

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SAN MAR CORPORATION : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 822993
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 2003 :
through August 31, 2006. :
:

Petitioner, San Mar Corporation, filed a petition 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 September 1, 2003 through August 31, 2006.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York 12180, on January 26, 2010 at 9:00 AM, with all briefs to be submitted by July 26, 2010, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). By a letter dated January 14, 2011, this six month period was extended for an additional three months (Tax Law § 2010[3]). Petitioner appeared by McDermott, Will & Emery, LLP (Arthur R. Rosen, Esq., and Lindsay LaCava, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., and Anita Luckina, Esq., of counsel).

ISSUES

I. Whether petitioner has established that the sales at issue during the audit period were nontaxable sales for resale.

II. Whether, if any (or all) of such sales were properly subject to tax, petitioner has established that the Division's manner of computing and applying the error rate it used in determining the additional tax due for the audit period was inherently distortive and should be rejected as unreasonable.

III. Whether imposing on petitioner a duty of providing a New York taxpayer identification number for each of petitioner's customers that had purchases shipped into New York State, in order to prove the resale nature of such sales transactions, constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

1. On November 26, 2007, following an audit, the Division of Taxation (Division) issued to petitioner, San Mar Corporation (San Mar), a Notice of Determination assessing additional sales and use taxes due for the period spanning September 1, 2003 through August 31, 2006 in the amount of \$444,284.64, plus interest. The Division determined that tax was due in four areas:

a) tax on sales of tangible personal property made to (or shipped to) customers located in New York State, with respect to which the Division maintains petitioner has not furnished information sufficient to establish that such sales were, as claimed by petitioner, sales for resale and therefore not subject to tax.

b) tax in the amount of \$976.00 resulting from petitioner's incorrect remittance of sales tax with its November 2003 sales and use tax return.

c) tax in the amount of \$1,627.26 based on taxable freight charges to petitioner's customers.

d) tax in the amount of \$8,684.15 based on the accrual of use tax on catalogs, clothing racks, and the distribution of clothing to petitioner's salespersons.

2. The Division's audit methodology with respect to the tax determined and assessed as described in Finding of Fact 1(a) involved a detailed audit of petitioner's claimed wholesale sales

for three separate one-month test periods, to wit, September 2003, September 2005 and June 2006, with the computation of a separate resulting error rate for each such test month, to wit, 1.2409% for September 2003, 0.04564% for September 2005, and 0.2732% for June 2006. The Division, in turn, applied the error rate determined for September 2003 to the claimed wholesale sales made by petitioner for the first eight quarterly periods under audit (i.e., all sales tax quarterly periods except the last four quarterly periods of the audit period), applied the error rate determined for September 2005 to the claimed wholesale sales made by petitioner for the two quarterly periods ended November 31, 2005 and February 28, 2006, and applied the error rate determined for June 2006 to the claimed wholesale sales made by petitioner for the two quarterly periods ended May 31, 2006 and August 31, 2006. Petitioner does not dispute the use of test period audit methodology in this case, but does contest the Division's conclusion that tax was due on certain sales during the particular test periods, and also contests the manner in which the error rates determined above for the various test periods were applied.

3. Petitioner challenged the Division's assessment by filing a Request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). Following a conciliation conference, a Conciliation Order (CMS No. 222556) was issued pursuant to which the amount of tax at issue was reduced to \$289,410.49, plus interest.

4. Prior to the hearing held in this matter, the parties executed two stipulations:

(a) As set forth in the first such stipulation, petitioner does not dispute the tax found due and assessed as set forth above in Finding of Fact 1 (b), (c) and (d), totaling \$11,287.41, plus interest thereon. Petitioner does, however, continue to dispute the tax found due and assessed as described in Finding of Fact 1(a), in the reduced amount as set forth in Finding of Fact 3.

(b) As set forth in the second such stipulation, the parties agree that the sales to one of petitioner's customers that were included as taxable sales per audit, were shown to be sales for resale and hence not subject to tax.

Accordingly, the parties agree that tax of \$49.91 based on sales to this customer should be removed from the error rate computation for the June 2006 test period and that the amount of tax included in the Notice of Determination as a result of such sales should be reduced by \$285.46, with interest reduced accordingly. Further, the parties agree that certain invoices reflected shipping charges for catalogs, that the tax associated with these invoices should be removed from the error rate computation for September 2005, and that the amount of tax included in the Notice of Determination as a result thereof should be reduced by \$2.10, with interest reduced accordingly.¹

5. San Mar is a family owned and operated wholesaler and distributor of a wide variety of printable and embroiderable apparel and accessories, including hats, tee shirts, sweatshirts, polo shirts, button-down shirts and jackets. San Mar, which has been in business since 1971, is incorporated in the State of Washington and has its principal place of business located there, but also has sales representatives operating in many states including New York State. In 2003 (the beginning of the audit period) San Mar sold approximately 350 products, while at present it offers approximately 800 products for sale.

6. San Mar sells “blank,” i.e., not decorated, embroidered or imprinted, products. San Mar’s products are all carefully selected and designed to ensure that they can be decorated by imprinting or embroidering with a logo, saying (phrase) or design. In this respect, for example, the jackets sold by San Mar usually have a “port pocket” to facilitate embroidery on the left chest area, all of the seams on the clothing items sold by San Mar are carefully placed so as not to interfere with common locations for such decorations (e.g., the left chest area), and any stripes or patterns are carefully “engineered” so that they are in the same location on each item of clothing and do not interfere with common locations for decoration.

¹ The particular invoices are numbered and dated as follows: 13766409 dated September 22, 2005, 13766412 dated September 15, 2005, 13766413 dated September 1, 2005 and 14159190 dated September 7, 2005.

7. Some of the products sold by San Mar are proprietary or private label brands, such as Port Authority or Sport-Tek brands, where San Mar owns, designs, sources and markets such branded products. Other products sold by San Mar are “retail” brands, such as Ping or Nike, meaning that San Mar purchases these products from third-party manufacturers or distributors and then resells them to its customers. San Mar claims differentiation from its competitors in its depth of inventory, whereby San Mar attempts to ensure that it always has a sufficient stock of its various products on hand and available to meet the product order needs of its customers as they arise. This distinction is important because most of San Mar’s customers sell products to their own “end user” customers before actually placing the order for those products with San Mar. Hence, if San Mar is out of stock when a San Mar customer places an order, that San Mar customer would be unable to fulfill its sale to its own customer.

8. San Mar sells its products to customers in the promotional and sportswear industry, and the vast majority of San Mar’s customers are decorators and promotional products distributors. A decorator is a company that actually puts the logo, saying or design on San Mar’s products, most commonly by means of embroidery or imprinting by screen printing. When a decorator customer orders a product from San Mar, San Mar usually ships the product directly to the decorator, who in turn applies the decoration to the product and resells the decorated product to its own end user customer. A promotional products distributor, in contrast, is a company that sells products bearing a logo, saying or design to corporations or other groups. Promotional products distributors typically sell a wide variety of decorated products, such as apparel, pens, mouse pads, mugs and the like. When a promotional products distributor orders a product from San Mar, San Mar usually ships the product to a designated third-party decorator that the promotional products distributor has hired to decorate the product. The designated decorator

decorates the product and thereafter ships the decorated product directly to the promotional product distributor's customer (i.e., the end user).

9. San Mar also sells its products to four additional types of customers, to wit, team dealers, uniform retailers, apparel retailers and industrial laundries, with these customers representing only a very minor segment of San Mar's total customer base. A team dealer is a company that sells sports equipment, team uniforms and team apparel to schools. A uniform retailer is a company that sells work uniforms, such as uniforms for police officers, fire fighters, bus drivers and municipal employees. An apparel retailer, also referred to as a transfer shop, is a company that sells apparel in a retail store. Team dealers, uniform retailers and apparel retailers purchase products from San Mar, decorate or contract with a third-party to decorate those products, and then resell the decorated products to their own customers.

10. Industrial launderers primarily rent and launder industrial uniforms, although many industrial launderers also have a direct sale business that sells uniforms directly to end users. In 2005, San Mar introduced a special product line known as "Cornerstone" for industrial launderers. Cornerstone products are "rental friendly," in that they are specially designed to withstand multiple industrial washes. Cornerstone is the only rentable product sold by San Mar, and all other products sold to industrial launderers by San Mar are sold for resale and not for rental.

11. In addition to the types of customers described above, San Mar also occasionally sells its products to its own employees for their own personal use. Further, San Mar territory managers have an account that they can use to purchase San Mar products to give away to customers as samples. Other than the Cornerstone rental product sold to industrial launderers,

San Mar employees are the only end users allowed to purchase products directly from San Mar, and San Mar collects and remits appropriate sales and uses taxes on such sales.

12. San Mar is a “channel marketer,” and operates its business under the view that its customers are a part of its sales force. Given the size of San Mar’s customer base, San Mar views itself, as explained by its witness at hearing, as having “approximately 250,000 people who are selling [our] product in the United States,” and San Mar recognizes this sales force as one that it “could never replicate.” Under this business model, the main focus of San Mar’s marketing efforts is not to directly promote San Mar’s own business, but rather to do so indirectly by helping its customers improve their own businesses. San Mar’s vice-president, Jeremy Lott, who is also one of San Mar’s owners, testified at hearing that San Mar tries very hard not to be visible to its customers’ customers (i.e., the end users of the products sold by San Mar). Thus, San Mar provides various marketing tools, including custom catalogs, to its customers to help those customers build their own businesses and, in turn, work to build San Mar’s business.

13. On average, San Mar’s customers receive from San Mar approximately 50 catalogs per year showing San Mar’s products. San Mar produces catalogs for its customers that can be, and are, customized with the customer’s name, logo and contact information. San Mar produces approximately 3,000,000 catalogs per year. Of this total, only approximately 30,000 (i.e., one percent) of these catalogs carry San Mar’s name and identifying information on them. The balance do not carry San Mar’s name, telephone number, website or address, but rather have the customer’s name, logo, address and telephone number imprinted thereon. In instances where San Mar’s customer’s customer (i.e., the end-user of the products) is a large-sized entity, the name of that entity (the end-user of the products) appears on the front of the catalog. San Mar’s

customer's name and other contact information appear on the back of the catalog. San Mar's name and other contact information do not appear on the catalog.

14. San Mar produces priced and unpriced catalogs. The priced catalogs include two versions. One version is a "retail" catalog, produced for San Mar's customers to use with their own customers. This retail catalog shows prices at which the San Mar customer might sell the products to its own customers. Typically, the "retail" price is based on twice the case price at which San Mar sells the products to its customers. The other priced catalog is an "industry" catalog, showing the prices at which San Mar's customer may purchase products from San Mar. The unpriced catalogs are provided to and used by San Mar's customers to show available products to their own customers. San Mar's customers would then determine, by reference to the industry catalog rather than the retail catalog, the appropriate price point at which they would sell products to their customers.

15. San Mar has, and had during the audit period, a number of customer acceptance policies and procedures in place in an effort to ensure that it sells only to customers within its channel of distribution (i.e., decorators, promotional products distributors, team dealers, apparel retailers, uniform retailers and industrial launderers) and does not sell to end users (i.e., retail purchasers). San Mar invests a significant amount of time and resources into training and thereafter monitoring its employees in this respect. Upon joining San Mar, all new employees in its call center (Customer Care Center) undergo a six-month training process. The trainees spend about half of their time in a classroom setting and half of their time handling customer calls while being supervised by a mentor or trainer. After completing their initial training program, San Mar employees continue to receive ongoing training on a wide range of topics, including training on company policies and procedures.

16. There are two departments within San Mar, the New Accounts Team (a part of San Mar's Customer Care Center) and the Resale Team (a part of San Mar's Credit Department), that are involved in the new customer acceptance process. Each is described hereinafter.

New Accounts Team

17. When a potential customer first contacts San Mar it is directed to the New Accounts Team, which, over the course of the audit period, expanded from two to six employees. The New Accounts representative first asks the potential customer a number of questions concerning the nature of its business to ascertain whether it is a retailer, embroiderer, screen printer, or in the promotional products industry. The name of a business (e.g., Johnson Embroidery) often sheds initial light on a potential customer's business.

18. In the case of a company that claims it is in the promotional products industry, the New Accounts representative will ask whether it is a member of any industry associations, such as the Promotional Products Association International (PPAI) or the Advertising Specialty Institute (ASI) and, if so, the representative will ask for the potential customer's industry association membership number so as to verify the same with the PPAI or the ASI. Membership in these associations is limited to decorators, suppliers, and distributors in the promotional products industry. If a company's membership in one of these "reseller" trade associations is successfully verified, the customer would be prequalified or preapproved as a new San Mar customer. Eighty-seven of the San Mar customers with sales at issue in this matter are members of ASI. If a potential customer is not a member of an industry or trade association, or if its claimed membership therein cannot be verified, the representative asks the customer additional questions to determine whether the customer is, in fact, in San Mar's specific channel of distribution, and then will seek to verify that information. For example, the representative may view the

customer's website or request copies of invoices for purchases from one of San Mar's competitors. Unless San Mar is satisfied that the potential customer is actually in the promotional products industry, San Mar will reject that company as a customer.

19. If a potential customer claims to be a decorator, the New Accounts representative asks additional questions about the potential customer's business operations and attempts to verify that information. For example, the representative may view the company's website or ask about the type of equipment used by the potential customer in carrying on its business. If the representative has doubts as to whether the potential customer is truly a decorator, there may be a request for copies of invoices for embroidery equipment purchased or used by the potential customer. In many instances, a San Mar territory manager will be dispatched to visit the potential customer's place of business to verify that it actually is a decorator. As above, unless San Mar is satisfied that the potential customer is in fact a decorator, San Mar will reject the company as a customer.

20. If a potential customer claims to be a retailer (e.g., team dealer, uniform retailer, apparel retailer), the New Accounts representative asks questions about the potential customer's business to determine whether apparel is the potential customer's main line of business and then will attempt to verify that information. Even if the potential customer is a retailer, San Mar will reject that potential customer unless apparel is its main line of business.

21. Prior to the introduction of the Cornerstone line in 2005, San Mar's industrial launderer accounts were handled in the manner described above. After 2005, these accounts were handled somewhat differently such that, in addition to the foregoing steps (including ascertaining the nature of the potential customer's business), the New Accounts representative determines whether the potential customer plans to utilize the purchased products for sale or

rental. If the potential industrial laundry customer is ultimately approved as a new customer, a direct sale account, a rental account, or two accounts will be established accordingly. In states where the rental product is taxed differently than the direct sale product, a separate account is required for the purchase of rental products (i.e., the Cornerstone rental-friendly products), with another separate account required for the purchase of direct sale products. When an industrial launderer purchases rental products, San Mar charges sales tax if the rental product is shipped to a state such as New York that taxes products purchased for rental.²

22. San Mar rejects potential customers when they do not provide information to establish that they are in San Mar's distribution channel. This action was described as consistent with San Mar's decision not to compete with its customers, the result of which San Mar believes would be to ultimately weaken its own business. In this respect, San Mar's owner and vice president testified that if San Mar were to "sell around" its own customers, they would stop buying from San Mar and would buy from San Mar's competitors. If a potential customer is rejected, San Mar will usually refer that potential customer to the internet or to the telephone directory to find a decorator from whom it can purchase products. An audio recording of a potential customer's telephone interview with a New Accounts Team representative was presented at hearing as an example of the types of conversations the New Accounts representatives have with potential customers. In the particular instance, after a series of questions, the potential customer was rejected because it could not provide a sales tax license number, and was referred to a decorator in order to make its desired apparel purchases.

² Sales tax on such sales of rental products shipped to industrial launderers in New York are not at issue in this matter.

23. In all instances, when San Mar personnel are satisfied that the potential customer is a reseller in San Mar's channel of distribution, the New Accounts Team prequalifies or preapproves the customer, sends the customer a resale certificate for completion and return, and requests a copy of the customer's resale license. The customer remains unable to purchase products from San Mar, however, until the Resale Team process is completed.

Resale Team

24. The Resale Team, which consisted of one to two employees during the audit period, is the division of San Mar's Credit Department that is charged with the responsibility to collect and review resale certificates and resale licenses. When a potential customer returns its completed resale certificate and sales tax license to San Mar after being prequalified or preapproved by the New Accounts Team, the resale documents are forwarded to the Resale Team.

25. The Resale Team first confirms that the potential customer was prequalified or preapproved by the New Accounts Team and, if not, then the potential customer is referred back to the New Accounts Team. If properly prequalified or preapproved, the Resale Team reviews the resale certificate and sales tax license to confirm that all of the critical information has been completed and matches the information that was entered in San Mar's computer system by the New Accounts Team. Further, for those states that require it, the Resale Team confirms the entity's sales tax license number with that state's revenue department. Since San Mar does not typically have shipping information at the time a new account is established, San Mar requires its new customers to provide a resale certificate only for the state where the customer is physically located. If there are any issues with the resale documents or resale license number, the Resale Team contacts the potential customer to try and resolve such issues. If, however, the issue cannot be resolved to the satisfaction of the Resale Team (e.g., the potential customer is unable

to furnish a valid resale license number), the potential customer is rejected. For those who are accepted as new customers, the Resale Team requires such customers to provide updated resale certificates every four years. If a customer does not comply with this renewal requirement, San Mar will place the customer's account on hold until an updated resale certificate is provided.

26. San Mar management monitors the performance of its employees, including those who comprise its New Accounts Team and Resale Team on an ongoing basis. Supervisors often listen to calls, and San Mar randomly records and monitors its employees' telephone conversations, as well as screen shots of its employees' computers. If an employee is not complying with San Mar's policies and procedures, the employee may be placed on probation, all of his or her calls may be flagged for recording or monitoring and, if the problem persists, the employment is terminated.

The Audit

27. The Division examined three one-month test periods during the audit period, as noted (*see* Finding of Fact 2). San Mar provided resale documentation for every customer with sales during such selected test periods, including a variety of multijurisdiction resale certificates, state-specific resale certificates (usually from the state where the customer is physically located), and copies of sales tax permits, registrations and licenses. As described in Finding of Fact 2, the audit method involved reviewing petitioner's claimed nontaxable sales for the noted test periods, and developing an error rate resulting from the comparison of claimed but disallowed nontaxable sales to total claimed nontaxable sales for each particular test period. The resulting error rates were applied to total claimed nontaxable sales for each of three different periods (extrapolation periods) encompassed within the audit period to arrive at the tax due on claimed nontaxable sales for the audit period.

28. The foregoing extrapolation periods were chosen by the auditor to coincide with the timing of certain changes to the Tax Law relative to the taxation of clothing and footwear. As of the beginning of the audit period, all clothing costing under \$110.00 was subject to New York's state and local sales tax. Effective September 1, 2005, New York City enacted an exemption from the local tax with respect to clothing and footwear costing less than \$110.00. Effective April 1, 2006, New York State enacted an exemption from the state tax with respect to clothing and footwear costing less than \$110.00 (*see* TSB-M-06[6]S [March 29, 2006])³

29. As a result of the test period audit, there are invoices for 191 customers at issue in this case.⁴ Upon audit, San Mar provided to the Division a New York Resale Certificate (Form ST-120) for the following ten such customers with invoices at issue:

- a) AS
- b) AP
- c) BRG
- d) D&DEU
- e) HLC
- f) H (*see* Finding of Fact 30[r])
- g) IY
- h) JLSA
- i) P&PS

³ The latter exemption applied to the state portion of the tax, but was not applicable to the locally imposed sales or use taxes unless a county or city elected to enact a companion exemption.

⁴ Petitioner asserted that its business is highly competitive and that disclosure of the names of its individual customers would result in a negative impact on petitioner's business viz that of its competitors. Accordingly, petitioner requested that its customers' names not be listed herein. The Division did not dispute this assertion or oppose petitioner's accompanying request for nondisclosure. Accordingly, though somewhat cumbersome, the individual customers to whom sales made by petitioner remain in issue shall be identified herein only by their initials. It is noted that for purposes of reference upon further appellate review, such customers are identified by full name in the audit documents, the transcript of proceedings herein, and in petitioner's posthearing briefs).

j) T-SU a/k/a NECE⁵

30. In addition to the foregoing customers, and through a stipulation, the parties agreed that the taxability of invoices to the following eight customers would be dispositive of the taxability of all of the remaining customers and invoices at issue:

k) CGB d/b/a API

l) A-CM

m) AE

n) FGL d/b/a CAP

o) GA

p) KT

q) PCP&P

r) H (*see* Finding of Fact 29[f])

Customers with New York Resale Certificates—Form ST-120

31. In addition to providing Form ST-120 for ten customers with invoices at issue, San Mar also provided out-of-state or multistate resale certificates or sales tax licenses for seven of such customers. Further, at hearing San Mar provided additional evidence in support of its claim that each of the ten customers listed above at Finding of Fact 29(a - j) was a reseller in the promotional products industry during the audit period. The evidence provided for each such customer is described hereinafter as follows:

a) Customer AS (one invoice):

The Form ST-120 provided for this customer was rejected on audit because the purchaser's name thereon was "SAS" as opposed to "AS," as the purchase's name is reflected in San Mar's

⁵ While it was initially stipulated that no documentation was provided for the customer T-SU, it was established at hearing that a Form ST-120 had been provided for the customer NECE and that T-SU is, as the result of acquisition, the same customer as NECE. Hence, that customer is reflected as T-SU a/k/a NECE.

accounting records. At hearing, San Mar provided a New York (sales tax) Certificate of Authority issued to both SAS and AS, indicating that the business operates under both such names. San Mar also provided photos of the customer's retail store and an affidavit from the owner of AS attesting that throughout the audit period AS was a reseller in the promotional products industry and that the products AS purchased from San Mar are resold to AS's customers.

b) Customer AP (seven invoices):

The Form ST-120 provided for this customer was rejected on audit because the customer did not complete the "purchaser information" section of such form (which requires a description of the purchaser's business and the products it sells), and did not complete the portions of the form that require either a New York State or an out-of-state registration number. San Mar provided a San Mar Uniform Sales and Use Tax Certificate – Multi-Jurisdiction (Multi-Jurisdiction Resale Certificate) from AP that included its Florida tax registration number and a description of its business. This form was rejected on audit, notwithstanding the information provided thereon, because it did not include a New York State taxpayer identification number. San Mar also provided (computer) screen shots of AP's website and online store, a copy of AP's 2009 customized catalog cover,⁶ and an affidavit from the owner of AP attesting that throughout the audit period AP was a reseller in the promotional products industry and that the products AP purchased from San Mar are resold to AP's customers.

⁶ The term "customized catalog cover," as used in this determination, refers to the type of catalog described in detail in Findings of Fact 12 through 14, where San Mar's customer's name and information (and in some instances San Mar's customer's customer's name and information as well), but not San Mar's name and information, is imprinted and displayed on the catalog.

c) Customer BRG (two invoices):

San Mar provided three forms ST-120, each of which was rejected because the same were not properly completed. Specifically, the first two such forms (Exhibits 13 and 14) were rejected because the purchaser information portions thereof had not been completed, and the third such form (Exhibit 15) was rejected because the seller's name (i.e., San Mar) and purchaser information portions thereof had not been completed. San Mar provided screen shots of BRG's website and online store, a copy of BRG's customized 2010 catalog cover, and an affidavit from BRG's president attesting that the items BRG purchased from San Mar were resold to BRG's customers.

d) Customer D&DEU (one invoice):

As with customer AP, the Form ST-120 provided for this customer was rejected on audit because the customer did not complete the "purchaser information" section of such form (which requires a description of the purchaser's business and the products it sells) and did not complete Part 2 of the form that requires an out-of-state registration number. San Mar provided a Multi-Jurisdiction Resale Certificate from D&DEU that included its Connecticut sales and use tax permit including its registration number, and a description of its business and the products it sold. This form was rejected on audit, notwithstanding the information provided thereon, because it did not include a New York taxpayer identification number. San Mar also provided (computer) screen shots of D&DEU's online store, a copy of its customized 2004-2005 catalog cover, and an affidavit from the owner of D&DEU attesting that throughout the audit period D&DEU was a reseller in the promotional products industry. Attached to this affidavit was a copy of an invoice from D&DEU to its customer (RC) showing that the specific items on the invoice at issue purchased by D&DEU from San Mar were resold by D&DEU to its customer. While the invoice

from San Mar to D&DEU indicates the purchase of 123 Gildan Ultra Cotton T-Shirts and 22 Port & Co. Essential T-Shirts, the invoice from D&DEU to its customer (RC) indicates all 144 shirts as Gildan Ultra Cotton T-Shirts. San Mar's owner explained in testimony that the two products are essentially identical, that San Mar was likely out-of-stock in double-extra large Gildan Ultra Cotton T-Shirts, and that D&DEU simply substituted the Port & Co. shirts without reflecting the specific substitution of this comparable product on its invoice.

e) Customer HLC (four invoices):

As above, the Form ST-120 provided for this customer was rejected on audit because the customer did not complete the "purchaser information" section of such form (which requires a description of the purchaser's business and the products it sells). San Mar provided a Massachusetts Sales Tax Resale Certificate that includes a description of HLC's business as well as a copy of the verification form from the Massachusetts Department of Revenue website confirming the validity of HLC's sales tax resale certificate status. This latter information was determined to be insufficient on audit for lack of language similar to that set forth in the certification section of Form ST-120 stating that the taxpayer (HLC) would remit tax to New York State if it consumed the tangible personal property in New York. San Mar also provided (computer) screen shots of HLC's website and online store, a copy of HLC's customized 2009 - 2010 catalog cover, and an affidavit from the president of HLC attesting that throughout the audit period HLC was a reseller in the promotional products industry and that the products HLC purchased from San Mar are resold to AP's customers.

f) Customer H allegedly a/k/a or d/b/a JB (one invoice):

The Form ST-120 provided for this customer was rejected on audit because the purchaser's name listed thereon was "JB," whereas the customer's name in San Mar's accounting records

was “H.” As with Customer AS (*see* Finding of Fact 31[a]), San Mar provided a New York (sales tax) Certificate of Authority issued to both JB and to H (located in New York City), indicating that the business is registered to operate under both such names. San Mar also provided a printout of its “Goldmine” history report for Customer H. Goldmine is San Mar’s customer relationship management system used to maintain and archive records and conversations with customers. The notes in the Goldmine report, made by San Mar employees contemporaneously with the events described, reflect that during the audit period H purchased products from San Mar that were to be decorated by screen printing and resold to performing bands. San Mar’s attempts to gather additional information concerning the business activities for this customer were unsuccessful since it appears the company is no longer engaged in business.

g) Customer IY (one invoice):

The Form ST-120 provided for this customer (as CAJ d/b/a IY) was rejected on audit because the name of the seller (i.e., San Mar) was not included. San Mar also provided two multi-jurisdiction resale certificates from IY, which included San Mar’s seller information, as well as a copy of IY’s Maine Seller’s Certificate. These documents, taken together, were still rejected on audit because they did not include a New York taxpayer identification number. San Mar also provided (computer) screen shots of IY’s website and online store, a copy of IY’s customized 2010 catalog cover, and an affidavit from IY’s owner attesting that throughout the audit period IY was a reseller in the promotional products industry and that the products IY purchased from San Mar are resold to AP’s customers.

h) Customer JLS (four invoices):

The Form ST-120 provided for this customer was rejected on audit because the purchaser information section was not completed. San Mar provided an affidavit from the owner of JLS

attesting that throughout the audit period JLS was a reseller in the promotional products industry and that the products JLS purchased from San Mar are resold to JLS's customers.

i) Customer P&PS (one invoice):

The Form ST-120 provided for this customer was rejected on audit because the customer name thereon (P&PS) did not match the customer name on the invoice in question (PP&P). Petitioner notes that the addresses on the Form ST-120, the customer's New York State (sale tax) Certificate of Authority, and the invoice are all identical. San Mar also provided an affidavit from the chief credit and administrative officer of the entity specifically named on the invoice (PP&P) attesting that P&PS is part of the PP&P franchise. Petitioner noted that if a customer is a part of the PP&P franchise San Mar adds, in its computer system and on its billing invoices (including the invoice at issue herein), the first word of the franchisor before the customer's name so as to ensure that the PP&P franchise customer qualifies for special programs set aside for such franchisees. The PP&P affiant also attested that the products purchased by P&PS, as a PP&P franchisee, from San Mar, were ultimately resold to its customers.

j) Customer T-SU a/k/a NECE (15 invoices):

The Form ST-120 provided for this customer was provided in the NECE name and not in the T-SU name, and was rejected on audit because of this name difference, i.e., the ST-120 appeared to pertain to a different customer. At hearing, San Mar provided an affidavit from the manager of the entity that acquired T-SU in August 2007, attesting that prior to July 2004, T-SU a/k/a NECE did business with San Mar under the name NECE, and that the items purchased by TSU from San Mar were resold to T-SU customers.

Customers with Multi-State and Out-of-State Resale Certificates

32. San Mar provided out-of-state resale certificates, multi-state resale certificates or sales tax licenses (or verifications thereof) for each of the remaining customers with sales at issue during the audit period in support of its claim that each of these eight customers (the customers listed above at Finding of Fact 30([k-r])) was a reseller in the promotional products industry during the audit period. The evidence provided for each such customer is described hereinafter as follows:

k) Customer CGB d/b/a API:⁷

The Multi-Jurisdiction Resale Certificate (dated May 12, 2003) provided by this customer was rejected on audit as insufficient to establish that San Mar's sales to this customer (and others who provided such certificates) were for resale because the certificate does not list a New York taxpayer identification number for the customer and because the certificate lacks language similar to that set forth in the certification section of Form ST-120 stating that the purchaser would remit tax to New York State if it consumed the tangible personal property in New York. In addition to the representative Multi-Jurisdiction Resale Certificate, San Mar provided another Multi-Jurisdiction Resale Certificate (dated August 28, 2007) and a certification of this customer's State of Maryland Resale Certificate Number dated May 13, 2003. San Mar also provided a marketing brochure, screen shots of CGB's website and online store, a copy of its customized 2007 catalog cover, and an affidavit from its president attesting that CGB is and was

⁷ The parties stipulated that the Multi-Jurisdiction Resale Certificate for CGB d/b/a API is representative of all such certificates received by San Mar and provided to the Division for customers who provided such certificates and, further, that the invoice at issue for this customer is representative of all invoices at issue for customers who provided such resale certificates.

throughout out the audit period a reseller in the promotional products industry whose products purchased from San Mar were resold to CGB's customers.

1) Customer A-CM:⁸

The San Mar Resale Certificate provided by this customer was rejected on audit as insufficient to establish that San Mar's sales to this customer (and others who provided such certificates) were for resale because the certificate lacks language similar to that set forth on Form ST-120 stating that the purchaser would remit tax to New York State if it consumed the tangible personal property in New York. In addition to the representative San Mar Resale Certificate, San Mar provided three Virginia sales and use tax certificates of exemption (dated December 26, 2007, October 2, 2007 and May 12, 2003, respectively), which were rejected as insufficient to establish that the sales San Mar made to this customer were for resale because such certificates were not the required New York resale certificate (ST-120). In addition to the foregoing items, San Mar provided screen shots of A-CM's website and online store, a copy of its customized 2006 - 2007 catalog cover, and an affidavit from its owner attesting that A-CM is, and was throughout the audit period, a reseller in the promotional products industry whose products purchased from San Mar were resold to A-CM's customers. A-CM's owner further attested, specifically, that the items on the invoices at issue were used for a uniform program at a local (Virginia) high school.

⁸ The parties have stipulated that the San Mar Resale Certificate for A-CM is representative of all such San Mar resale certificates received by San Mar and provided to the Division for customers who provided such certificates and, further, that the invoice at issue for this customer is representative of all invoices at issue for customers who provided such resale certificates.

m) Customer AE:⁹

The San Mar Exemption from Resale form provided by this customer was rejected on audit as insufficient to establish that the sales San Mar made to this customer were for resale because such form was not the required New York form ST-120. In addition to the representative San Mar Exemption From Resale form, San Mar provided a Minnesota Certificate of Exemption (dated May 12, 2005), which was rejected as insufficient to establish that the sales San Mar made to this customer were for resale because such certificate was not the required New York resale certificate (ST-120). In addition to the foregoing items, San Mar provided a marketing brochure for AE, a copy of its customized 2006 - 2007 catalog cover, and an affidavit from its president attesting that AE is and was throughout out the audit period a reseller in the promotional products industry whose products purchased from San Mar were resold to AE's customers.

n) Customer FGL d/b/a CAP:¹⁰

The Streamlined Sales Tax Agreement Certificate provided by this customer was rejected on audit as insufficient to establish that the sales San Mar made to this customer were for resale because New York has not agreed to accept and adhere to the Streamlined Sales Tax Agreement. In addition to the Streamlined Sales Tax Agreement Certificate, San Mar provided a Multi-Jurisdiction Resale Certificate (dated May 8, 2006), which was rejected as insufficient to establish that the sales San Mar made to this customer were for resale because such certificate

⁹ The parties have stipulated that the San Mar Exemption from Resale form for AE is representative of all such San Mar Exemption from Resale forms received by San Mar and provided to the Division for customers who provided such forms and, further, that the invoice at issue for this customer is representative of all invoices at issue for customers who provided such resale certificates.

¹⁰ The parties have stipulated that the Streamlined Sales Tax Agreement Certificate for FGL d/b/a CAP is representative of all such Streamlined Sales Tax Agreement Certificates received by San Mar and provided to the Division for customers who provided such forms and, further, that the invoice at issue for this customer is representative of all invoices at issue for customers who provided such resale certificate.

did not include a New York taxpayer identification number for the purchaser and did not include language, similar to that set forth on the certification section of Form ST-120, stating that the purchaser would remit tax to New York State if it consumed the tangible personal property in New York. In addition to the foregoing items, San Mar provided an affidavit from FGL d/b/a CAP's president accompanied by invoices from FGL d/b/a CAP to its customers attesting to and demonstrating that the products purchased from San Mar were resold to FGL d/b/a CAP's customers.

o) Customer GA -and- p) Customer KT:¹¹

The out-of-state certificates provided by these customers were rejected on audit as insufficient to establish that the sales San Mar made to these customers were for resale because such forms were not the required New York resale certificate (ST-120). In addition to the representative out-of-state certificates, San Mar provided a Multi-Jurisdiction Resale Certificate (dated May 12, 2003) and a San Mar Resale Certificate (dated January 1, 1997) for GA, which were rejected as insufficient to establish that the sales San Mar made to this customer were for resale because the certificate does not list a New York taxpayer identification number for GA and because the certificates lack language, similar to that set forth on the certification section of Form ST-120, stating that the purchaser would remit tax to New York State if it consumed the tangible personal property in New York. In addition to the foregoing items, San Mar provided a marketing brochure for GA, a copy of its customized 2010 catalog cover that GA ordered for its

¹¹ The parties have stipulated that the Minnesota Certificate of Exemption (for GA) and the Pennsylvania Exemption Certificate (for KT) are representative of all such out-of-state (i.e., non-New York State) certificates received by San Mar and provided to the Division for customers who provided such forms (San Mar provided out-of-state certificates from the following jurisdictions: California, Connecticut, District of Columbia, Florida, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, Texas, Virginia, West Virginia and Wisconsin.) Further, the parties have stipulated that the invoices at issue for these customers are representative of all invoices at issue for customers who provided such certificates.

customer (a large well-known corporation), and an affidavit from its president attesting that GA is, and was throughout the audit period, a reseller in the promotional products industry whose products purchased from San Mar were resold to GA's customers, together with invoices from GA to its customers attesting to and demonstrating that the products purchased from San Mar were "embellished" (i.e., decorated) and resold to GA's customers.

With respect to KT, San Mar provided a Pennsylvania Exemption Certificate (dated July 18, 2007), which was rejected on audit as insufficient to establish that the invoices from San Mar to KT were for products that were resold because the certificate was not a New York Resale Certificate. San Mar provided screen shots of KT's website and online store, a copy of its customized 2010 catalog cover, and an affidavit from KT's co-owner attesting that KT is, and was throughout the audit period, a reseller in the promotional products industry whose products purchased from San Mar were resold to KT's customers.

q) Customer PCP -and- r) Customer H allegedly a/k/a or d/b/a JB.¹²

The registration documents provided with respect to these customers were rejected on audit as insufficient, on their own, to establish the resale nature of the invoices for PCP and H. In response, San Mar provided additional resale documentation for each of these customers, including a Multi-Jurisdiction Resale Certificate (dated March 19, 2001) for PCP, which was rejected on audit as insufficient because it did not include a New York taxpayer identification

¹² The parties have stipulated that the North Carolina Merchant's Certificate of Registration issued to PCP (dated July 26, 2000) and the New York Certificate of Authority issued to H (dated October 16, 2003) are representative of all such sales tax permits, registrations or licenses received by San Mar and provided to the Division for customers who provided such forms (San Mar provided such permits, registrations or licenses from the following jurisdictions: California, Connecticut, District of Columbia, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin.) Further, the parties have stipulated that the invoices at issue for these customers are representative of all invoices at issue for customers who provided such permits, registrations or licenses.

number. In addition and with respect to PCP, San Mar provided an affidavit from the chief credit and administrative officer of the entity specifically named on the invoice (PP&P) attesting that PCP is part of the PP&P franchise. Petitioner noted that if a customer is a part of the PP&P franchise, San Mar adds the first word of the franchisor before the customer's name in its computer system and on its billing invoices (including the invoice at issue herein) to ensure that the PP&P franchise customer qualifies for special programs set aside for such franchisees (*see* Finding of Fact 31[i]). The PP&P affiant also attested that the products purchased by PCP, as a PP&P franchisee, from San Mar, as set forth on the invoices for the test period at issue herein (Invoices numbered 16391148 and 16444863) were ultimately resold to its customers.

With respect to customer H, San Mar provided a printout of its Goldmine history report (*see* Finding of Fact 31[f]), that reflects that H purchased products from San Mar during the audit period that were to be decorated by screen printing and resold to performing bands. San Mar's attempts to gather additional information concerning the business activities for this customer during the audit period were unsuccessful since it appears the company is no longer engaged in business (*see* Finding of Fact 31[f]).

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon the receipts from “every retail sale of tangible personal property.” Tax Law § 1101(b)(4)(i)(A) defines a “retail sale” as a sale for any purpose “other than . . . for resale as such.” Tax Law § 1132(c)(1) sets forth a presumption that all sales receipts for tangible personal property are subject to tax “until the contrary is established,” and sets the burden of proving the contrary upon the vendor or its customer (20 NYCRR 532.4[a][1]; [b][1]).

B. With respect to establishing nontaxability, and as provided for by Tax Law § 1132(c)(1), the Division prescribes exemption documents, including resale certificates (Form ST-120--New York State and Local Sales and Use Tax Resale Certificate). When properly completed and timely accepted by a vendor from its customer, the Form ST-120 resale certificate satisfies the vendor's burden of proving the nontaxability of a sales transaction and relieves the vendor of its obligation to collect and remit sales tax on that transaction (Tax Law § 1132[c][1]; 20 NYCRR 532.4[b][2]; [c][1], [2][i]). The resale certificate is considered "properly completed" when it contains the information required to be provided thereon, including the date prepared, name and address of the purchaser, name and address of the vendor, identification number of the purchaser (if required on the certificate), signature of the purchaser (or its authorized representative), and any other information required to be provided on the particular certificate (Tax Law § 1132[c][2]; 20 NYCRR 532.4[b][2][ii]; [d][2]). The resale certificate is "timely" if it is received by the vendor within 90 days after delivery of the tangible personal property. In the case of a "blanket" resale certificate, the same may be completed and filed in advance with a vendor to cover future purchases (*id.*, 20 NYCRR 532.4[b][2][iii]; [d][4]).

C. The presumption of taxability established under Tax Law § 1132(c)(1) is not irrebuttable (*see Matter of RAC Corporation v. Gallman*, 39 AD2d 57, 331 NYS2d 945 [1972]), and a vendor's failure to receive a timely and properly completed resale certificate does not change the tax status of a given sales transaction or preclude the vendor from establishing that the transaction was, in fact, a sale for resale and therefore not subject to tax (20 NYCRR 532.4[b][6]). Rather, such failure merely deprives the vendor of the right to rely *solely* on the resale certificate to meet its burden (*id.*). In this respect, and notwithstanding the absence of a timely and properly completed resale certificate a vendor may, by the presentation of sufficient

evidence, such as contracts, sales invoices, bills of lading, other evidence of delivery, documentation from the purchaser attesting to why a purchase was exempt, or other substantiation of nontaxability, establish that a transaction was, in fact, a sale for resale (20 NYCRR 532.4[b][4][v]; [6]; *Matter of Intercontinental Audio and Video, Inc.*, Tax Appeals Tribunal, January 4, 1996). Essentially, without a timely and properly completed resale certificate, it becomes incumbent upon the vendor to provide evidence establishing what its customers intended to do, and what they did, with the products they purchased from that vendor (*see Matter of Savemart v. State Tax Commn.*, 105 AD2d 1001, 482 NYS2d 150 [1984], *lv denied* 65 NY2d 604, 493 NYS2d 1025 [1985]). Clearly, this route to establishing nontaxability by the submission of other proof is more involved and difficult than simply providing timely and properly completed resale certificates (*id*).

D. With respect to the ten customers identified in Finding of Fact 29, for whom petitioner provided Form ST-120, the Division specifically rejected four of such forms as not properly completed because the purchaser's name on the certificate differed from the purchaser's name in San Mar's records. The Division rejected the other six such forms ST-120 because (a) in some instances the "purchaser's information" portion of the form, which requires a description of the purchaser's business and products sold, was not completed, (b) in one instance the seller's information (i.e., San Mar's name and address) was not listed, (c) in some instances (involving out-of-state customers) the certificate was missing either a New York Sales Tax Certificate of Authority Number or a non-New York State identification or registration number and (d) in some instances, there was no check mark on the face of the form in the box located next to the statement affirming that if the purchaser consumed the property (i.e., was or became the end-user of the items purchased from petitioner) it would remit the tax due thereon.

With respect to the customers identified in Finding of Fact 30, and those not listed therein but bound by stipulation to the result reached herein with respect to such identified customers, the Division rejected petitioner's claim of nontaxability because (a) petitioner did not produce a New York resale certificate for such customers, (b) the Division is not required to rely on or accept forms other than the ST-120,¹³ (c) petitioner did not otherwise provide a New York taxpayer identification number for such customers, (d) petitioner did not provide statements from such customers on the out-of-state forms, or otherwise, certifying that if such customers consumed the products purchased from petitioner (i.e., became the end-users of such products) they would pay the tax due thereon and (e) did not provide substantiation sufficient to establish that the sales in question were nontaxable sales for resale. Given this background, the overriding question in this case is whether petitioner has provided sufficient evidence to establish that its sales to the customers identified in Findings of Fact 29 (for whom allegedly incomplete forms ST-120 were provided) and 30 (for whom substantiation other than forms ST-120 was provided) were in fact sales for resale and therefore not subject to tax (*Matter of Intercontinental Audio and Video, Inc.*).

E. Upon review of all of the evidence presented, it is concluded that petitioner has carried its burden of proving that all of the disputed test period sales upon which the Division's error rate was computed and projected to arrive at the assessment at issue (with respect to claimed resale sales) were, in fact, sales for resale. As a starting point, San Mar has established that the specific nature of its business is that of a wholesaler and distributor not engaged in making retail sales, and that it puts significant time and expense into efforts aimed to ensure that it does not sell its

¹³ The auditor did accept one multijurisdictional certificate on the basis that it listed the purchaser's New York Sales Tax Certificate of Authority number.

products to end users (i.e., retail customers).¹⁴ As explained in detail at hearing, San Mar views its customers as its sales force. Thus, San Mar undertakes specific efforts to avoid selling its products to its customers' customers (or their potential customers), so as not to place itself in a position of competing with its own customers, thereby undermining the sales efforts and successes of those customers. To this end, San Mar's potential customers go through an extensive qualification process, conducted by San Mar's New Accounts Team and aimed at determining whether such potential customers are resellers as opposed to end users of San Mar's products (*see* Findings of Fact 15 through 26). If approved and prequalified as a potential customer by the New Accounts Team, a further process is undertaken by San Mar's Resale Team in order to obtain from each potential customer the proper resale documentation for that customer. Every four years thereafter, San Mar requires the Resale Team to update its customers' resale or other exemption documentation. San Mar's effort in this qualification process is not limited only to reliance upon telephone information provided by the potential customer, but also involves obtaining confirmation of the potential customer's membership in relevant industry groups, obtaining additional information such as the types of decorating or embroidering equipment used by the potential customer, and can involve visits to a potential customer's location by a San Mar employee for the purpose of ascertaining the nature of that customer's business (*see* Findings of Fact 18 and 19). While this process is not dispositive on the question of whether all sales by San Mar, including specifically those rejected by the Division on audit, were sales for resale, it is fully consistent with San Mar's business aim and intent of

¹⁴ San Mar does, as described, sell rental products to industrial launderers, sells products to its own employees and provides samples of its products to its customers. However, these transactions are handled via separate accounts, and there is no dispute that any applicable sales tax (on sales to launderers and to its own employees) and use tax (on sample products provided to customers) is paid.

only making sales for resale as a wholesaler and distributor. Moreover, it is a significant and thorough process, which also carries the goal of gleaning the *purchasers'* intent of reselling the products purchased from San Mar. Thus, this process establishes not only San Mar's intent to make only sales for resale, but also provides evidence that San Mar's customers intend to resell the products they purchase from San Mar, most frequently after performing decoration, such as embroidery or imprinting, specific to their own purchasing customers' needs.

F. Further strong support for the conclusion that petitioner adheres to its business aim of selling its products only to resellers is shown through the manner in which the vast majority of San Mar's product catalogs are produced and distributed. As detailed in Findings of Fact 13 and 14, of the approximately three million catalogs produced by San Mar, only approximately one percent carry any San Mar identifying information. The balance are customized catalogs showing the name and identifying information of San Mar's customers (or of San Mar's customers' customers). San Mar's production and provision of advertising materials (catalogs) that carry the names and identifying information of other vendors (i.e., petitioner's customers), as opposed to its own name and identifying information, seems entirely inconsistent with the aim of directly generating sales of products to petitioner's own end-user retail customers. It is, however, fully consistent with increasing one's sales through efforts aimed at assisting one's customers with their own sales efforts to their end-user customers. This conclusion is further strengthened by the fact that petitioner produces and distributes to its customers catalogs that do not reflect prices, but rather are designed to allow petitioner's customers to establish their own prices when dealing with their own customers (*see* Finding of Fact 14). Again, as above, while this fact is not dispositive of the taxable status of the particular sales at issue herein, it provides strong support

for the proposition that petitioner is in fact a wholesaler and distributor that does not, as claimed, knowingly make any sales to end-user customers.

G. For San Mar to sell at retail would be entirely at odds with its “channeled” marketing method, would clearly undermine its customers’ sales ability and efforts, and thus impair the success of “San Mar’s sales force.” Such actions, being clearly contrary to San Mar’s own interests, provides a powerful incentive for petitioner not to sell at retail. Consistent with petitioner’s business model, business actions and procedures, the likelihood of petitioner making a sale at retail might therefore be best described as an inadvertent and isolated occurrence. Noted, in this regard, is the fact that petitioner is located in the State of Washington, deals on a nationwide basis, and has customers located in jurisdictions outside of New York. These customers frequently direct petitioner to ship products to decorators in New York for decoration followed by subsequent delivery to the ultimate customer (i.e., petitioner’s *customers’* customer) outside of New York, or direct petitioner to make drop shipments to end users (again petitioner’s *customers’* customers) in New York. Notably, at the time petitioner processes a customer for qualification, it typically obtains resale documentation for the state where the customer is physically located, and does not usually have, at that point in time, information concerning where a customer may, in the future course of fulfilling its own customers’ orders, direct petitioner to make shipments of products (i.e., to jurisdictions other than that of petitioners’ customers’ physical location). Under these circumstances, petitioner’s business model and extensive and thorough practices to ensure its aim of not making retail sales and not competing with its own customers who do sell at retail, carries significant weight. Essentially, this supports a conclusion that petitioner would make retail sales only if, despite its chosen business model and its customer qualification procedures and efforts, it was “fooled” into making a sale to an end user purchaser.

H. At a minimum, all of the foregoing gives rise to a reasonable inference that petitioner was simply not engaged in the business of making retail sales to its customers, and that its customers were not the end users of the goods sold by petitioner but rather resold such goods to their own customers. Nonetheless, it remains possible that some of the sales transactions within those challenged and disallowed on audit could have represented unlikely, inadvertent or isolated instances of a retail sale. In order to address this possibility, and in addition to the foregoing support for petitioner's claim that all of its sales were nontaxable sales for resale, petitioner provided additional documentary and testimonial evidence concerning the disputed transactions with the customers identified in Findings of Fact 29 and 30. While the reasonable inference of nontaxability, by itself, may be insufficient to carry petitioner's burden (*see Matter of Savemart v. State Tax Commn.*) it is, when coupled with the balance of the evidence provided, more than sufficient to meet petitioner's burden. This additional evidence, and the customers and transactions to which it pertains, is discussed hereinafter.

Customers with New York Resale Certificates – Form ST-120

I. The New York resale certificates provided on audit for the four customers listed in Finding of Fact 29 (a), (f), (i) and (j), were rejected on audit because the purchaser's name as listed on each of such certificates listed differed from the purchaser's name as appearing in petitioner's records or on the related transaction invoices. However, petitioner provided additional evidence, as described in detail in Finding of Fact 31 (a) and (f), establishing that the first two of such customers each operated under two names but were in fact the same purchaser. Petitioner further established that the third such customer was identified on San Mar's records by the inclusion of an additional letter, so as to signify that it was a franchisee entitled to certain additional price or other benefits but was nonetheless the same business as was identified on both

the Form ST-120 and on the New York Certificate of Authority provided for that customer (*see* Finding of Fact 31[j]). Finally, the fourth such customer was the successor by acquisition of a business that did business with San Mar under its former name (NECE) and continued under the same circumstances as T-SU (*see* Finding of Fact 31 [j]). The evidence provided by petitioner in support of these facts establishes that the resale certificates provided on audit apply to the four customers and that petitioner was entitled to rely upon such certificates in meeting its burden to show that its sales to these four customers were nontaxable as sales for resale.

J. The New York resale certificates provided on audit for the six customers identified in Finding of Fact 29 (b), (c), (d), (e), (g) and (h) were rejected on audit either because the certificates lacked a New York identification number or lacked a description of the “purchaser information” (a description of the purchaser’s business and the products it sold). Petitioner argued that these failures cited by the Division in rejecting the forms ST-120 submitted for these customers, and particularly the absence of “purchaser information,” concern items of information that are not specifically required to be provided on the New York resale certificate under the Division’s regulations and that are allegedly not essential to the Division’s purposes in administering the Tax Law in the context of sales for resale. On this score, the Division must properly be afforded considerable latitude with respect to “such other information” as it may require to be furnished on a resale certificate (Tax Law § 1132[c]; 20 NYCRR 532.4[b][2][ii][F]; [d][2]). It is not within petitioner’s province to determine which parts of the information called for on such a form are “non-essential,” or to expect the Division to rely upon or accept forms that do not reflect thereon the information required on the face of such forms.

K. While the Division was entitled to reject the resale certificates furnished on audit based on missing information, petitioner has in response provided evidence sufficient to overcome the

noted information lapses in the resale certificates. As specifically detailed in Finding of Fact 31 (b), (c), (d), (e), (g) and (h), petitioner provided:

- (1) out-of-state (i.e., non-New York) identification numbers (Finding of Fact 31 [b], [d], [g]);
- (2) affidavits describing the customers' business and the products purchased from San Mar, and attesting to the resale of such products to their own customers (Finding of Fact 31 [b], [c], [e], [g], [h]);
- (3) out-of-state certificates describing the customers' business and the products they sold (Finding of Fact 31 [b], [d], [g]);
- (4) custom catalog covers (Finding of Fact 31 [b], [c], [e], [g]);
- (5) information in the form of screen shots showing the customers' web sites and online retail stores (Finding of Fact 31 [b], [c], [g]).

Coupling this information with the balance of the evidence in the record concerning petitioner and its business practices suffices to establish that the purchases made by the six customers in question were purchases for resale and that petitioner was not obligated to collect and remit sales tax with respect thereto.

L. With respect to sales by petitioner to the customers identified in Finding of Fact 30 (k - r), and by extension to the similarly situated customers covered by the stipulation between the parties (*see* Finding of Fact 30), the out-of-state resale or exemption documents (multijurisdictional resale certificates, San Mar resale certificates, and the like) were rejected at the time of audit as insufficient for the following reasons:

- (1) did not include a New York Taxpayer Identification Number (Finding of Fact 30 [k], [n], [o], [q]);
- (2) were not form ST-120 (Finding of Fact 30 [l], [m], [n], [o], [p]);
- (3) bore a different customer name than appeared on San Mar's invoices or other records (Finding of Fact 30 [r]);

(4) did not include a statement certifying that if the purchaser consumed the property it would remit the tax due (Finding of Fact 30 [k], [l], [n], [o]).¹⁵

In response, and in similar manner to the ten customers described above in Conclusions of Law I through K, petitioner has provided additional evidence to overcome the Division's disallowance of the claimed nontaxable status of such sales. The substantiating items of proof provided for these customers are set forth in Finding of Fact 32 (k - r).

M. Before discussing such additional items in detail, it is again significant to note that petitioner applies its rigorous customer acceptance methods to all of its customers, the point of which is to assure that petitioner does not sell at retail and thereby does not compete with its own customers. In reviewing the evidence gleaned from this process, petitioner's point is to ascertain its customers' intent with respect to the products they propose to purchase from San Mar prior to accepting and making sales to these customers. The steps and outcome of this process, together with the out-of-state resale documents furnished by San Mar, the purchasers' affidavits, and the other documents provided, constitute sufficient evidence of each of such customers' status as resellers, of their intent to resell the products they purchased from San Mar, and of their actual resale of such products (20 NYCRR 532.4[b][4][v]; [6]). Specifically, petitioner provided:

- (1) multijurisdictional resale certificates (Finding of Fact 30 [k], [l], [m], [n], [o], [p], [q]);
- (2) specific out-of-state resale or exemption certificates or registrations (Finding of Fact 30 [k-Maryland], [l-Virginia], [m-Minnesota], [o-Georgia], [p-Pennsylvania], [q-North Carolina]);
- (3) a New York State Certificate of Authority confirming that the customers listed as "H" and as "JB" were one and the same (Finding of Fact 30 [r]; refer to Finding of Fact 29 [f]; Conclusion of Law J);

¹⁵ Any such purchaser is obligated under the law (absent proof of exemption or nontaxability on other grounds) to pay tax due in such circumstances in any event (20 NYCRR 532.4[d][3]).

- (4) marketing brochures (Finding of Fact 30 [k], [m], [o]);
- (5) screen shots of customers' web pages and online stores (Finding of Fact 30 [k], [l], [p]);
- (6) custom catalog covers (Finding of Fact 30 [k], [l], [m], [o], [p]);
- (7) affidavits from owners or officers of customers attesting to the customer's status as a reseller and that the products purchased from San Mar were resold (Finding of Fact 30 [k], [l]— noting that the products purchased were school uniforms resold to a school in Virginia, [m], [n], [o], [p], [q]— noting that the customer was a franchisee with respect to which an additional letter appears in San Mar's records—refer to Finding of Fact 29(i));
- (8) information from San Mar's "Goldmine" archives indicating that the products purchased were to be imprinted with the logos of various musical groups (bands) and resold (Finding of Fact 30[r]).

Taken cumulatively, all of this evidence is sufficient to establish that each of the customers whose purchases were disallowed on audit were customers who made purchases for resale and were not subject to tax.

N. The Division did not, by brief, comment directly on any of the specific items of substantiation provided by petitioner, post-audit and at hearing, but rather maintained that the Division is not obligated to accept any document (e.g., multijurisdictional certificates, streamlined sales tax documents, affidavits) other than a timely and properly completed New York resale certificate (Form ST-120) as sufficient to establish the nontaxable status of a particular sales transaction. In addition, the Division questioned the value of the affidavits provided by petitioner, arguing that they should be accorded little weight since the affidavits were supplied by customers with whom petitioner likely has an ongoing business relationship and thus would be likely to provide information helpful to petitioner's position. As noted earlier, while there is no question that, upon audit, the Division was entitled to rely upon the presence or absence of the specific New York resale certificate as the basis for accepting or rejecting the claim that a particular transaction was a sale for resale, such document is not the only basis upon

which a taxpayer may establish the nontaxability of its sales (*Matter of Intercontinental Audio and Video, Inc.*; 20 NYCRR 532.4[b][4][v]; [6]). With respect to the Division's expressed concern over the affidavits provided by petitioner, while an affiant might be inclined to testify in a manner favorable to one with whom there exists an ongoing business relationship, it is also noteworthy that under the facts of this case, each of the affidavits filed explicitly admits that the customer made sales of the San Mar products purchased, thus opening that customer to liability for any tax due but not paid on such sales. Ultimately, this case is about a taxpayer's right to rely upon a timely and properly completed Form ST-120 as absolving it of the obligation to collect sales tax on the related sale, the Division's right to reject those forms that are not complete as to the information required thereon, and about a taxpayer's right thereafter to provide proof which, as in this case, establishes the nontaxability of its sales.

O. Petitioner raised two additional arguments. First, petitioner argued the Division's requirement (on audit) that a New York Taxpayer Identification Number must be furnished for every one of its non-New York State customers that had purchases shipped into New York, in order to establish such purchases were nontaxable purchases for resale, imposes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. Second, petitioner argued that the Division's use of three separate test periods, each covering the earliest portion of the extrapolation period to which the resulting error rates determined thereby were applied, as opposed to developing a single blended error rate to be applied to the entire period under audit, was flawed as inherently distortive and should be rejected as incorrect and unreasonable. These arguments pertain to the issue of the Division's assessment of tax on petitioner's claimed but disallowed sales for resale. Given that petitioner has met its burden of

establishing that all of the disputed transactions at issue were, in fact, nontaxable sales for resale, these additional arguments are rendered moot and need not be addressed herein.

P. The petition of San Mar Corporation is hereby granted to the extent that tax assessed on sales which have been determined herein to be sales for resale is cancelled (*see* Findings of Fact 1(a), 4(b); Conclusion of Law E), but is otherwise denied, and the Notice of Determination dated November 26, 2007, as reduced pursuant to Conciliation Order No. 222556 (*see* Finding of Fact 3) and as further reduced in accordance herewith, is sustained.

DATED: Troy, New York
April 14, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE