

SALES AND USE TAXESPETITION FOR REDETERMINATION

Hearing Officer: Warren W. Mangels

For petitioner: \_\_\_\_\_

Business: Retail catalog showrooms selling general merchandise

Tax determined 8-27-78 to 10-31-81	\$403,696.88
Credit concurred in	<u>16,475.04</u>
Protested	<u>\$420,171.92</u>

The protested tax is measured by \$6,754,415 representing the cost to petitioner of catalogues and mini catalogues distributed door to door to California donee-recipients.

Issues

1. Whether the imposition of use tax upon certain of petitioner's catalogues distributed in California violated the Commerce Clause of the United States Constitution.
2. Whether petitioner made a taxable use of certain catalogues it owned where it hired delivery companies which distributed petitioner's catalogues door to door to California donee-recipients.
3. Whether petitioner's assertion that the use tax was not imposed upon identified transactions in the prior audits of its predecessor establishes that the imposition of the use tax liability in the current audit is an unconstitutional retroactive tax.
4. Whether the imposition of the use tax upon the distribution of the catalogues represents an inequitable double tax imposed upon petitioner.

Petitioner's Contentions

1. Application of the California use tax to the use of the catalogues in question violates the Commerce Clause of the United States Constitution.
2. Petitioner's activities in California with respect to the catalogues in question were insufficient to constitute a taxable use.
3. The determination of use tax liability for the period in question is an unconstitutional retroactive tax.
4. Imposition of the use tax in question results in an inequitable double tax imposed upon petitioner.

## Staff Analysis

1. Petitioner operates 55 stores in California and maintains its California business office in \_\_\_\_\_, California.

Catalogues for its stores are printed by an out-of-state printer and the catalogues at issue here are those that are distributed door to door to California donee-recipients by independent delivery companies hired by petitioner. Petitioner lets the contractors arrange with the printer for deliveries via contract or common carriers to warehouses, designated by the delivery companies, from which the door to door deliveries are made. The catalogues owned by petitioner, are shipped in bulk and are not pre-addressed to the California donee-recipients. The independent delivery companies are agents of petitioner. Title to these catalogues is still vested in petitioner while they are located at the various designated California warehouses. At this point the interstate commerce portion of the transactions is over. Following the interstate shipment the petitioner, through its agents, then performs the local intrastate act of transferring title to the donees.

The imposition of tax upon this use of the property after it has been brought into the state does not violate the Commerce Clause of the United States Constitution.

2. Section 6009 of the Revenue and Taxation Code provides that “use” includes the exercise of any right or power over tangible personal property incident to the ownership of that property. With respect to the catalogues at issue, the transfer of title to them in California by petitioner to the donee-recipients constitutes such a “use”.

3. Petitioner argues that it followed the same operating and reporting procedures as its predecessor, \_\_\_\_\_, and that an audit of that company by the Board in 1976 resulted no use tax liability. Petitioner has not shown that such an identical activity existed for its predecessor, let alone that it was not regarded as taxable in prior audits. Prior audits of that company have been purged from Board files, however, even if an area of tax has been overlooked in the audit of one taxpayer, this does not provide a legal basis for stopping the Board from collecting those taxes that are properly due.

4. Petitioner’s alternative position is that its cost of the catalogues is incorporated as an overhead cost into the ultimate sales price of petitioner’s merchandise and, therefore, California collects a double tax, once on the catalogues and again on the cost price of the catalogues included in the sales price of its merchandise.

The fact that the catalogue costs enter into the determination of the ultimate sales price of the retailed merchandise is not a basis for not imposing the use tax on catalogues. The cost of many items used by retailers to manufacture, market, sell, and deliver products enter into the calculation of the selling price of articles actually sold but unless such items become physically incorporated into a part of the property being sold the use tax applies.

No payments have been received.