STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHARPER IMAGE CORPORATION	:	DECISION DTA NO. 815434
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 December 10, 1989 through August 31, 1992.	:	

Petitioner Sharper Image Corporation, 650 Davis Street, San Francisco, California 94111, filed an exception to the determination of the Administrative Law Judge issued on September 24, 1998. Petitioner appeared by Brann & Isaacson, LLP (David W. Bertoni, Esq. and Martin I. Eisenstein, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Robert Tompkins, Esq. and James Della Porta, 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, at petitioner's request, was heard on May 25, 1999 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether imposition of use tax on the printing costs of petitioner's catalogs violates the First Amendment of the United States Constitution.

II. Whether, by the operation of Tax Law § 1110(a)(A) and § 1101(b)(7), petitioner is liable for use tax imposed on the cost of catalogs mailed from outside New York State to residents in New York State.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued to petitioner, Sharper Image Corporation (hereafter, "petitioner" or "Sharper Image"), a Notice of Determination, dated November 30, 1995, assessing use tax of $104,578.88 plus penalty and interest for the period December 1, 1989 through August 31, 1992. Following a conference, the Division issued a Conciliation Order, dated August 9, 1996, sustaining the tax assessment but canceling all penalties.

The issuance of the assessment followed a field audit of petitioner's books and records for the audit period. The only contested item arising from that audit is the Division's imposition of use tax on the printing cost of catalogs distributed in New York.

Petitioner is a Delaware corporation with its headquarters in San Francisco, California. Sharper Image sells merchandise by mail order and from retail stores located throughout the United States, including three stores in New York City. Sharper Image is a registered vendor, files New York State sales tax returns and collects and remits sales tax and use tax to New York on receipts from sales made in its New York stores and by mail order to residents of New York.

The Sharper Image catalog serves as the primary source of advertising for petitioner's retail stores and mail-order business. The catalog is published monthly. Copywriting, photography and design of the catalog are completed in San Francisco. Sharper Image had a

contract with a Nebraska printer, known as Foote & Davies during the audit period and now named Quebecor, for the printing, labeling and mailing of the catalogs to persons throughout the world, including persons in New York. All arrangements, instructions and payments to Foote & Davis were made from petitioner's California headquarters, or at the offices of Foote & Davis or by telephone. No activities related to the design, printing or distribution of the catalogs were performed in New York.

Foote & Davis printed the catalogs, addressed them as directed by petitioner, and bundled them according to the regulations of the United States Postal Service (USPS). What is known as a "plant loading system" was used to deliver the catalogs to the custody of the USPS. A Postal Service employee worked on-site at the Foote & Davis plant which is considered a mailing facility of the USPS. Postal Service employees verified weight and sortation levels and inspected the mail prior to its being loaded into USPS trailers located on-site. After the catalogs were loaded, the trailers were sealed, and the catalogs were considered to be mailed at that time. The catalogs were sent by third class mail to the address on the mailing label.

On audit, it was determined that the catalogs were advertising materials subject to use tax under sections 1110(a) and 1101(b)(7) of the Tax Law. The audit report contains only one paragraph describing the tax assessed on the catalogs. It states that the cost of producing the catalogs was reviewed in detail with the following conclusions. Two types of catalogs were produced. One was sent to customers' homes, and a shorter version was sent to Sharper Image retail stores throughout the country. Nine percent of the total number of catalogs mailed were sent to an address in New York State. Based upon these findings, the Division computed a total

tax due of $104,578.88, of which $9,700.00 is attributable to catalogs delivered to Sharper Image retail stores in New York. The computation of tax is not in issue.

During the course of the audit, the Division determined that the text and pictures displayed in the Sharper Image catalog constituted advertisements for products being sold by petitioner. There is no indication in the audit report that the auditor examined the catalogs with any care after she determined that they contained descriptions of products for sale. The auditor's supervisor, Donald Dahlgren, stated in testimony that during the course of the audit the catalogs were never considered to be anything other than advertising materials. When asked to provide a definition of advertising material, Mr. Dahlgren referred to the Sharper Image catalog and testified:

> Advertising material. This is advertising material, this is what I mean by advertising material. They are showing a picture of a product, they give a description of the product, they give a price for the product.

Whether the catalogs might be considered exempt from tax as periodicals was never raised as an issue on audit. On cross-examination, Mr. Dahlgren was asked to apply the regulations pertaining to the periodical exemption and provide an opinion as to whether the Sharper Image catalog would be considered a periodical under the regulations. He stated that it would not because it did not contain a variety of articles on different topics by different authors. It was his opinion that the product descriptions in the catalog did not constitute "articles" as that term is used in the Division's regulations.

The Sharper Image catalogs placed in evidence were between 60 and 75 pages long. Each catalog solicits mail-order sales through the use of glossy color photographs and descriptions of

the products for sale. A toll-free telephone number is prominently and frequently displayed in the catalogs, and above that number, it reads "To order, call 24 hours a day."

Almost all of the pictures and text in the Sharper Image catalog relate directly to a product for sale. Each product is pictured with accompanying text describing the product. Every product description ends with an item number, a price and an amount for delivery. A tear-out order form and a postage paid mailing envelope is attached to the middle of each catalog.

Typically, the product descriptions are detailed and informative and occasionally entertaining. Woodrow Nelson, who is responsible for producing the catalog, explained the philosophy behind the catalog design.

> We have believed since day one that our customers wanted to be informed about the latest and greatest things. They are very interested in anything that's new, whether it's technology, whether it's collectibles, whether it's science, whether it's fitness, what have you. They want to be informed. Philosophically, our creative approach is to make sure that our customers are, number one informed, number two, entertained, and we believe for many, many years that our customers enjoy getting the catalog in their mailbox. (Tr., p. 62.)

The following description of a Lava Lite, offered for sale on page 13 of the February 1991 catalogue, exemplifies the philosophy described by Mr. Nelson.

> What a head trip! Lava Lites are now 25 years old. At a recent anniversary bash and be-in, one party goer commented (as quoted in the ***New York Times***), "*I'm reminded of sneaking into people's parents dens to make out. Everybody had one over the TV set, and when the lights went out the Lava Lite glowed."*
>
> To celebrate a passionate quarter century, Lava Lite's maker creates this bodacious new coral version exclusively for Sharper Image customers. Still made in the US, Lava Lite's secret formula of 11 non-toxic fluids undulates with a *"fascinating, intriguing, soothing, endlessly captivating motion."* Or as an official of the American Institute of Architects put it: the lamp's "*kinetic*

> *sculptural elements constitute an intriguing relief from hard-edged rectilinearity."*
>
> Made from sturdy aluminum and glass, Lava Lite measures 16½H x 4½" in diameter and weighs 3¾ lbs. Plugs into wall outlet. UL-listed. Comes with a 40W bulb and 90 day warranty. *Styrofoam-free packaging*.
>
> **■ Lava Lite**
> **# BLV845 Was $49.95.**
> **Now $39.95 (5.50)**[1]

Sharper Image employs between two and five writers each month to write the text found in each catalog. Like the Lava Lite advertisement, many of the product descriptions quote from other sources, including periodicals, newspapers and scientific and medical journals and attempt to be informative and entertaining. The text may not always be a description of a product, but it is always related to products for sale. Page 18 of the February 1991 catalog, for example, advertises products related to recycling. Boxed text on that page states:

> Did you know that if you toss out one aluminum can, you waste as much energy as if you'd filled the same can half full of gasoline and poured it into the ground? The average can that is returned for recycling is melted and back on the supermarket shelf in six weeks.

One of the products advertised on the page where this information appears is a device for compacting aluminum cans prior to recycling ("The Crusher"). Similarly, an advertisement in the June 1990 catalog for a device that sanitizes toothbrushes (a Purebrush) describes the product; briefly summarizes university research studies which concluded that toothbrushes are a breeding ground for bacteria; and offers testimonials from dentists regarding the efficacy of the Purebrush.

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[1] The amount in parenthesis refers to the delivery charge.

Petitioner's customer mailing list came primarily from a list of customers who had previously purchased from the catalog. In addition, one could ask to be placed on a mailing list by calling the company's toll-free number or registering at a retail store, with or without making a purchase. Sharper Image sometimes advertised its catalog in other magazines, and it sometimes rented customer mailing lists from other publications. The catalog was not available at newsstands. The entire catalog was not distributed in Sharper Image retail stores, but an abridged version of it was available in the stores. Each catalog contained an advertisement listing the Sharper Image retail stores nationwide under the headline: "VISIT OUR STORES."

Petitioner's retail catalog sales operations and its retail stores are overseen by a common central management. Mail-order sales were shipped to customers from the same warehouse and distribution centers which service the Sharper Image retail stores.

Some products available by mail order were not offered for sale in the retail stores, although most were. Mr. Nelson testified that store personnel would place a telephone order for a customer if asked to do so and would accept returns of merchandise ordered through the catalog. There is no evidence, however, that Sharper Image encouraged these practices.

Typically, newspapers and magazines contain some form of advertising. Some of those advertisements are similar to the advertisements found in the Sharper Image catalog. A picture of a product is displayed, text describes the product and information is provided about purchasing the product in-person or by mail order.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioner's argument that taxation of its printing costs violated petitioner's First Amendment rights. In analyzing relevant statutory law and the regulations, the Administrative Law Judge noted that in order for petitioner to avail itself of the exemption pursuant to Tax Law § 1115(a)(5), it would have to demonstrate that its publications were *periodicals* rather than catalogs as determined by the Division. The Administrative Law Judge noted that in order to qualify as a periodical, a publication must satisfy the five criteria set forth in the Division's regulations at 20 NYCRR 528.6(c)(1).

In addressing the criteria for qualifying as a periodical, the Administrative Law Judge noted that the one criteria which petitioner's publication failed to meet was that "each issue must contain a variety of articles by different authors devoted to literature, the sciences or the arts, news, some special industry, profession, sport or other field of endeavor" (20 NYCRR 528.6[c][1]). The Administrative Law Judge reasoned that although the Sharper Image catalog contains a variety of articles by different authors, such articles were not written for the proper purpose. The Administrative Law Judge opined that the articles in the catalogs describing the products were written in order to sell a product; such articles were not "devoted to literature, the sciences or the arts, news, some special industry, profession, sport or other field or endeavor" within the meaning of the regulation.

Furthermore, the Administrative Law Judge noted that the regulations address advertising materials at 20 NYCRR 528.6(c)(3) wherein it states that publications devoted to selling products are not periodicals. Therefore, the Administrative Law Judge found that the catalog did

not qualify as a periodical and, thus, failed to qualify for exemption from the tax imposed by the Division in this case.

Because its publication cannot be identified as advertising material without scrutiny of its contents, petitioner argues that its First Amendment rights are being violated based upon the content of the speech contained in its catalogs. Although the Division argued that the Administrative Law Judge was without jurisdiction to address the facial constitutionality of a statutory/regulatory scheme, the Administrative Law Judge determined that, in fact, she had jurisdiction and concluded that the Division's regulation defining the term *periodical* in such a way as to exclude catalogs from the scope of the exemption did not violate the First Amendment.

In essence, the Administrative Law Judge, after analyzing the cases of ***Regan v. Taxation with Representation of Washington*** (461 US 540, 76 L Ed 2d 129) and ***Leathers v. Medlock*** (499 US 439, 113 L Ed 2d 494), concluded that the Division's regulations did not raise any constitutional concerns. The Administrative Law Judge emphasized that New York's sales tax scheme did not single out the press for taxation and there was no indication that the regulation attempted to interfere with the First Amendment rights of a targeted group. The Administrative Law Judge held that excluding all advertising materials from the scope of the periodical exemption did not target a small number of people to selectively tax. Lastly, the Administrative Law Judge noted that the regulation in issue was not content-based but rather it focused on the form of communication rather than the content of the communication.

Next, the Administrative Law Judge addressed petitioner's argument that it did not make a taxable use of the catalogs within the State. Pursuant to Tax Law § 1110(a), the Administrative Law Judge determined that petitioner made use of its catalogs in this State because the

distribution of the catalogs occurred within New York when petitioner's catalogs were mailed to its customers and its retail stores in New York. As aptly summarized by the Administrative Law Judge, petitioner clearly made use of the catalogs in New York through the following procedure carried out at the direction of petitioner:

> Even though the postal service carried out the actual delivery of the catalogs, petitioner exercised complete power and control over the distribution. Petitioner provided the names and addresses of the catalog recipients to Foote & Davis and directed their mailing by USPS to residents and retail stores in New York. Thus, petitioner made a taxable use of the catalogs within New York (Determination, conclusion of law "H").

Similarly, the Administrative Law Judge rejected petitioner's argument that the legislative amendment to Tax Law § 1101(b)(7), as a result of the decision rendered in ***Bennett Bros. v. State Tax Commn.*** (62 AD2d 614, 405 NYS2d 803), expanded the definition of the term "use" to include the distribution of promotional materials *but only* by New York companies who have their promotional materials printed out-of-state. Petitioner argued that the amendment was necessary to prevent New York-based companies from avoiding the New York sales tax by making purchases in the other states. Although petitioner argued that it was not a New York-based company, since it was based in California, the Administrative Law Judge noted that the result in ***Bennett Brothers*** did not hinge on the fact that petitioner was a New York company but rather whether the petitioner therein exercised a right or power over the catalogs "in directing the distributor to mail them to certain designated firms and individuals for the purpose of generating sales of merchandise within the State" (***Bennett Bros. v. State Tax Commn.***, ***supra***, 405 NYS2d, at 805). Accordingly, the Administrative Law Judge concluded that petitioner's reading of the 1989 amendment to Tax Law § 1101(b)(7) was unsupported.

The final argument raised by petitioner was that the imposition of use tax on catalogs printed outside of New York and shipped to residents and retail stores in New York, at its direction, violated the Commerce Clause of the United States Constitution. As stated by the Administrative Law Judge, the Commerce Clause prevents the states from discriminating against interstate commerce. When a state seeks to tax the sale or use of goods within its borders, the tax is subject to a four-prong test: (1) the activity being taxed must have a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax may not discriminate against interstate commerce; and (4) the tax must be fairly related to benefits provided by the state (***see***, ***Complete Auto Transit v. Brady***, 430 US 274, 51 L Ed 2d 326). The Administrative Law Judge concluded that New York's imposition of use tax in this case complied with the four- prong test set forth in ***Complete Auto*** and, as such, found that the use tax on petitioner's catalogs did not violate the Commerce Clause.[2]

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the imposition of tax in this case violates the First Amendment by discriminating against the content of petitioner's publications. Petitioner asserts that advertising is commercial speech and is fully protected by the First Amendment despite the Administrative Law Judge's determination to the contrary. Petitioner claims that distinguishing between its catalog and other publications on the basis that the catalog is merely advertising material is a form of content-based discrimination.

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[2]Petitioner did not file an exception with respect to the Administrative Law Judge's determination on the issue of the Commerce Clause.

Moreover, petitioner contends that it did not make a taxable use of the catalogs in New York. Petitioner emphasizes that all of its catalog-related activities occur outside the State. Additionally, petitioner states that its power and control over the catalogs ceased when such catalogs were deposited with the USPS outside of New York. Lastly, petitioner reasserts its argument that the 1989 statutory amendment to Tax Law § 1101(b)(7), as a result of the decision in ***Bennett Bros. v. State Tax Commn.*** (***supra***), applies only to vendors located in New York. Petitioner maintains that since its operations are based in San Francisco, where all of the activities and decisions with respect to the catalogs are made, it is not an in-state company to which the 1989 amendment is applicable.

As set forth by the Division in its brief on page 3, the Division agrees with the determination of the Administrative Law Judge that petitioner's catalogs are purely promotional materials which do not qualify for the periodical exemption under Tax Law § 1115(a)(5). Moreover, the Division argues that the imposition of use tax on petitioner's catalogs distributed within New York in no way violates the First Amendment of the United States Constitution.

With respect to the definition of the term "use" as set forth at Tax Law § 1101(b)(7), the Division maintains that such statutory language clearly includes the mailing of catalogs at the direction of petitioner from outside the State to addressees and its retail stores within the state. The Division alleges that this interpretation of the statute is supported by the legislative history behind the 1989 amendment to Tax Law § 1101(b)(7).

OPINION

We begin by addressing petitioner's claim that the Division's regulation, which draws a line between what does and does not qualify as a periodical, violates the First Amendment of the United States Constitution.[3]

Petitioner disagrees with the Administrative Law Judge's conclusion that its publications were not excluded from the periodical exemption due to the contents of the publications but rather due to the form of communication chosen by petitioner to sell its products. Petitioner focuses on the testimony of the Division's auditor at hearing wherein such witness testified that it was necessary for him to review the contents of petitioner's publication in order for him to ascertain whether such publication contained a variety of articles devoted to literature, the sciences, arts, news, some special industry, profession, sport or other field of endeavor. However, as amply evidenced by the record, this assessment by the Division's auditor was made as a direct result of questioning by petitioner's representative on cross-examination. In fact, at no point in time during the audit or any time prior to the assessment being issued to petitioner was *any* review made of the catalogs at issue. As the Administrative Law Judge stated in her determination, it is clear to anyone looking at the catalog on its face to recognize it as a catalog which promotes a product for sale. The Division did not consider whether such catalog qualified as a periodical since it was determined on audit that the catalog qualified as advertising material which was not entitled to an exemption (***see***, 20 NYCRR 528.6[c][3][i]). Therefore, we reject

[3]We agree with the Administrative Law Judge that we have jurisdiction to address the validity of the Division's regulations (***see***, Tax Law § 2006[7]; ***Matter of Greig***, Tax Appeals Tribunal, September 16, 1999).

petitioner's argument that a review of the contents of its publication was undertaken in this case by the Division.

Furthermore, petitioner argues that the Supreme Court decision in ***Cincinnati v. Discovery Network*** (507 US 410, 123 L Ed 2d 99) controls in this case. We disagree. In ***Discovery Network***, the issue involved the distribution of commercial handbills by newsracks located on a public right of way that was prohibited by regulation even though newspapers being sold in newsracks located on public rights of way were not so prohibited. Petitioner's catalogs herein were not prohibited from being distributed by the same methods that newspapers and other periodicals were distributed within New York, but rather, the issue before us involves whether the printing costs of petitioner's publication are entitled to a tax exemption to which periodicals are entitled.

In ***Regan v. Taxation with Representation of Washington*** (***supra***), the Supreme Court was presented with certain provisions of the Internal Revenue Code which discriminated between tax exempt organizations that engage in lobbying activities and those exempt organizations that do not. The Court noted in its decision that "tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system" (***Regan v. Taxation with Representation of Washington***, ***supra***, 76 L Ed 2d, at 136). Describing tax exemptions as a matter of grace, the Court concluded that while a legislature may not restrict the exercise of free speech, it need not subsidize it. The Court stated that "[w]e have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny" (***Regan v. Taxation with Representation of Washington***, ***supra***, 76 L Ed 2d, at 139).

Moreover, as stated by the Court in ***Leathers v. Medlock*** (***supra***), a tax which discriminates among speakers is constitutionally suspect only under certain circumstances: (1) where the tax singles out the press for special treatment; (2) where a selective tax targets individual members of the press; and (3) where tax discriminates on the basis of the content of the taxpayer's speech (***see***, ***Leathers v. Medlock***, ***supra***, 113 L Ed 2d, at 502-503). We agree with the Administrative Law Judge that the regulation at issue raises none of the concerns identified above. As succinctly stated by the Administrative Law Judge:

> New York's sales tax is a tax of general applicability which does not single out the press for taxation. There is no indication that the regulation attempts to interfere with the First Amendment rights of a targeted group. Excluding all advertising materials from the scope of the periodical exemption hardly resembles a selective tax targeted to a small number of speakers. Finally, the regulation is not content-based. It makes a distinction between periodicals and catalogs based on the form of communication (advertising) and the common understanding of what constitutes advertising - not on the content of the communication (Determination, conclusion of law "G").

As pointed out by the Division, the Court of Appeals decision in ***Stahlbrodt v. Commissioner of Taxation & Fin.*** (92 NY2d 646, 684 NYS2d 466) is further support for its position that the regulation does not violate the First Amendment. In ***Stahlbrodt***, the Court held that Tax Law § 1115(i)(C) which exempted newspapers from sales tax on purchases of printing services, provided that no more than 90 percent of the printed area of the paper was devoted to advertising, did not violate the First Amendment. The Court, at the outset, stated that:

> We begin with the unarguable fact that the imposition of the sales tax here is not directed at the press in general or at a particular class of news entities, but is one of general application for the taxation of sales of goods and services in the State [citation

> omitted] (***Stahlbrodt v. Commissioner of Taxation & Fin.***, ***supra***, 684 NYS2d, at 467).

The Court noted that the so-called 90 percent rule was incorporated into the sales tax exemption provided to shopping papers to ensure that at least 10 percent of the publication would be devoted to news of general or community interest. The Court held that restricting the exemption pursuant to Tax Law § 1115(i)(C) to "those advertising papers that serve at least in part the same informational social purposes served by general newspapers and news periodicals" (***Stahlbrodt v. Commissioner of Taxation & Fin.***, ***supra***, 684 NYS2d, at 468) passed constitutional muster under both ***Regan v. Taxation with Representation of Washington*** (***supra***) and ***Leathers v. Medlock*** (***supra***).

Comparing the facts of the petitioner in ***Stahlbrodt*** to the constitutional analysis provided in ***Regan*** and ***Leathers***, the Court reasoned that the tax imposed was one of general application and no group was targeted for special treatment. Moreover, the Court pointed out that other forms of published commercial speech which were distributed free of charge, including shopping catalogs, advertising flyers and shopping center advertising sheets, were not eligible for any sales tax exemption for purchases of printing services (***see***, ***Stahlbrodt v. Commissioner of Taxation & Fin.***, ***supra***).

Additionally, the Court addressed the issue of whether the 90 percent rule resulted in differential treatment based on the content of the petitioner's shopping paper. In relying on ***Regan***, the Court held that:

> absent invidious discrimination, the Legislature can pick and choose between the forms of expression it decides to subsidize through a tax exemption. In ***Regan***, the Supreme Court held that the First Amendment was not implicated in Congress' choice not

> to subsidize expressions designed to advance a public interest group's legislative agenda. Here, a fortiori, the Legislature may validly decline to subsidize shopping papers which fail to serve at least minimally the same social purpose as a conventional newspaper by informing the public in matters of community interest, rather than exclusively commercial interest (***Stahlbrodt v. Commissioner of Taxation & Fin.***, ***supra***, 684 NYS2d, at 469).
> .

Finally, the Court in ***Stahlbrodt***, distinguished ***Cincinnati v. Discovery Network*** (***supra***) from the facts in its case. The Court explained that in ***Discovery Network***, the issue involved the imposition of a regulation directly and significantly suppressing commercial expression which triggered First Amendment concerns as opposed to merely a governmental decision to subsidize certain forms of expression through a tax exemption while remaining neutral to other forms of expression (***see***, ***Stahlbrodt v. Commissioner of Taxation & Fin.***, ***supra***).

Therefore, applying the principles and analysis espoused in ***Stahlbrodt***, we find that the Division's regulation does not violate the First Amendment. There is no evidence that the regulation, defining the term "periodical," attempts to selectively tax a targeted group. Moreover, the regulation is not content-based. Accordingly, we sustain the determination of the Administrative Law Judge on this issue.

We next address petitioner's argument that it did not make a use of the catalogs within New York State since it is based in San Francisco where all decisions and activities relating to the catalogs are made. Petitioner asserts that "[i]t is the location where it exercised control over the catalogs, rather than the fact that it exercised such control, that is dispositive for purposes of the proper imposition of the New York use tax" (Petitioner's brief in support, p. 16).

Tax Law § 1101(b)(7) defines the term "use" as follows:

> The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. *Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials* (emphasis added).

The last sentence of the above-quoted statutory section was added by section 242 of Chapter 61 of the Laws of 1989. This amendment was a direct result of the decision in ***Bennett Bros. v. State Tax Commn.*** (***supra***). In ***Bennett Brothers***, the Court held that a New York vendor was not subject to use tax on catalogs distributed in New York because it lacked control over a shipment of catalogs produced by an out-of-state printer once the printer deposited the catalogs with a common carrier outside the State for delivery to the vendor's customers within the State. Under this holding, New York vendors were encouraged to patronize out-of-state printers in order to avoid paying sales tax that an in-state printer was required to collect on catalogs it sent to in-state addresses (***see***, Governor's Bill Jacket, L 1989, ch 61, pp. 52-54).

We find unpersuasive petitioner's argument that this amendment does not apply to it because it is a company based in San Francisco. There is no doubt that petitioner is a New York vendor. It has three retail stores in New York. The amendment to Tax Law § 1101(b)(7) is quite clear and certainly applies to petitioner. Petitioner makes use of its catalogs by directing the distribution of such catalogs to addressees in New York as well as to its retail stores in New York. Thus, we find that petitioner is properly liable for the use tax in this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sharper Image Corporation is denied;

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

3. The petition of Sharper Image Corporation is denied; and

4. The Notice of Determination dated November 30, 1995, as modified by the conciliation order, is sustained.

DATED: Troy, New York
November 24, 1999

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner