STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LLOYD MANSFIELD CO., INC.	:	DECISION DTA No. 809798
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 June 1, 1986 through February 28, 1989.	:	

Petitioner Lloyd Mansfield Co., Inc., Wolf, Mansfield & Bolling (as Successor), 40 Fountain Plaza, Buffalo, New York 14202, filed an exception to the determination of the Administrative Law Judge issued on April 20, 1994. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau and Michel P. Cassier, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was heard on January 19, 1995, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner was relieved from its duty to collect sales and use taxes on sales of promotional materials to Fisher Price by virtue of its having obtained a blanket exempt use certificate from Fisher Price.

II. Whether, based upon the Division of Taxation's overlapping audit policy, petitioner was entitled to an adjustment based upon the Division of Taxation's audit of Fisher Price.

III. Whether, due to the fact that the Conciliation Order states that the period at issue is December 1, 1988 through February 28, 1989, the assessment must be reduced to $306.11 which is the amount assessed for such quarter.

IV. Whether petitioner is entitled to a refund of tax and/or interest paid on its sales to Fisher Price.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Pursuant to a field audit which commenced in October 1988, the Division of Taxation ("Division"), on November 24, 1989, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Lloyd Mansfield Co., Inc. ("Lloyd Mansfield") assessing total tax due of $80,454.99, plus penalty and interest, for a total amount due of $123,428.91 for the period June 1, 1986 through February 28, 1989.[1]

Prior to the issuance of the notice of determination, consents extending the period of limitation for assessment of sales and use taxes were executed by the parties whereby it was agreed that taxes due for the period March 1, 1986 through August 31, 1986 could be assessed at any time on or before December 20, 1989.

We modify the Administrative Law Judge's finding of fact "3" to read as follows:

> By Conciliation Order (CMS No. 102270) dated April 26, 1991 (the conciliation conference was held on July 18, 1990), total tax due was reduced to $73,436.03, plus interest computed at the applicable rate. Penalties previously assessed were cancelled.
>
> The caption of the Conciliation Order indicated that the year or period at issue was "12/1/88-2/28/89." While tax due was recomputed

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[1]Lloyd Mansfield was sold in 1986 and, subsequently, the company name was changed to Wolf, Mansfield, Bolling. Although, at the time of the issuance of the assessment, the name of the company was Wolf, Mansfield, Bolling, the notice of determination was issued in the name of Lloyd Mansfield and the parties agree that, for purposes of this proceeding, petitioner shall be referred to as Lloyd Mansfield.

> to $73,436.03, petitioner points out that on the notice of determination, total tax due for the quarter ended February 28, 1989 was $306.11.
>
> At the hearing, an additional reduction was agreed to by the Division, i.e., Lloyd Mansfield was entitled to a credit in the amount of $8,977.84 based upon an overlapping audit of Kittinger Company.
>
> It was also agreed by the parties that Lloyd Mansfield made a payment of $4,843.15 on November 8, 1989 and that another payment of $59,897.76 was made on February 27, 1990 by Lloyd Mansfield to the Division. Accordingly, it was agreed (see, Tr., p. 14) that the total remaining balance of the amount asserted by the statutory notice which had not yet been paid by Lloyd Mansfield was $15,187.36 which represents interest computed until January 15, 1993 on the Fisher Price transactions (see, Exhibit "F").[2]

Lloyd Mansfield is an advertising agency which is located in Buffalo, New York. Most of the additional tax assessed resulted from the sale of advertising materials by Lloyd Mansfield to Fisher Price. Lloyd Mansfield began doing work for Fisher Price in July 1987 shortly after Thomas Bolling, Lloyd Mansfield's president, joined the company. Mr. Bolling was Lloyd

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[2] The Administrative Law Judge's finding of fact "3" read as follows:

> "By Conciliation Order (CMS No. 102270) dated April 26, 1991 (the conciliation conference was held on July 18, 1990), total tax due was reduced to $73,436.03, plus interest computed at the applicable rate. Penalties previously assessed were cancelled.*
>
> "At the hearing, an additional reduction was agreed to by the Division, i.e., Lloyd Mansfield was entitled to a credit in the amount of $8,977.84 based upon an overlapping audit of Kittinger Company.
>
> "It was also agreed by the parties that Lloyd Mansfield made a payment of $4,843.15 on November 8, 1989 and that another payment of $59,897.76 was made on February 27, 1990. Accordingly, it was agreed (see, Tr., p. 14) that the total amount remaining at issue was $15,187.36 which represents interest computed until January 15, 1993 (see, Exhibit "F").
>
> *It must be noted that the Conciliation Order, in the caption thereof, indicated that the year or period at issue was "12/1/88-2/28/89." While tax due was recomputed to $73,436.03, petitioner points out that on the notice of determination, total tax due for the quarter ending February 28, 1989 was $306.11."

We modified this finding of fact to reflect the record in more detail.

Mansfield's primary contact with Fisher Price since he had previously done work for Fisher Price while employed at Faller, Klenk & Quinlan Advertising.

Mr. Bolling testified that, while employed at Faller, Klenk & Quinlan, he had asked for and received blanket exempt use certificates from Fisher Price and that once Lloyd Mansfield obtained the Fisher Price advertising account, he made the same request from Fisher Price.

An affidavit of Gerald Magoffin, Jr., Supervisor of Taxes for Fisher Price (the affidavit was sworn to on January 13, 1993), stated that it was the intent of Fisher Price that the original exempt use certificate issued September 16, 1987 cover all sales to Fisher Price by Lloyd Mansfield occurring on or after July 1, 1987. However, the "Single Purchase Certificate" box had been erroneously checked due to an administrative oversight. When the oversight was brought to its attention, Fisher Price issued a corrected certificate, dated August 8, 1988, which indicated on its face that the wrong box had been mistakenly checked on the original certificate and that this corrected certificate was intended to remedy that error and apply to all sales occurring on or after July 1, 1987.

Subsequently, on or about October 6, 1989, Fisher Price learned that the corrected certificate may have also contained some defects and that the Division was questioning the intent of the parties as to the scope of the exemption claimed on the original certificate. Therefore, on October 6, 1989, Fisher Price issued a third certificate which was pre-dated September 16, 1987. This certificate indicated that it was a corrected certificate and should be substituted for the defective certificate originally issued on September 16, 1987 (the original certificate).

Mr. Magoffin's affidavit stated, in paragraph 5 thereof, as follows:

> "It was the intent of Fisher-Price, and our understanding with Lloyd Mansfield, that the original Certificate was to apply to all purchases made by Fisher-Price after July 1, 1987 -- i.e., that the Original Certificate was to be a blanket certificate applicable to all purchases made on or after July 1, 1987."

Lloyd Mansfield's books and records were deemed adequate and a detailed audit was, therefore, performed. Upon audit, it was found that Lloyd Mansfield had in its possession two

exempt certificates. Each was dated September 16, 1987 and was signed by Agnes Meyer, Senior Financial Accountant, each was attached to an individual Wolf, Mansfield, Bolling invoice to Fisher Price dated August 10, 1987 (one invoice was in the amount of $241.02; the other was in the amount of $8,851.50), and each certificate indicated that it was a single purchase certificate rather than a blanket certificate.

When the Division's auditor pointed out the fact that the certificates were single purchase certificates (each was accepted for the individual invoice to which it was attached), Lloyd Mansfield obtained a blanket certificate, again signed by Agnes Meyer, Senior Financial Accountant, which was dated August 8, 1988. This exempt use certificate stated thereon that it was intended to apply to purchases beginning July 1, 1987.

Upon receipt of this blanket certificate, the Division's auditor stated that since it was dated August 8, 1988, it would be accepted for sales by Lloyd Mansfield to Fisher Price occurring 90 days prior to August 8, 1988 and for all sales subsequent to that date.

Thereafter, on November 10, 1989, the Division received another exempt use certificate (blanket certificate) signed by Gerald Magoffin, Jr., Supervisor - Taxes, which was dated September 16, 1987 with a notation that "[t]his is a corrected certificate and should be substituted for the defective certificate originally isued [sic] by us on 9/6/87."[3]

The Division advised Lloyd Mansfield that the single purchase certificates dated September 16, 1987 and the blanket certificate dated August 8, 1988 were not defective and, accordingly, that the blanket certificate received November 10, 1989 would not be accepted as a substitute for either the single purchase certificates or the previous blanket certificate.

An audit of Fisher Price was performed by the Division for the period March 1, 1986

[3]As previously pointed out above, the date set forth on the single purchase certificates was September 16, 1987, not September 6, 1987.

through May 31, 1989.[4] The auditor who performed the Fisher Price audit appeared and testified at the hearing held herein.

The auditor stated that the Fisher Price audit was a computer-assisted audit, i.e., a statistical sampling was done which included purchases from Lloyd Mansfield. He further stated that, at the time of the audit, it was his understanding that Lloyd Mansfield was going to be assessed for these sales to Fisher Price.

The auditor obtained a schedule of tax due on sales from Lloyd Mansfield to Fisher Price (Exhibit "I") from the auditor who performed the Lloyd Mansfield audit. The schedule indicated taxable sales of $832,925.00, with tax due thereon, at 8%, of $66,634.00. Various invoices were crossed out on the schedule as was the total tax due figure of $66,634.00 and the amount of $59,897.76 was handwritten on the schedule as total additional tax due. The Fisher Price auditor was not certain as to the reason for these revisions.[5]

In order to determine whether Fisher Price had paid this tax, the auditor then obtained a Wolf, Mansfield, Bolling invoice to Fisher Price dated February 22, 1990 in the amount of $59,897.76 which stated thereon that it was for New York State sales taxes on invoices included for the audit period August 1, 1986 through February 28, 1989. The auditor also obtained an interoffice memorandum of Fisher Price requesting that a check for sales taxes in the amount of $59,897.76 be issued to Wolf, Mansfield, Bolling and a copy of the check in that amount dated February 23, 1990 (these documents are also contained in Exhibit "I"). As indicated above, Lloyd Mansfield paid the sum of $59,897.76 on February 27, 1990.

The Fisher Price auditor stated that, for the sales tax quarter ended May 31, 1990, Fisher Price claimed a credit of $48,149.34 relating to the tax of $59,897.76 which it had paid to Lloyd

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[4]The affidavit of Gerald Magoffin, Jr., Tax Supervisor of Fisher Price (Exhibit "4"), indicates that the Fisher Price audit was commenced on or about July 6, 1989. There is no evidence in the record as to the dates on which assessments for additional tax due were issued.

[5]Neither of the auditors who performed the Lloyd Mansfield audit were present at the hearing. One of the auditors had retired and the other was deceased.

Mansfield on its purchases from the advertising company. Of the total credit claimed, $44,353.27 was allowed and the balance ($3,796.07) was denied.

The Fisher Price auditor testified (Tr., p. 158) that, as of the date on which the Lloyd Mansfield audit was concluded, the Fisher Price audit was still ongoing. He further testified (Tr., p. 169) that in computing the Fisher Price assessment, he did not include the $59,897.76 already paid to Lloyd Mansfield. There is no other evidence in the record regarding the date on which the Fisher Price audit was concluded (Exhibit "J" is a memorandum dated January 3, 1992 which refers to the claim; however, it does not indicate the date on which the audit was concluded).

A letter dated January 13, 1993 from Gerald Magoffin, Jr., Supervisor of Taxes, to Thomas J. Bolling stated as follows:

> "This letter confirms the following:
> "1. Fisher-Price Division of The Quaker Oats Company (F-P) has been audited by the Sales and Use Tax Division of the New York State Department of Taxation and Finance for tax periods beginning March 1, 1986 and ending June 28, 1991.
>
> "2. We have concluded the audit and satisfied our liability with the State resulting from that audit. No outstanding balance remains unpaid.
>
> "3. There was no agreement to exclude purchases from your company as part of our audit.
>
> "4. The F-P Sales Tax Identification Number was NY7379597C. The Quaker Oats Company's Federal Employer ID Number is 36-1655315."

An affidavit from Mr. Magoffin, also dated January 13, 1993, stated, in pertinent part, as follows:

> "6. On or about July 6, 1989, the Audit Division commenced a sales and use tax audit of Fisher-Price for the period beginning March 1, 1986 and ending May 31, 1989.
>
> "7. The Division's audit of Fisher-Price covered all purchases made by Fisher-Price, including purchases from Lloyd Mansfield.
>
> "8. Fisher-Price was audited for all taxable purchases, received credit for taxes previously paid, and reached agreement with the Audit Division concerning the balance due.

"9. No agreement existed between Fisher-Price and the Audit Division to exclude purchases from Lloyd Mansfield from those purchases examined by the Audit Division on its audit of Fisher-Price.

"10. On September 13, 1991, Fisher-Price agreed to the final audit findings, and paid the outstanding liability asserted by the Audit Division, thereby fully satisfying its liability to New York State for all sales and use taxes, penalties and interest for the audit periods."

Lloyd Mansfield's president, Thomas Bolling, testified that it was not until the audit that he became aware that the exempt use certificates received from Fisher Price were single use certificates rather than blanket certificates since it had been his practice previously (see, above) to request a blanket certificate and since he had again made such a request after joining Wolf, Mansfield, Bolling. A letter from Gerald Magoffin, Jr., Supervisor of Taxes, was produced (Exhibit "2") to corroborate Mr. Bolling's testimony.

Thomas Bolling testified that certain invoices (Exhibit "5") were not subject to sales or use taxes. These invoices were as follows (Ref. No. refers to Division's schedule - Exhibit "I"):

Date	Invoice No.	Ref. No.	Amount	Reason Nontaxable
10-26-87	10454	59	$15,000.00	Partial bill - no product delivered
9-21-87	10361	41	10,505.00	Envelopes shipped to Dallas
11-9-87	10494	64	23,700.24	Progress bill - no product delivered
11-17-87	10507	66	10,150.07	Progress bill - no product delivered
9-21-87	10358	38	10,000.00	Progress bill - no product delivered
10-26-87	10445	54	22,292.80	Progress bill - no product delivered
1-22-88	10685	125	16,389.60	Shipped to show in Dallas
1-29-88	10707	132	22,267.91	Produced and stored in Toronto
11-17-87	10510	69	12,423.48	Progress bill - no product delivered
2-29-88	10790	138	18,148.00	Progress bill - no product delivered
2-29-88	10791	139	18,148.00	Second progress bill - same project as Invoice No. 10790
11-17-87	10511	70	12,361.61	For Juvenile Products Show in Dallas
11-18-87	10515	74	78,511.00	Final bill for catalog shipped to Juvenile Products Show in Dallas
11-18-87	10516	75	16,372.02	VIP teaser mailer - Federal Expressed throughout U.S.
11-18-87	10517	76	11,040.40	No product - job cancelled
2-29-88	10808	154	11,828.69	Final bill (see Invoice No. 10494) shipped to pediatricians & car seat customers
11-24-87	10521	79	10,179.80	Progress bill
4-18-88	10961	175	11,902.52	Shipped to Eastman Kodak
4-18-88	10964	176	25,068.23	Shipped to Data Central and then to children

10-1-87	10366	45	12,000.00	Shipped to Juvenile Products Show in Dallas
12-31-87	10595	90	26,662.50	Juvenile Products Catalog - Dallas
10-26-87	10452	58	15,261.86	Affixed to furniture - shipped
10-26-87	10455	60	33,702.96	Shipped to Dallas
1-19-88	10671	120	16,331.88	Shipped throughout U.S.
1-19-88	10675	174	17,016.81	Shipped throughout U.S.

As indicated above, the Conciliation Order issued by the Division's Bureau of Conciliation and Mediation Services ("BCMS") indicated that the period at issue was December 1, 1988 through February 28, 1989, while the notice of determination stated that the period at issue was June 1, 1986 through February 28, 1989.

Pursuant to a request made by the Division at the hearing held on May 11, 1993, the hearing record was held open for the submission of an affidavit from William Proefrock, Conciliation Conferee. This affidavit stated that, upon his review of the BCMS file (at the request of the Division's representative), he discovered a typographical error relating to the period at issue on the 5520 Information Sheet which was carried forward on some of the subsequent standardized documents (some of which were attached to the affidavit), most notably, the Conciliation Order. The affidavit pointed out, however, that the conferee's notes from the conference held on July 18, 1990 indicated that he noted in writing and also made a verbal statement to the parties regarding the period in question (6/1/86-2/28/89). In addition, certain other correspondence (a letter from the conferee to petitioner's accounting manager, a consent form and an interest calculation) contained the correct audit period. The affidavit also stated, in paragraph 13 thereof, as follows:

> "At no time did I intend to limit the periods in question to 12/1/88-2/28/89. To do so would have been to deny the Petitioner the hearing they [sic] requested. An initial error was made in the 5520 data sheet which was carried through those documents which were issued pro-forma. The Petitioner was aware of the period under discussion, 6/31/86 [sic]-2/28/89, as all of the documents indicate. If I had noticed the error in the caption of the Order, I would have corrected it and had our Word Processing Unit prepare a corrected 5520 Information Sheet."

OPINION

Section 1132(c) of the Tax Law creates a presumption that the receipts from the retail sale of tangible personal property or services are taxable and places the burden of proving that the receipt is not taxable on the vendor or the customer. The statute shifts the burden of proving that a receipt is not taxable solely to the customer if the "vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe" (Tax Law § 1132[c]). Section 1132(c) allows for the correction of a timely received exemption certificate by providing that where such a certificate "is deficient in some material manner, and where such deficiency is thereafter removed, the receipt of such resale or exemption certificate . . . shall be deemed to have satisfied all of the requirements" of a correctly completed certificate.

In its regulations at 20 NYCRR 532.4(b)(4)(ii)-(iv), the Division has explained this statute as follows:

> "(ii) Where an exemption certificate or document timely received by the vendor is found to be deficient in its completion, the vendor will be allowed a reasonable period of time prior to the conclusion of the audit to obtain the necessary information to correct the deficiency. When the deficient certificate or document is corrected within such time allowed, the exemption certificate will be accepted as having been properly completed and received by the vendor within 90 days of the transaction and is deemed to satisfy the vendor's burden of proof as to the taxability of the particular transaction.
>
> "(iii) Requested exemption certificates and documents which are not submitted to the Department within the allotted time period and exemption certificates and documents determined to be deficient which are not corrected within the additionally allotted time period prior to the conclusion of the audit are deemed not to have been properly completed and timely received by the vendor. Any such exemption certificates or documents later presented by the vendor will not, in and of themselves, be considered sufficient to satisfy the vendor's burden of proof concerning the taxability of the subject transactions.
>
> "(iv) Exemption certificates or documents not received by the vendor within 90 days after the delivery of the property or the rendition of the service will likewise not, in and of themselves, be considered as satisfying the vendor's burden of proof concerning the taxability of the subject transaction."

The regulations at 20 NYCRR 532.4(b)(2)(ii) provide that a certificate "is considered to be properly completed when it contains the:

"(a) date prepared;

"(b) name and address of the purchaser;

"(c) name and address of the vendor;

"(d) identification number of the purchaser as shown on its certificate of authority, or exempt organization number as shown on the exempt organization certificate, if any such numbers are required by the certificate or document. The farmer's exemption certificate does not have such a number. Also, the exemption certificate for tractors, trailers or semitrailers does not require the number of the purchaser's certificate of authority in all instances. However, if the purchaser completing an exemption certificate for tractors, trailers or semitrailers does not have a certificate of authority, such exemption certificate must show the purchaser's highway use tax identification number unless the purchaser is a certificated household goods mover, in which instance it must show its Interstate Commerce Commission or New York State Department of Transportation identification number. Absent such identifying numbers, the exemption certificate for tractors, trailers or semitrailers is incomplete.

"(e) signature of the purchaser or the purchaser's authorized representative; and

"(f) any other information required to be completed on the particular certificate or document."

The Administrative Law Judge determined that the single purchase certificates dated September 16, 1987 and the blanket certificate dated August 8, 1988 were properly completed within the meaning of this regulation because all of the information required by the regulation was properly set forth. Therefore, the Administrative Law Judge concluded that these certificates were not defective and could not be corrected by the blanket certificate issued by Fisher Price on October 6, 1989 which was dated September 16, 1987.

Petitioner argues that Tax Law § 1132(c) allows all "deficiencies of a material manner" to be cured and that "[t]he Division's contrived circumscription of this provision of the law based on its own regulation--limiting it to situations where the form is blank--leads to absurd results" (Petitioner's exception, p. 25).

In response, the Division argues that to be correctable a certificate must be deficient in its completion, that deficient means "lacking in some necessary quality or element" and that a certificate that is complete on its face is not deficient (Division's brief in opposition, p. 16, citing Webster's Ninth New Collegiate Dictionary).

We reverse the determination of the Administrative Law Judge on this issue.

We conclude that the Administrative Law Judge and the Division are seeking to impose a crabbed, hypertechnical and impractical meaning on the statute, the regulation and on the meaning of "deficient." It is undisputed that Fisher Price intended to give petitioner a blanket exempt use certificate to cover all sales to Fisher Price on or after July 1, 1987. Therefore, it is clear to us that the certificates dated September 16, 1987 and August 8, 1988 were lacking in a necessary quality -- the quality of reflecting the purchaser's intention. Accordingly, we conclude that the September 16, 1987 certificates, as well as the certificate dated August 8, 1988, were deficient in their completion, were able to be corrected and were in fact corrected by the certificate issued on October 6, 1989 bearing the date of September 16, 1987.

The Administrative Law Judge's determination suggests, and the Division's brief in opposition contends, that a timely filed blanket exempt use certificate could not protect petitioner from liability for the tax at issue because during the period covered by this audit it was improper to accept exemption certificates for the sale of promotional materials. Instead, the Division contends that petitioner was required to collect and pay over the tax and then file a claim for a credit or a refund.

We see no merit to this contention.

The Court in Matter of Saf-Tee Plumbing Corp. v. Tully (77 AD2d 1, 432 NYS2d 409) established that a section 1132(c) exemption certificate accepted in good faith by a vendor insulated the vendor from liability for tax with respect to the sales made pursuant to the certificate. The Division itself applied the Saf-Tee Plumbing rule in this case, to the extent it accepted the single purchase certificates dated September 16, 1987 as each applying to a single

sale and the blanket certificate dated August 8, 1988 as applying to all sales back to May 8, 1988. The Division's auditor explained this acceptance on the basis that these certificates "were properly and completely filled out and accepted in good faith for sales within the 90 days and forward" (Tr., p. 19). Similarly, we conclude that the corrected blanket use certificate must apply to and exempt from tax all of petitioner's sales to Fisher Price from July 1, 1987 onward.[6]

Because we have concluded that tax should not have been assessed on the Fisher Price transactions, we need not address the issues raised by petitioner with respect to the overlapping audits of petitioner and Fisher Price. Our conclusion that tax should not have been assessed on the Fisher Price transactions does, of course, mean that the $15,187.36 in interest on these transactions, which is the only portion of the assessment remaining unpaid, is not due from petitioner.

With respect to the error on the conciliation order in stating the period at issue, the Administrative Law Judge held that petitioner had not shown that it was in any way prejudiced by the error or that it was not aware of the actual period at issue. Absent such a showing, the Administrative Law Judge concluded that the assessment for the period June 1, 1986 through November 30, 1988 could not be voided. The Administrative Law Judge relied on Matter of Pepsico, Inc. v. Bouchard (102 AD2d 1000, 477 NYS2d 892) for this conclusion.

On exception, petitioner argues that the conciliation order, as written, is binding on the Division.

We affirm the determination of the Administrative Law Judge on this issue for the reasons stated in the determination.

The next issue we must address is whether petitioner is entitled to a refund of either, or both, of the payments of $59,897.76 or $4,843.15 made by petitioner to the Division.

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[6]In its brief in opposition, the Division attempts to suggest that petitioner did not accept the certificates in good faith (see, Division's brief, p. 10, fn. 7). We find this claim to be baseless because it is contradicted by the Division's own witness' testimony as well as the Division's acceptance of the first three certificates.

The Administrative Law Judge rejected petitioner's assertion that the payment of $59,897.76 was not made in petitioner's role as a sales tax vendor/collector. Because the Administrative Law Judge concluded that petitioner had not refunded any portion of this tax to Fisher Price, the Administrative Law Judge determined that petitioner was precluded by 20 NYCRR 534.8(a)(3) from obtaining a refund of any portion of it. The Administrative Law Judge did not address whether petitioner was entitled to a refund of the $4,843.15.

On exception, petitioner argues that the payment of $59,897.76 was a payment of tax by petitioner and that "[t]he Tax Law does not preclude a vendor from reaching an accommodation or agreement with its customer that the customer will reimburse the vendor for the vendor's payment of tax attributable to transactions between the two" (Petitioner's brief on exception, p. 6).

Tax Law § 1139(a) provides in part that "[n]o refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer." The Division's regulations at 20 NYCRR 534.8(a)(3) and 534.2 require the vendor to prove, without specifying the type of evidence, that the tax has been refunded to the customer.

Petitioner does not claim that it has refunded the tax to Fisher Price, but instead contends that the money paid by Fisher Price to petitioner was not tax. This contention is contrary to the record. As stated in the facts, petitioner issued an invoice to Fisher Price billing an amount of $59,897.76 "For New York State Sales Taxes on Invoices included in Audit Period August 1, 1986 to February 28, 1989" (Exhibit "I"). Similarly, the interoffice memorandum of Fisher Price indicates that the check for $59,897.76 was for sales taxes covering the same audit period. In the face of this evidence, we cannot accept petitioner's contention that the payment of $59,897.76 by Fisher Price to petitioner was not sales tax. Accordingly, we conclude that

section 1139(a) of the Tax Law prohibits a refund of this amount because petitioner has not refunded it to Fisher Price.

With respect to the payment of $4,843.15, petitioner claims, citing finding of fact "3" of the Administrative Law Judge determination, that the Division agrees that this amount was not collected from others. We see nothing in finding of fact "3" that indicates that the $4,843.15 payment made by petitioner was not of tax collected from others. Further, the Division does not agree that this amount was not collected from others (see, Division's brief in opposition, p. 8, fn. 4). At the hearing, petitioner's representative acknowledged that transactions with other customers resulted in a minor portion of the assessment (Tr., p. 146). We have found nothing in the record that eliminates these other customers as the source of the $4,843.14. As a result, we must conclude that section 1139(a) also precludes a refund of this amount to petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lloyd Mansfield Co., Inc. is granted to the extent that this decision holds that tax on the Fisher Price transactions, and interest on this tax, should be eliminated from the Notice of Determination dated November 24, 1989, but is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed;

3. The petition of Lloyd Mansfield Co., Inc., is granted to the extent indicated in paragraph "1" above and in conclusion of law "F" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination dated November 24, 1989 in accordance with paragraph "3" above, but such Notice is otherwise sustained.

DATED: Troy, New York
June 8, 1995

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

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