STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SPENCER GIFTS, INC.	:	DECISION
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1978 through February 28, 1983.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 15, 1988 with respect to a petition of Spencer Gifts, Inc., 1050 Black Horse Pike, Atlantic City, New Jersey 08411 for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through February 2, 1983 (File No. 800741). Petitioner appeared by Hutton and Solomon (Stephen L. Solomon, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

The petitioner filed a brief on exception. The Division did not file a brief on exception, but relies solely on the proposed findings of fact and conclusions of law contained in its notice of exception. Oral argument at the request of the Division was heard on March 21, 1989.

After reviewing the entire record the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether charges designated by petitioner as "postage and handling" were costs of transportation and thus not subject to sales tax.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are repeated below, except that we modify finding of fact "8" as indicated below.

Petitioner, Spencer Gifts, Inc. ("Spencer"), operates a retail sales business. Its mail order division sells gifts through mail order. In recent years, Spencer has mailed out approximately 100 million catalogues and filled approximately eight million orders per year.

On July 6, 1983, the Division of Taxation ("Division") issued to Spencer two notices of determination and demands for payment of sales and use taxes due. One notice was for the period September 1, 1978 throughFebruary 28, 1982, and it assessed tax due of $370,106.45 plus penalty and interest. The second notice was for the period March 1, 1982 through February 28, 1983, and it assessed tax due of $140,845.11 plus penalty and interest.

The tax assessments resulted from a test period audit of Spencer's records. As a result of the audit, the Division assessed tax in three areas. Sales tax of $269,086.60 was assessed based upon the Division's determination of additional unreported sales. Sales tax of $11,474.38 was assessed based upon Spencer's failure to pay tax due on its own purchases of taxable fixed assets. Finally, the Division assessed sales tax of $230,390.58 based upon its determination that charges called "postage and handling" on Spencer's mail order forms were subject to sales tax.

Following a Tax Appeals Bureau conference, the Division agreed to reduce to $71,639.57 that portion of the assessment based upon additional unreported sales. Spencer conceded tax due of $11,474.38 on its purchase of fixed assets. The Division agreed to abate penalties above the minimum on the entire assessment. Petitioner executed a withdrawal of petition as to those items agreed to by the parties; therefore, the only area before the Division of Tax Appeals is the Division's imposition of sales tax on charges denominated "postage and handling".

During the audit period, Spencer used a mail order form on which the customer calculated a charge for postage and handling. The customer was instructed to calculate this charge by referring to a postage chart. The chart declared: "Avoid delay by including postage and handling charges with orders. These small charges represent only part of total costs. We pay the rest."

The amount charged by Spencer for postage and handling was based upon the total purchase price of an order. In October 1978, customers were charged 85 cents for orders up to $3.00, $1.15 for orders from $3.01 to $5.00, etc. The maximum charge was $2.85.

The audit at issue consisted of a test of orders received by Spencer during a three-day period in July 1981. In those three days, Spencer received approximately 10,000 orders, of which 472 orders were from New York residents. The auditor prepared a listing of the New York orders, showing that each order contained a separately stated charge for postage and handling. The charges were no less than 95 cents nor more than $3.15. The Division did not perform independent analyses to identify those tasks which might be included under the term "handling" or to determine the relationship between the amounts charged for postage and handling and the costs incurred by Spencer in mailing or shipping orders.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> The amounts Spencer charged its customers for postage and handling were established by its marketing division based on the prevailing rates charged in the mail order industry. The charges were imposed to enable Spencer to recover its own costs in transporting merchandise from its warehouses to the customer. The charges do not cover costs for handling the merchandise.

Spencer shipped its merchandise to its customers by United Parcel Service or United States mail. In both cases, the charge to Spencer was determined by the distance shipped and the weight and size of the package shipped. In a particular case, the amount Spencer charged for postage and handling might be more or less than the actual cost to Spencer of shipping a particular package. In the aggregate, amounts Spencer received for postage and handling did not cover the cost to Spencer of shipping by United States mail or private carrier.

The Division performed no analysis to determine whether Spencer's charges for postage and handling were reasonable, and it took no position on this issue.

Spencer has been in the mail order business since 1947. It used the term "postage and handling" on its mail order form from that time until sometime in 1986. After the audit at issue,

Spencer revised its order form by replacing the term "postage and handling" with the term "transportation costs".

OPINION

The Administrative Law Judge determined that the charge denoted as "postage and handling" on petitioner's mail order form was a charge for delivery of merchandise from petitioner's warehouse to the purchaser; that it was a cost of transportation excluded from the definition of receipt as contained in section 1101(b)(3) of the Tax Law. The Administrative Law Judge further concluded that the charge qualified as a cost of transportation under the Division's regulations, 20 NYCRR 525.5(g)(2), namely, that the charge was for the delivery of the tangible personal property to the purchaser, that the charge was separately stated and that the charges were reasonably related to the prevailing established rates.

The Division, in its notice of exception, asserts that "[T]he charges at issue herein were not separately stated within the meaning and intent of the statute and regulations . . ."; that "[i]n determining the applicability of an exclusion, it is the form of the transaction, not the substance which controls. . ." (cites omitted); and that "[W]here an exemption is claimed to be applicable to an otherwise taxable transaction, the burden is on the taxpayer to show a provision of law plainly giving the exemption" (cites omitted). The Division asserts that the petitioner failed to meet the burden of proof imposed upon it.

We affirm the determination of the Administrative Law Judge.

Tax Law section 1105(a) provides for a tax upon:

> "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

The term "receipt" is defined in relevant part by Tax Law section 1101(b)(3) as:

> "The amount of the sale price of any property .. excluding the cost of transportation of tangible personal property sold at retail where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser."

The regulations, 20 NYCRR 526.5(g), adopted by the Division of Taxation provide:

> "(1) The cost of transportation of tangible personal property, sold at retail, which is separately stated in the written contract, if

> any, and on the bill rendered to the purchaser is excluded from the receipts subject to the tax.
>
> "(2) To qualify for the exclusion transportation costs must be for the delivery of the tangible personal property to the purchaser. Any charge made to a retail purchaser, whether labeled transportation, handling or some other designation, which represents the cost of transportation between a supplier, manufacturer, warehouse, or catalog vendor's place of business constitutes part of the receipt subject to tax.
>
> "(3) Transportation charges shall be deemed to be separately stated if they can be computed from information appearing on the bill.
>
> "(4) To qualify for the exclusion, transportation charges must be reasonable in relation to prevailing established rates. The bureau may establish reasonable charges for an industry, and reduce the exclusion for excessive transportation charges." (Emphasis added.)

We deal first with the Division's assertion that the petitioner did not meet its burden of proof to show that the charges at issue were for transportation costs.

The test imposed by the Division's regulations is whether the charge imposed by the vendor is for the delivery of the tangible personal property to the purchaser.

Petitioner here offered uncontroverted testimony that the term "postage and handling" as used on its mail order form denoted a charge for delivery of merchandise from petitioner's warehouse to the purchaser; that the charges do not cover costs for handling the merchandise; and that in the case of an individual order the charge for postage and handling might be more or less than the actual cost to petitioner of mailing or shipping, however, in the aggregate, the amounts collected by petitioner for postage and handling were less than its overall postage and shipping costs.

Petitioner maintains that these facts establish that its entire charge was for delivery of merchandise to the purchaser and that none of the charge was for handling, notwithstanding its designation as a charge for "postage and handling." Petitioner pointed out that in Matter of Linen World (State Tax Commn., January 16, 1987) relied upon by the Division, a similar result was reached by the former State Tax Commission which concluded that petitioner's fee was entirely

for transportation of tangible personal property sold at retail and was separately stated on the bill rendered to the customer, notwithstanding its designation as a fee for "shipping/handling."

Further, petitioner distinguished its billing practices from those at issue in Matter of Lillian Vernon (State Tax Commn., November 22, 1982), also relied upon by the Division. In Vernon, the Commission found that 40 percent of the charge denominated as postage and handling constituted the handling charge and accordingly found the total charge for postage and handling subject to tax. Here, no such assertion was made by the Division, nor does the record support such a conclusion. The Division offers no proof that the charges by the vendor were for anything other than for transportation of the tangible personal property to the purchaser. We find the fact that the charges here involved did not even cover the costs to the petitioner of shipping by United States mail or private carrier persuasive in determining that they were for transportation. Under the facts and circumstances we can only conclude that petitioner sustained its burden of proof that the charge for "postage and handling" was for transportation costs.

We deal next with the Division's assertion that in determining the applicability of an exclusion, it is the form of the transaction, not the substance which controls. In this case, we disagree.

The Division's position is contrary to its own regulations which recognize that the terminology employed by the vendor is not necessarily determinative of the substantive nature of the charge imposed by the vendor. More particularly, 20 NYCRR 526.5(g)(2) provides, in part, that "Any charge made to a retail purchaser, whether labeled transportation, handling or some other designation, which represents the cost of transportation, between a supplier, manufacturer, warehouse, or catalog or other distribution point and the vendor's place of business constitutes part of the receipt subject to tax." To prevent the abuses which might result from mislabeling costs as "transportation", the regulations allow the Division to ". . . establish reasonable charges for an industry, and reduce the exclusion for excessive transportation charges."

Again, we note the petitioner here offered uncontroverted testimony that in the aggregate the amounts it collected for postage and handling were less than its overall postage and shipping

costs. The Division's assertion that the total amount is taxable solely because of the "label" affixed to it by petitioner is without merit.

We deal next with the Division's assertion that the charges at issue were not separately stated within the meaning and intent of the statute.

The crux of the Division's argument is that the term "postage and handling" as used by the petitioner denotes two separate charges: one for postage and one for handling. It concedes that a charge for postage would be considered a transportation cost and thus excluded from the operation of the sales tax law. It deems handling charges to be taxable but offers no definition of handling to support this position in this case, even though the term is used by the Division in its own regulations (see, 20 NYCRR 526.5[2]).

Clearly here the order form used by the petitioner for its mail order business required the purchaser to insert a charge for "postage and handling" in computing the cost of the item to be purchased. The charge was separately stated on the form. The dollar amount was determined by the purchaser from a chart entitled "postage" on the order form. The accompanying language to the chart instructed the purchaser that the cost was for "postage and handling" which is less than the cost to the petitioner for actual postage.

Under the circumstances we conclude petitioner complied with the Division's regulations. We note the same conclusion was reached by the Tax Commission in Matter of Linen World (supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Spencer Gifts, Inc. is granted to the extent indicated in conclusions of law "C", "D" and "E" of the Administrative Law Judge's determination, but except as so granted, the petition is in all other respects denied; and

4. The notices of determination issued on July 6, 1983 shall be modified accordingly.

DATED: Troy, New York
July 27, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner