STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **POPULAR CLUB PLAN, 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 July 15, 1988 through December 31, 1988.	:	DECISION DTA Nos. 810667 and 810668
In the Matter of the Petition of **POPULAR SERVICES, 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 June 1, 1986 through February 28, 1989.	:	

Petitioners Popular Club Plan, Inc. and Popular Services, Inc., P.O. Box 33, 22 Lincoln Place, Garfield, New Jersey 07026, each filed an exception to the determination of the Administrative Law Judge issued on January 27, 1994. Petitioners appeared by Herzfeld & Rubin, P.C. (William B. Randolph, Leonard M. Polisar and William H. Cox, Esqs., of counsel) and Morrison & Foerster (Arthur R. Rosen, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioners filed a brief in support of their exceptions and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, requested by petitioners, was heard on November 17, 1994, 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 a Popular Club secretary's redemption of a reward credit for merchandise is a transaction subject to tax.

II. If the redemption of a reward credit is subject to sales tax, what is the amount of the receipt upon which the tax is imposed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "8," "13" and "15" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

As a result of a sales tax field audit, the Division of Taxation ("Division") issued to Popular Club Plan, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (notice number S901220132C) for the period July 15, 1988 through December 31, 1988, assessing sales tax in the amount of $190,390.93, plus interest. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Popular Services, Inc. (notice number S901220131C) for the period June 1, 1986 through February 28, 1989, assessing sales tax in the amount of $894,619.64, plus interest.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> Popular Club Plan was a division of Popular Services, Inc. On July 15, 1988, Popular Club Plan was incorporated as a wholly-owned subsidiary of Popular Services, Inc. The business audited by the Division was operated by Popular Services, Inc. until July 15, 1988 and by Popular Club, Inc. thereafter. Popular Services, Inc. filed sales tax returns and reported sales made by Popular Club and Popular Club, Inc. The Division concedes that only one entity is liable for the tax assessed for the period July 15, 1988 through December 31, 1988. It explains the duplicative assessments by stating that it is unsure of which entity is liable for the tax, and, therefore, it has issued

assessments to both. In this decision, "petitioner" refers to both Popular Club Plan, Inc. and Popular Club Services, Inc.[1]

At hearing, the Division agreed that any tax payment made for the period July 15, 1988 through December 31, 1988 would be applied to reduce the liabilities assessed against both petitioners.

Petitioner is a mail-order house with its principal place of business in Garfield, New Jersey. It has no offices, warehouses or other facilities in New York; however, it is a registered New York State sales tax vendor, and it collected and remitted sales tax on merchandise sold to New York customers.

Petitioner markets its goods through a unique system called the Popular Club Plan ("Popular Club"). According to its promotional materials, the range and quality of its merchandise is equivalent to that which would be found in a large department store. This merchandise is displayed for sale in the "big catalog". The Popular Club operates through Popular Club secretaries who perform a wide variety of tasks which are described by petitioner in a booklet entitled "Club Secretary Handbook" under the heading "A Business of Your Own".

> "Each Popular Shopping Club is a small business, 'owned and operated' by its club Secretary.
>
> "She enjoys the satisfaction and earnings of owning a small business, but without any investment or expense -- in return for just a few minutes a week of her spare time.
>
> "Now you can do the same.
>
> **"What you do.**
>
> "As a club Secretary you make your catalog available to your customers. If you need an extra catalog we will send it. And we also send special-price Supplements and Bulletins.
>
> "Your catalog is your store. You decide <u>who</u> can shop in it. And <u>when</u> it's open for business.

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[1] We modified finding of fact "2" by changing "Popular Club" in the third sentence to "Popular Services, Inc." in order to more accurately reflect the record.

"As a club Secretary you do not go 'door-to-door' or contact strangers. Your customers are your own friends, co-workers, neighbors, relatives.

"You take orders and send them to us. We ship the goods directly to each customer.

"We send you a payment book for each order, and each week you collect the payments from your customers and remit a check to us.

"You can get additional customers, and more orders from the same customers, at any time.

* * *

"What you earn.

"Your Popular shopping club is a business that pays you well, with hundreds and even thousands of dollars worth of top-quality merchandise.

"The amount you earn depends only on you.

"You set your own goals.

"You decide how many customers you'll go for. And how often you'll help your customers to shop in your catalog.

"For each $10 your customers purchase you earn a reward credit. And each reward credit is worth $2.50 in goods from the catalog.

"It piles up fast.

"Most club Secretaries earn hundreds of dollars in reward credits in just a few weeks. Then more and more during subsequent weeks, months, and years."

One of the key aspects of the Popular Club is the award of dividend credits to members or customers. The award and use of these dividends is explained by petitioner in a booklet written for the Popular Club secretaries entitled "Making your club better".

"Each $10 purchase in the big catalog earns one Dividend Credit valued at $2. These credits can be used for merchandise in the big catalog.

"Member Dividend Credits help members stretch their budgets. These credits can be used to get free merchandise, and that means more money available for other family pleasures -- dinner out, dance lessons, a lot of things.

"**Member Dividend/Dividend/Dividend Credit:** All mean the same thing, one credit valued at $2 is given to the member for each even $10 purchased. The member can use these credits to get SuperStar Dividend merchandise or Dividend Certificates.

"**SuperStar Dividend:** This merchandise is found in a special section in the back of your catalog and is only available by using your Dividend Credits. You can

redeem Dividend credits for this merchandise. Each SuperStar item requires a nominal dollar amount in addition to credits.

"A member orders SuperStar Dividend merchandise along with her regular order by listing the items on the Member Dividend section of the Member Order Form. They will be shipped along with her order.

"**Dividend Certificate:** If you don't order SuperStar merchandise, we'll automatically send you Dividend Certificates as pictured below. They will be attached to the Packing List.

"You can redeem certificates on a Dividend Certificate Redemption Order Form, or on a Member Order Form for SuperStar items."

On audit, the Division made the determination that the award and redemption of reward credits earned by Popular Club secretaries was a form of bartering, essentially the exchange of merchandise for services, taxable under Article 28 of the Tax Law. The amount subject to the sales tax was calculated based upon the face value of the reward certificates redeemed in New York for merchandise. Member dividend credits were deemed to be a form of discount and were not held subject to sales tax. Petitioner took the position that the reward credits represented volume discounts not compensation for services, and, if the rewards were deemed to represent a taxable exchange, the reward credits should not be valued at face value.

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

> Beginning in 1983, petitioner was required by the Internal Revenue Service to file a Form 1099 for every non-employee who received more than $600.00 from petitioner. Petitioner was not required to report the value of member dividend credits. The value of the reward credits earned by the Popular Club secretaries was includable in amounts to be reported on the forms 1099. It was petitioner's opinion that each reward credit was worth less than its $2.50 face value. The task of valuing the reward credits for Federal income tax purposes fell to William Von Klemperer, then petitioner's vice-president for finances, who described the valuation method he used.
>
> Mr. Klemperer determined that by using a combination of dividend credits and reward credits a secretary could reduce the "cash price" of merchandise to 69% of the catalogue price. This assumes the use of a $2.00 dividend credit (which secretaries received on their own purchases) and a $2.50 reward credit (earned by making sales to other

members) plus $10.00 in cash to purchase a catalogue item valued at $14.50. Thus, the use of the credits reduces the cash price of the merchandise to 69% of the catalogue price. Based on this analysis, Mr. Klemperer testified that the secretary's reward credit was worth no more than $1.72, or 69% of $2.50.

Mr. Klemperer then tried valuing the reward credits by taking a survey of the active secretaries. He knew that the cost to petitioner of merchandise with a catalogue price of $2.50 was approximately $1.05. He considered this to be the minimum worth of a reward credit. He considered $1.72 to be "the theoretical maximum" worth of a $2.50 reward credit. He selected a value of $1.30 as being approximately half way between these maximum and minimum values. Mr. Klemperer then surveyed three groups of active secretaries and offered to exchange the reward credits for cash. Petitioner offered secretaries in the first group $1.00 for each reward credit, secretaries in the second group $1.30 for each reward credit and secretaries in the third group $1.72 for each reward credit. Based on the responses, petitioner determined that a substantial number of secretaries would be willing to make the exchange for $1.30. Mr. Klemperer could not remember the exact number of secretaries in each group surveyed, although he thought it was between 20 and 50 people. He thought that between 40% and 70% of the secretaries in the second group showed an interest in exchanging a reward credit for $1.30 in cash.

Mr. Klemperer testified that after taking the survey, he decided to initiate an actual exchange program. He explained the purpose of the exchange program as follows:

> "I, as the financial officer, I didn't want and I had to issue 1099's quite soon, I didn't want to issue 1099's with $1.30 value based only on a telephone conversation. What I wanted to do was get to secretaries and have some real transactions to say that beyond what someone happened to say at the moment when we telephoned them, that secretaries were really willing to part with their reward credit for that amount of cash. So, I was concerned with making sure some of them would really do it." (Tr., p. 49-50.)

Mr. Klemperer also felt the reward credits were worth less than their face amount because they were not freely transferable like cash. They could only be redeemed by petitioner.[2]

In 1983, petitioner sent letters to 50 secretaries offering to redeem their reward credits for money instead of merchandise at the rate of $1.30 per reward credit. Some of the secretaries took advantage of the offer, but the number doing so is not in the record. There is no evidence

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[2] We modified finding of fact "8" by adding the last paragraph to more accurately reflect the record.

that the cash exchange offer was made to all Popular Club secretaries. The Club Secretary Handbook and the booklet entitled "Making your club better" do not mention a cash exchange program.

Petitioner offered in evidence (1) a memorandum written by Mr. Klemperer to his associates regarding certain aspects of the cash redemption program; (2) a copy of the letter sent to the secretaries who were offered a cash exchange; (3) a list of the 50 secretaries contacted; and (4) a suggested "script" for following up on the letter by telephone. Included in the script is the following hypothetical exchange:

> "Why aren't you interested [in redeeming reward credits for cash]? What would it take to get you interested?
>
> * * *
>
> ". . . I'm afraid I'll have to pay taxes if I receive cash.
>
> "The IRS says you must report the fair market value of the merchandise you receive. You see, you pay taxes either way."

Prior to hearing, petitioner and the Division entered into a stipulation of facts. Those stipulated facts, modified by deleting references to exhibits, are as follows:

> "1. The Division of Taxation is aware of the fact that department stores located in the State of New York, including the counties of Albany, New York and Westchester that are registered with the Department of Taxation and Finance ('the Department') to collect sales and use taxes, sell merchandise at a discount from their regular retail sales prices to employees. It is the policy of the Department not to assert or assess sales or use taxes against such department stores on the amount of the discount allowed to employees on their purchases when the discount is not conditioned on the employees' performance and the discount amount is not included as compensation on a 1099 or W-2 Form. That policy obtained in the Department with respect to the period June 1, 1986 through February 28, 1989.
>
> "2. Petitioners' club secretaries were independent contractors, not employees.
>
> "3. Petitioners filed with the United States Internal Revenue Service Forms 1099 reporting the redemption of reward certificates of club secretaries during the periods June 1, 1986 through February 28, 1989. The Forms 1099 as filed with respect to such redemptions were in the same form and contained the same information as the Forms 1099 filed by the petitioners with the United States Internal Revenue Service with respect to redemptions of Club Secretaries' rewards during the year 1992 . . . .

> "4. Petitioners debited cost of sales and credited reward liability on its books to record the cost of the reward certificates issued to club secretaries. The reward liability account was debited and inventory account was credited when a club secretary redeemed the certificates for merchandise."

As an exhibit to the stipulation, the parties offered in evidence examples of forms 1099 actually filed by petitioner in 1992. The exhibits establish that the value of the reward credits was reported as nonemployee compensation. The amount of compensation was calculated by multiplying the number of reward credits redeemed by $1.30, whether the reward credits were redeemed for cash or merchandise.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> A schedule attached to the stipulation provides examples of secretaries who have redeemed reward credits for cash only, for merchandise only and for cash and merchandise. The form 1099 filed for each of these secretaries shows nonemployee compensation equal to $1.30 times the number of reward credits redeemed. The four secretaries who redeemed some or all of their reward credits for cash are not listed among the 50 secretaries who received letters explaining the cash exchange program in 1983.[3]

It was petitioner's practice to give discounts to employees who purchased merchandise from petitioner. Employees were allowed a 40% discount on all items purchased from Popular Club catalogues. Twice a year, petitioner offered a two-thirds discount on clearance items.

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

> Petitioner presented the testimony of Howard E. Hassler, presently a director of Brooks Fashion Stores and of Ames Department Stores. Previously, Mr. Hassler had been with Allied Stores of New York City for more than 20 years and had been its chief operating

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[3] The first sentence of finding of fact "13" read as follows: "A schedule attached to the stipulation shows that in 1992 four secretaries redeemed reward credits for either cash or a combination of cash and merchandise." The modifications were made to clarify that the secretaries listed on the schedule were examples of those who had redeemed credits in three different manners. The sentence as it read originally created the impression that the four secretaries who had redeemed some number of credits for cash were the only ones to have done so during that year. We also modified the last sentence by inserting "some or all" in order to remain consistent with the clarification referenced above.

> officer. Allied Stores owned Brooks Brothers, Bonwit Teller, Plymouth Shops and Ann Taylor. Mr. Hassler was qualified as an expert in the field of retail merchandising. He offered his expert opinion on the value of a reward credit. He stated his belief that a reward credit is worth less than its face value because it is not transferable and can only be used to obtain merchandise through Popular Club. He agreed with petitioner that the proper value of one reward credit is $1.30. He testified that the average discount retail store operates at a markup of approximately 30%. Thus, a customer can purchase merchandise acquired by the discount store for $1.00 at a price of $1.30. Theoretically then, merchandise listed in the big catalog for $2.50 could be purchased at a discount store for $1.30. Based on this scenario, Mr. Hassler believes that a reward credit is properly valued at $1.30. Finally, Mr. Hassler regarded as very significant the fact that some secretaries actually exchanged reward credits for $1.30 apiece.[4]

We make the following additional finding of fact.

> Neither reward credits nor dividend credits are issued to club secretaries on the redemption of dividend or reward credits for merchandise.

We also make the following additional finding of fact.

> The Division's representative at hearing attempted to introduce into evidence a memorandum regarding another taxpayer. The Division sought to introduce the document in support of its position that petitioner was not treated any differently than other similarly situated taxpayers. Petitioner objected to the introduction of this evidence. The Administrative Law Judge sustained petitioner's objection upon the assurance by petitioner that it was not making an equal protection argument. The Administrative Law Judge, however, provided that, if such an argument were to be made, she would entertain a motion to reopen the record so as to allow the Division to introduce additional evidence.

Petitioner requested additional findings of fact, some of which have been incorporated herein. The remaining requested facts have been rejected as either redundant, unsupported by the record or conslusory.

OPINION

The Administrative Law Judge concluded that the transactions at issue constituted a barter arrangement, the exchange of goods for services. The Administrative Law Judge found

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[4] We modified finding of fact "15" by adding the second and third sentences in order to reflect additional details in the record.

the reward credits were payments for services rendered by the secretaries on behalf of petitioner. When the credits were exchanged for merchandise, the Administrative Law Judge determined that a retail sale occurred. The Administrative Law Judge further rejected petitioner's claim that reward credits were promotional items distributed free to the Popular Club secretaries. The Administrative Law Judge reiterated that the credits were earned by secretaries in exchange for services and were not given away for free.

Petitioner, on exception, contends that reward credits are a discount, not a barter exchange. Petitioner further asserts it is arbitrary and capricious to treat the reward credits differently from discounts to department store employees.

Petitioner further argues the fact that the reward credit may constitute an item of economic gain to the recipient is irrelevant in determining whether price reductions constitute a discount.

We affirm the Administrative Law Judge's finding that the transactions at issue are subject to tax.

Sales tax is imposed, inter alia, on the receipts from every retail sale of tangible personal property (Tax Law § 1105[a]).

Tax Law § 1101(b)(5) defines "sale, selling or purchase" as:

> "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

20 NYCRR 526.7(d) provides the following definition of barter: "the transfer of tangible property . . . to a person in consideration for . . . services received is a 'sale' under the Tax Law."

Tax Law § 1101(b)(3) defines receipt as:

> "[t]he amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. For special rules governing computation of receipts, see section eleven hundred eleven."

Consistent with the definition of barter under the Commissioner's regulations, we find the two-step process involved here to be a barter exchange. First, the issuance of the reward credits in exchange for services was a noncash form of compensation for specific services performed by the secretaries. As correctly pointed out by the Administrative Law Judge:

> "[t]he secretaries earned reward credits by making sales. They solicited customers, wrote up orders in an order book provided by petitioner, transmitted orders to Popular Club, collected money and submitted payment to Popular Club. Secretaries earned reward credits whether they made purchases from the Popular Club or not. The credits were based on their sales, not their purchases." (Determination, conclusion of law "A").

In the second step of this barter, the secretaries exchanged the reward credits, which were not otherwise transferable, for merchandise from petitioner. Even if the two-stage transaction was not viewed as a single barter exchange, the exchange of merchandise for reward credits is in itself a transfer of tangible personal property for consideration and, thus, is a sale under section 1101(b)(5) of the Tax Law.

We find unpersuasive petitioner's attempt to characterize redemption of reward credits as discounts.

Petitioner makes much of the fact that the employee discounts are also payments for services rendered to the employer and argues that this is not a ground upon which the reward credits can be distinguished from employee discounts. Although employee discounts may also be a form of employee compensation, we agree with the Administrative Law Judge that

employee discounts and the redeeming of reward credits are entirely distinct transactions. As correctly pointed out by the Administrative Law Judge,

> "the reward credit was an item of value given to the secretaries in exchange for services. Secretaries used the reward credits to obtain merchandise from petitioner. Thus, redemption of the reward credit was the equivalent of a payment, not a reduction in the purchase price. The IRS required the reward credits be reported as income. They did not require that the employee discounts or member dividend credits be treated as income (Determination, conclusion of law "A").

Thus, the reward credits are different from an employee discount because the reward credits were specific, and the only compensation paid for specific services. In contrast, employee discounts are a right to purchase merchandise at a discounted rate that the employee utilizes to the extent the employee chooses. Another difference noted by the Administrative Law Judge is that the secretaries made a distinct payment when they exchanged reward credits for merchandise; a payment that clearly fits the definition of receipt at section 1101(b)(3) of the Tax Law. As petitioner notes, a discount is a reduction in price (Petitioner's brief on exception, p. 10). In other words, a discount results in an amount not being paid. In our view, this is a significant difference that justifies treating the reward credit as a taxable receipt while not treating an employee discount in this manner.

We conclude that petitioner has failed to present a basis on which we may distinguish the instant matter from other taxable transactions where no exchange of cash was made (see, Matter of Envirogas, Inc. v. Chu, 114 AD2d 38, 497 NYS2d 503, affd sub nom National Fuel Gas Distrib. Corp. v. Chu, 69 NY2d 632, 511 NYS2d 228 [taxable sale occurred where possession of gas was exchanged in return for the right to produce gas on the land]; Matter of B&B Enterprises, State Tax Commn., February 6, 1985 [transfer of possession of stage bills in exchange for the right to solicit, sell and retain all revenue from advertising appearing in stage bills is a taxable transaction]).

As a final matter, we address petitioner's argument on exception that the Division's policy with respect to employee discounts should be applied to the redemption of reward credits. Petitioner states in its brief, "[t]he Division, by its employee discount policy, has adopted and applied an unwritten policy which is arbitrary and capricious because it accords unequal and discriminatory sales tax treatment to two classes of similarly situated taxpayers on essentially the same facts" (Petitioner's brief, pp. 18 & 19).

We must first, however, address the Division's argument on exception that the issue regarding application of the employee discount policy to redemption of reward credits should not be heard. The Division argues that it was precluded from introducing evidence on this subject at the hearing by an objection from petitioner. The Division points out that when asked by the Administrative Law Judge if petitioner was raising an equal protection argument, petitioner's representative stated petitioner was not and, as a result, the objection was sustained.

In response, petitioner asserts that it is not raising an equal protection argument. Petitioner further argues that the evidence the Division sought to introduce was a memorandum regarding the treatment of a taxpayer alleged to be similarly situated to petitioner and was irrelevant to petitioner's argument. Petitioner goes on to contend that the Division suffered no prejudice, nor was denied the opportunity to present evidence on the issue of "the difference of its treatment of the petitioner as opposed to the stipulated treatment of discounts accorded to department store employees" (Petitioner's reply brief, p. 4). Further, petitioner points to the fact that it argued this point in both its post-hearing brief and post-hearing reply brief and the Division and Administrative Law Judge alike addressed the issue without objection. Further, petitioner argues the Division was given the opportunity to submit additional evidence after the hearing but chose not to.

We first comment that it is unmistakable from the language quoted from petitioner's brief that the argument petitioner is making is in essence an equal protection argument. However, petitioner's argument on exception does not deviate in any manner from that raised below.

Further, as pointed out by petitioner, the Division was given the opportunity to introduce evidence after the hearing yet elected not to. Consequently, the Division cannot be heard to argue that petitioner should be precluded from arguing for the application of the stipulated policy to this matter. Finally, the issue raised by petitioner is purely a legal issue relating to a stipulated fact. Because there is no factual dispute, we do not see how the Division was harmed by the Administrative Law Judge's actions.

Turning to the merits of petitioner's argument, we disagree with its position. We have already determined that employee discounts are significantly different from the reward credits. However, even if we presumed that department store employees and secretaries are equally situated as petitioner contends, we could not conclude that the Division's policy results in "invidious discrimination" (cf., Matter of Krugman v. Board of Assessors of Village of Atlantic Beach, 141 AD2d 175, 533 NYS2d 495, appeal dismissed 73 NY2d 872, 537 NYS2d 498).

The stipulation provides:

> "1. The Division of Taxation is aware of the fact that department stores located in the State of New York, including the counties of Albany, New York and Westchester that are registered with the Department of Taxation and Finance ("the Department") to collect sales and use taxes, sell merchandise at a discount from their regular retail sales prices to employees. It is the policy of the Department not to assert or assess sales or use taxes against such department stores on the amount of the discount allowed to employees on their purchases when the discount is not conditioned on the employees' performance and the discount amount is not included as compensation on a 1099 or W-2 Form. That policy obtained in the Department with respect to the period June 1, 1986 through February 28, 1989."

It is our impression that the stipulated policy is premised on § 132 of the Internal Revenue Code, which essentially provides under subsection (c) of that section, that any employee discount with respect to "qualified property or services" provided by an employer to an employee for the employee's personal use is not included in the employee's gross income. The Division's policy reflects a decision to avoid taxing a transaction that Congress has explicitly elected not to tax. Thus, the Division's policy represents more than mere administrative convenience (Matter of Krugman v. Board of Assessors of Village of Atlantic Beach, supra) and

the Division has clearly acted within the discretion accorded governmental tax authorities in "drawing lines which in their judgment produce reasonable systems of taxation" (Matter of Balan Printing, Tax Appeals Tribunal, April 17, 1991; see also, Matter of Tanagraphics, Tax Appeals Tribunal, April 17, 1991).

The next issue before us is the proper valuation of reward credits redeemable by Popular Club secretaries for merchandise.

The Administrative Law Judge rejected petitioner's efforts to value the reward credit because the factors petitioner raised were appropriate for determining the value of credits for income tax purposes and not necessarily useful for sales tax purposes. The Administrative Law Judge determined that the receipt on which the tax is imposed is the sale price of the property valued in money, which in this case was the catalogue sale price. In order to purchase an item with a list price of $2.50, the Administrative Law Judge found that the face value would have to be paid, whether in cash or with a $2.50 reward credit.

Petitioner contends that the Administrative Law Judge erroneously interpreted the sales tax law. More specifically, petitioner argues that the Administrative Law Judge misinterpreted "receipts" to be the sales price asked, not the sales price paid.

Petitioner also argues that a reward credit is properly valued at $1.30 given the testimony of petitioner's witnesses and documentary evidence. Petitioner finds determinative the fact that some secretaries did redeem credits for $1.30.

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

Sales tax is imposed upon the "receipts" from every retail sale (Tax Law § 1105[a]). Tax Law § 1101(b)(3) defines "receipt" as "[t]he amount of the sale price of any property . . . valued in money, whether received in money or otherwise." In order to determine the "value in money" of a receipt in a transaction where cash is not exchanged, the Commissioner's regulations provide that if parties have a normal charge for the services or property given in the exchange,

this will be the cash value, otherwise tax is imposed on the market value of the goods or services received (20 NYCRR 526.7[d] [examples 1, 2, 3]).

In this matter, the Division argues the typical charge for merchandise is the list price of the merchandise in petitioner's catalogue. Petitioner contends the list price does not accurately reflect the cash value of the receipt because the list price for merchandise is never paid. We agree.

As petitioner notes, the record reflects that none of petitioner's customers pay full catalogue list price for merchandise. Even on a secretary's initial $10.00 purchase, the secretary receives goods with a list price of $10.00, a dividend certificate and a reward credit. As a result, the list price is not the actual price paid for merchandise. To affirm the Administrative Law Judge's conclusion that $2.50 is the accurate amount subject to tax, merely because it is the price listed, would give a false cash value to the reward credit. The list price of merchandise in petitioner's catalogue is not the "normal charge" on which sales tax may be assessed. Further, petitioner has established that the more accurate cash value of a reward credit is $1.30.

The record reflects that petitioner initiated an exchange program whereby a secretary had the option to redeem credits for $1.30 each and that secretaries in fact acted on the offer (Petitioner's exhibit "1"). We find the cash exchange program is probative for two reasons. First, it is generally recognized that the market value of property can be accurately determined by the amount paid in an arm's length transaction (see, Plaza Hotel Assocs. v. Wellington Assocs., 37 NY2d 273, 372 NYS2d 35; Matter of Acres Storage Co. v. Chu, 144 AD2d 758, 535 NYS2d 165, appeal dismissed 73 NY2d 914, 539 NYS2d 294). As noted above, 20 NYCRR 526.7(d) indicates fair market value is an accepted method of determining cash value for sales tax purposes (see also, TSB-H-80[104]S [fair market value considered valid manner to

determine tax due on a car given by employer to employee as compensation for services]).[5] No evidence was presented to controvert petitioner's contention that the redemptions which occurred pursuant to the exchange program were at arm's length.

Further, we find this method of valuation is consistent with that of the United States Tax Court with respect to barter and exchange transactions (see, Evans v. Commissioner, T.C. Memo 1992-276, 63 TCM 3001). In Evans, the Tax Court found that where credits could be redeemed for cash the credits' fair market value can be determined by the exchange rate.[6]

While the record does not establish whether the exchange program was made available to all secretaries, we do not find this controlling. Courts have found that a single arm's length transaction is sufficient to determine fair market value (Plaza Hotel Assocs. v. Wellington Assocs., supra and Matter of Acres Storage Co. v. Chu, supra). In addition to the exchange program, petitioner presented other evidence to buttress its position that $1.30 was the cash value of the receipts at issue. Petitioner presented the testimony of Mr. Klemperer, former vice-president for finances of Popular Club who was required by the IRS to report the value of reward credits on forms 1099. Mr. Klemperer testified that a survey of active Club secretaries indicated $1.30 was a figure secretaries would be willing to redeem credits at. Petitioner also presented IRS forms 1099 on which the value of reward credits was listed at $1.30. Further, petitioner presented the testimony of Mr. Hassler, qualified as an expert in the field of retail merchandising, to support the valuation of the reward credit at $1.30. Mr. Hassler found significant that credits were redeemable for cash. He further testified that the reward credit's

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[5]The Division's representative concedes as much in his post-hearing brief: "[b]ecause we are discussing a sale transaction, the appropriate perspective is what a willing buyer would pay a willing seller for the goods in question" (Division's post-hearing brief, p. 29). What a willing buyer will pay a willing seller is generally recognized to be fair market value (see, Matter of Town of Islip, 49 NY2d 354, 426 NYS2d 220; County of Westchester v. State of New York, 127 AD2d 556, 511 NYS2d 358).

[6]While the sales tax is not patterned after the Federal income tax, for limited purposes, a Federal principle may be applied for an analogous state tax purpose (see, Matter of Greenburger, Tax Appeals Tribunal, September 8, 1994; Matter of Glover Bottled Gas, Tax Appeals Tribunal, September 27, 1990). Here, we find the Federal principle for the valuation of credits in a barter or exchange transaction to be relevant.

cash value was less than $2.50 because they could only be redeemed by Popular Club.[7] In addition to finding significant that credits were redeemable for cash, Mr. Hassler concluded that $1.30 was a reasonable estimate of the cash value of the reward credit based upon comparisons of petitioner's merchandise with inventory at a discount store.[8] The uncontradicted testimony of petitioner's witnesses, taken in conjunction with the survey taken of Club secretaries, the filing of forms 1099 valuing the credits at $1.30 and most significantly, the cash exchange program, we find petitioner has met its burden through clear and convincing evidence.

As a final matter, we wish to address the issue of liability for tax owed. In her determination below, the Administrative Law Judge concluded that there was no evidence in the record that would allow her to determine which legal entity is liable for the tax assessed during the period at issue. On exception, petitioner points out that the Administrative Law Judge found that the business that was audited was operated by Popular Services, Inc., until July 15, 1988, and thereafter by Popular Club Plan, Inc., a wholly-owned subsidiary of Popular Services, Inc. Consistent with this finding, petitioner requests that the assessments be revised to provide that Popular Services, Inc., shall be liable for any sales tax for the period June 1, 1986 through July 14, 1988 and Popular Club Plan, Inc., shall be liable for sales tax for the period July 15, 1988 through February 28, 1989. We see no reason to find otherwise. As a result, the Division is directed to so modify the assessments.

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[7]The Tax Court in Evans v. Commissioner (supra) found restrictions on transferability relevant in determining the cash value of credits in barter exchanges.

[8]In this matter, had petitioner sought to rely primarily on comparable sales to establish the value of the reward credits, petitioner's failure to introduce proof on the comparability of discount store and catalogue sales could have been a critical failure. Given, however, the weight of the other evidence in the record, we find it was not necessary for petitioner to do so because the expert's testimony was not dispositive, but merely supportive.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Popular Club Plan, Inc. and Popular Services, Inc., are granted to the extent that the reward credits shall be valued at $1.30 and the assessments will be modified as stated above, but are otherwise denied;

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

3. The petition of Popular Club Plan, Inc., and Popular Services, Inc., is granted to the extent indicated in paragraph "1" above; and

4. The Division of Taxation is directed to modify the notices of determination dated December 12, 1990, in accordance with paragraph "1" above, but such notices are otherwise sustained.

DATED: Troy, New York
May 11, 1995

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

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