontaxable sales. In turn, the auditor issued a Statement of Proposed Audit Adjustment (the 30-day letter) seeking tax due in the amount of $294,586.96.

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[2]Under New York's then-effective amnesty program, petitioner was allowed to pay tax due plus interest while avoiding the imposition of penalties with regard thereto.

Subsequent to the above-described initial calculations, the auditor issued third-party confirmation letters to those vendors doing business with petitioner and for whom petitioner presented resale certificates. The auditor's review of the completed resale certificates, plus returned confirmation letters from third parties who had purchased merchandise from petitioner, resulted in a reduction in the amount of initial disallowance. In sum, the auditor allowed the amount of claimed exempt sales (per petitioner's invoices) where the third-party confirmation amount matched the amount claimed by petitioner and where a properly completed resale certificate was submitted.[3] In those instances where the third-party confirmation indicated a different amount purchased than that claimed by petitioner, the auditor disallowed the difference between the two claimed amounts and, in turn, disallowed all claimed amounts if no resale certificate was furnished. In sum, after the additional information was received and reviewed, the remaining dollar amount of claimed but disallowed nontaxable sales receipts was as follows:

Amount	Item
$ 356,509.00	Claimed nontaxable sales to businesses in New York State
41,844.00	Claimed exempt sales to diplomatic personnel and/or exempt organizations
723,010.00	Claimed nontaxable sales to TS/AVU
$1,121,363.00	Total

On April 27, 1987, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $97,244.00 for the period March 1, 1982 through May 31, 1985, plus penalty and interest.[4] As described above, the sum of $4,731.69 in

[3]Of the approximately 100 third-party verification letters sent by the auditor, 92 matched the invoice amount as shown by petitioner, while 8 showed some variance or disallowance (difference in purchase amount per third-party response versus petitioner's invoice amount).

[4]Included in the record are validated consents, the latest of which allowed the assessment in question to be made at any time on or before June 20, 1987.

tax is not challenged or at issue (see, Finding of Fact "5"), therefore leaving $92,512.31 at issue in this proceeding. In addition, the auditor determined to impose penalty since the results of the audit reflect a 100% increase over the amount of tax reported by petitioner, and because of the auditor's belief that petitioner was negligent for failing to obtain and keep proper exemption documents.

Petitioner's business premises in Queens, New York consisted of a street-level store entrance with a display area approximately 10 feet by 30 feet. The display area included counters. In addition, the back section of petitioner's premises included a room for storage, a small office and a bathroom. Petitioner's owner and founder, one Harish Patel, testified that petitioner commenced business in or about March 1982. Initially, petitioner utilized the same type of invoice for both its retail and its wholesale sales, with petitioner's employees allegedly writing "resale" on the resale invoices. Shortly after petitioner commenced operations (approximately in late 1982), however, a switch was made whereby smaller sized invoices were used for retail sales, while the originally-used larger invoices were continued for wholesale (resale) sales. Review of such invoices reveals that the word "resale" is written on many, though not all, of such invoices.

Mr. Patel testified that the hottest-selling item on the market during the years in question was the Sony "Walkman". He explained that his family operated electronics stores in London, England and that as a result he (for petitioner) could obtain large quantities of the Walkman. Mr. Patel explained that petitioner's first import shipment of Walkmans was 1,000 units, noting that petitioner could buy such units at a reasonable price and, after including the cost of air shipment, still resell such items at a profit. Mr. Patel estimated that 90% of petitioner's sales during the audit period were sales of Walkman units.

Mr. Patel admitted that petitioner did not obtain resale certificates from most of its customers at the time of sale, noting simply that he "[d]idn't think about it much" and that "we were more interested in getting merchandise in and out as fast as possible." He noted that he was told by various customers that writing "resale" on the invoice was sufficient proof of resale

for tax purposes. Mr. Patel also claimed that most of his customers had customers of their own waiting for the Walkman units and purchased from petitioner because petitioner was able to supply such units. He described petitioner, in this regard, as being in essence a warehouse for its customers. Mr. Patel pointed out that in England, where his family owned and operated appliance and electronic stores, a value added tax ("VAT") is imposed at both the wholesale and retail levels (i.e., tax is paid at the time of purchase and is subsequently collected at the time of sale, with the difference between such two amounts remitted to the taxing authorities). There are no exemptions and, according to Mr. Patel, the wholesale/retail distinction is not an important distinction.

Mr. Patel testified that his accountant advised petitioner that it would need "some kind of proof that a sale is for resale", but did not mention specifically the need for a resale certificate. Mr. Patel also testified that he had never heard of an out-of-state resale permit. As to resale certificates, petitioner had at the commencement of the audit only approximately four or five such certificates, and obtained the balance of such certificates as the result of efforts undertaken during and after the audit in question.

As reflected on invoices submitted in evidence, petitioner sold approximately 8,000 to 9,000 Walkman units to TS/AVU. Most of the TS/AVU invoices include the name "Robert" or "R. Bund" thereon. According to Mr. Patel, Robert Bund was the buyer representing TS/AVU in its transactions with petitioner.

With regard to the TS/AVU sales, petitioner submitted a letter dated November 15, 1988 under the letterhead of "T. Sack Company, Inc. - Electronics Distributor". This letter, signed by Robert M. Bund and listing T. Sack's address as 185 New Boston Street, Woburn, Massachusetts 01801, provides as follows:

> "To Whom It May Concern:
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> "During 1982, 83, and 84, in my capacity as purchasing agent for T. Sack Company, and Audio Video Unlimited Incorporated (both of Massachusetts), I purchased consumer electronics products from Intercontinental Audio and Video Incorporated.
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> "These goods were purchased for resale and were marketed in New England. If

> you require a specific list of dates and amounts, we can provide it; however, the records are in storage, and it will take some time to retrieve them."

In connection with the hearings held herein, petitioner also pursued proceedings in Massachusetts and eventually secured testimony from Mr. Bund.[5] The transcript of Mr. Bund's testimony reveals, as petitioner essentially admits, that Mr. Bund has no present recall of having transacted business with petitioner on behalf of TS/AVU. However, said testimony does include affirmative statements by Mr. Bund that he was a buyer and trader for TS/AVU, that such entities were wholesalers purchasing

consumer electronic equipment and reselling the same to various chain stores in the greater Boston, Massachusetts area, and that any purchases by TS/AVU from petitioner would have been made for wholesale (i.e., resale) purposes.[6]

With regard to the sales to other businesses, petitioner submitted resale certificates for sales totalling $191,076.00. These certificates lack purchaser signatures. Mr. Patel explained that he obtained the certificates or information thereon from the purchasers in question (after the audit), and that while such purchasers were generally willing to provide such information they were generally unwilling to sign the certificates. Mr. Patel testified that his observations of the purchasers' business premises, as well as advice given to him on visits, indicated and confirmed his initial understanding that these purchasers would be reselling the goods purchased from petitioner. In addition, petitioner submitted business cards for some of these entities indicating that they were wholesale sellers and/or importers.

Review of the invoices submitted for the sales to other businesses reveals sales amounts

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[5]Said testimony was taken under subpoena in Superior Court, Middlesex County, Massachusetts under threat of contempt against Mr. Bund for his prior failure(s) to appear and testify.

[6]Mr. Bund noted, in connection with the potential difficulty in obtaining TS/AVU business records, that "T. Sack" stood for "Trudy Sack", who was Mr. Bund's spouse and with whom Mr. Bund was engaged in less than amicable divorce proceedings.

ranging from a low of $24.00 to a high of $46,083.00 (excluding sales to Mastermind International, Inc. totalling $63,918.00). Many of such invoices do not carry a purchaser address. Finally, with regard to one such purchaser, Mastermind International, Inc., and its repeat purchases totalling $63,918.00, petitioner submitted a letter on Mastermind

letterhead signed by its director of sales. This letter, described as marketing correspondence, is addressed "Dear Buyer" and reveals Mastermind to be a seller or distributor (as opposed to an end user) of the types of products sold by petitioner.

Shortly after the period at issue, petitioner ceased its business operations. According to Mr. Patel, the main reasons for ending business were that (a) petitioner no longer enjoyed circumstances where it (versus other suppliers) was able to obtain large quantities of one very popular item (the "Walkman") and (b) as a result of the subject audit, petitioner refused to make sales without receiving a fully completed resale certificate thereby resulting in many purchasers' outright refusal to buy merchandise from petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from "every retail sale" of tangible personal property. In turn, Tax Law § 1101(b)(4)(i) defines a retail sale as a sale for any purpose "other than . . . for resale as such." Furthermore, Tax Law § 1132(c) sets forth a presumption that all sales receipts are subject to tax "until the contrary is established", and sets the burden of proving the contrary upon the vendor.

B. Against this background, the Division's regulations allow a vendor a means of protection, to wit, the vendor may obtain a properly completed resale certificate from the purchaser. Receiving such a certificate, stating that the property (or service) is being purchased for resale, protects the vendor and places the burden on the purchaser to prove that the receipt is not taxable (see, Matter of Entech Mgt. Services Corp., Tax Appeals Tribunal, June 23, 1994). However, a vendor does not receive protection and is not relieved of its burden of proof when no certificate is obtained, where an incomplete certificate is obtained, or where the vendor has

actual knowledge that a properly completed certificate is false or fraudulent.

C. In this case, petitioner admits it does not have completed certificates for any of the sales remaining in dispute. Hence, petitioner cannot and does not claim reliance on resale certificate protection, and admits it carries the burden of establishing the nontaxability of the sales at issue. By the same token, however, the parties agree that the presumption of taxability created under Tax Law § 1132(c) is not irrebuttable (see, RAC Corp. v. Gallman, 39 AD2d 57, 331 NYS2d 945), and that the failure to obtain properly completed resale certificates does not serve to preclude a finding of nontaxability (see, 20 NYCRR 532.4[13]). Thus, the specific question in this case becomes whether petitioner has provided sufficient evidence to carry its burden of establishing that some or all of the sales in question were sales for resale or were otherwise not subject to tax.

D. The sales and amounts thereof remaining at issue fall into two categories, to wit, sales allegedly made to individuals ($41,844.00), and sales claimed as wholesale (resale) sales ($1,079,519.00). Further, the claimed wholesale sales consist of two subgroups, to wit, sales to TS/AVU ($723,010.00) and sales to other businesses ($356,509.00). These sales categories will be discussed separately as follows:

TS/AVU ($723,010.00)

In light of all of the evidence taken as a whole, petitioner has carried its burden of proving that such sales were, in fact, wholesale sales (sales for resale). First, the volume of goods sold by petitioner to TS/AVU (approximately 9,000 Walkmans) gives rise to a legitimate inference that TS/AVU was not the end user (i.e., retail purchaser/consumer) of such goods. In turn, while petitioner readily admits that any such inference standing alone is insufficient to carry its burden (citing, Savemart v. State Tax Commn., 105 AD2d 1001, 482 NYS2d 150, lv denied 65 NY2d 604, 493 NYS2d 1025), the additional accompanying evidence submitted by petitioner is sufficient, viewed as a whole, to meet petitioner's burden. In this regard, the testimony of Robert Bund established clearly that TS/AVU were solely engaged in wholesale selling (see, tr. of Mass. proceedings at pp. 27, 36, 47), and that Mr. Bund served as buyer/trader for those

entities. This testimony is consistent with the fact that "R. Bund" and "Robert" appear on many of the sales invoices between petitioner and TS/AVU, and is fully consistent with Mr. Patel's testimony that Robert Bund was TS/AVU's representative who dealt with petitioner. In sum, Mr. Bund's testimony established that if TS/AVU purchased from petitioner, it would have been for the purpose of reselling such items and doing so outside of New York State (see, Findings of Fact "14" and "15"). In turn, while the Division points out that Mr. Bund could not recall specific purchases or doing business with petitioner on behalf of TS/AVU, the fact that such business occurred is directly proven by petitioner's invoices. Moreover, the tenor of Mr. Bund's testimony leaves clear the fact that he could not be described as a friendly witness, or even a willing witness given that petitioner had to engage in substantial legal efforts (ultimately leading to a contempt citation) in another jurisdiction (Massachusetts) simply to obtain Mr. Bund's testimony. In short, if not a hostile witness, Mr. Bund was at best a reluctant witness. Finally, given that petitioner is no longer in business, there is no ongoing business relationship between Mr. Bund and petitioner or any other apparent motive for Mr. Bund to be predisposed to testify in a manner favorable to petitioner. Thus, while the sales between petitioner and TS/AVU involved delivery in New York State (as opposed to nontaxable out-of-state shipment) and were not accompanied or supported by Division forms affording protection against the presumption of taxability (i.e., out-of-state resale permit), the evidence produced by petitioner, as described and linked together above, satisfies petitioner's burden of proving that such sales were not retail sales and thus the receipts therefrom should not be subjected to tax.

Sales to Other Businesses ($356,509.00)

Of the $356,509.00 total amount in question, petitioner points to specific items of evidence with regard to $254,994.00 thereof. That is, petitioner notes that for $191,076.00 of such total, resale certificates lacking only purchaser signatures were submitted, and that for $114,088.00 thereof, the related invoices carry the written term "resale". Petitioner also notes that business cards for some of the entities involved were submitted indicating such entities as wholesale sellers and/or importers. Finally, petitioner notes specifically that its sales to

Mastermind International, totalling $63,918.00, must be viewed in light of the letter on Mastermind stationery clearly indicating said entity to be a seller of electronic appliances. Petitioner offers no specific evidence or argument as to the other $101,515.00 (i.e., $356,509.00 less $254,994.00) amount of such sales.

As to the foregoing, the volume of business transacted with Mastermind, Mr. Patel's testimony regarding Mastermind, and significantly the Mastermind letter describing its business, supports the conclusion that petitioner's sales to Mastermind were sales for resale (i.e., that Mastermind was itself a distributor/seller and was not the end user of the products). Hence, such sales should not be subjected to tax. However, for the balance of petitioner's sales to other businesses, the evidence is insufficient to support nontaxability. It is true that there is a certain consistency within the evidence -- Mr. Patel's testimony, use of different-sized invoices, writing resale on such invoices, business cards, etc. Such consistency leaves no sense that petitioner was engaged in any planned manner of avoiding tax. However, unlike the TS/AVU and Mastermind sales, the quantities of merchandise sold generally to these other businesses ranges significantly in dollar amounts and does not clearly support an inference that all of such sales were for resale or clearly establish that the buyers were not likely the end users of such merchandise. Furthermore, and critically, there is no evidence from any of the purchasers showing either their intended use of the goods at the time of purchase or their actual use thereafter. In this regard, the reluctance of the purchasers to sign resale certificates militates against concluding that a sale for resale occurred and highlights the problem here caused by petitioner's recordkeeping failure. Finally, the submission of business cards listing some entities as wholesalers or importers does not establish that such entities were exclusively wholesalers and/or that the goods involved were not purchased for their own use. Accordingly, except for the sales to Mastermind, petitioner has not rebutted the presumption and established that the sales to other businesses were not subject to tax.

Sales to Individuals ($41,844.00)[7]

Of the $41,844.00 amount in question, petitioner supplied invoices for 48 out of the 56 transactions involved, representing $24,999.00 out of such amount. Further, petitioner notes that 27 of such invoices, representing $8,657.00 in sales, carried an alleged diplomatic exempt number and that 15 of such 27 invoices, representing $4,739.00 in sales, were signed by the buyer. Petitioner offered no specific argument as to the $16,845.00 (i.e., $41,844.00 - $24,999.00) balance of such sales.

Similar to the other business sales discussed above, the evidence submitted does not rebut the presumption of taxability or establish the proper nontaxability of the sales. As above, there is no evidence from the purchasers as to their status (exempt organization or diplomatic personnel) sufficient to assure nontaxability, and such status cannot be ascertained from review of the evidence in the record. In addition, some of the invoices lack purchaser addresses. Again as above, the difficulty here flows from petitioner's recordkeeping failures.

E. To summarize, petitioner has established that the sales to TS/AVU (totalling $723,010.00) and to Mastermind (totalling $63,918.00) were sales for resale and thus should not have been subjected to tax. However, the evidence submitted for the balance of the sales in question falls short of overcoming the presumption of taxability (or of establishing nontaxability) and such receipts remain subject to tax. Accordingly, the Division is directed to reduce the amount of disallowed nontaxable sales to $334,435.00

($1,121,363.00 less $723,010.00 less $63,918.00 = $334,435.00), and to recompute and reduce the amount of tax due based thereon.

F. Penalty was appropriately imposed in this case and is sustained. While as the result of post-sale efforts petitioner has proven entitlement to a substantial reduction in the amount of tax due, it remains that petitioner's efforts to obtain requisite proof of nontaxability at the time of

[7]Some (a small portion) of these sales actually appear to be claimed as sales to exempt organizations, with the balance representing claimed sales to diplomats.

sale were minimal at best. Furthermore, while petitioner did not challenge the Division's audit methodology, and hence the question of maintaining adequate records for an audit of gross receipts is not directly presented, it remains that petitioner lacked many records as described (see, Finding of Fact "2"), including specifically proof with respect to nearly $17,000.00 in claimed exempt sales to individuals and $101,515.00 in sales to other businesses. Further, it is noted that petitioner's method of accounting resulted in certain sales receipts not being included on its sales tax returns as described (see, Finding of Fact "4"). Accordingly, the imposition of penalty is sustained.

G. The petition of Intercontinental Audio & Video, Inc. is granted to the extent indicated in Conclusion of Law "E", but is otherwise denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 27, 1987, as recomputed and reduced in accordance herewith, is sustained.

DATED: Troy, New York
December 8, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE