

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BLOOMINGDALE BROS., DIVISION OF FEDERATED DEPARTMENT STORES, INC.	:	DECISION
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, 1971 through August 31, 1974.	:	

Petitioner, Bloomingdale Bros., Division of Federated Department Stores, Inc., Lexington Avenue and 59th Street, New York, New York 10022 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, 1971 through August 31, 1974 (File No. 17061).

On February 28, 1983, petitioner, by its representative, Robert J. Levinsohn, Esq., filed a waiver of formal hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record and a stipulation of facts of even date with all briefs to be submitted by January 6, 1984. After due consideration, the Tax Commission renders the following decision.

ISSUE

Whether petitioner, as a New York vendor, was required to collect sales and use taxes on sales made to New York nonresidents at out-of-state locations when the items purchased were to be delivered by common carrier to locations within New York State as gifts to New York residents.

FINDINGS OF FACT

1. On August 23, 1976, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against petitioner, Bloomingdale Bros., Division of Federated Department Stores, Inc., in the amount of \$583,301.12 plus penalty and interest of \$298,380.13 for a total due of \$881,681.25 for the period September 1, 1971 to August 31, 1974.¹

2. Petitioner, by its controller and vice president-treasurer, had executed consents extending the period of limitation for assessment of sales and use taxes due for the period September 1, 1971 through August 31, 1974 to September 20, 1976.

3. Petitioner has its principal office in New York City. During the period in issue, petitioner owned and operated a chain of retail department stores both in and out of New York State. Petitioner's out-of-state stores included two stores in New Jersey and one store each in Connecticut, Massachusetts and Pennsylvania. Not all of the out-of-state stores were open during the entire period in issue.

4. As a result of a pre-hearing conference, the Audit Division cancelled \$391,880.48 in tax previously assessed. Subsequently, the Audit Division cancelled an additional \$87,636.00 leaving \$103,784.68 plus minimum statutory interest in issue. The sole remaining issue involved merchandise purchased and paid for at petitioner's out-of-state stores, by customers who were not residents of New York, as gifts for other persons with addresses in New York. These purchases were shipped by petitioner's out-of-state stores via common carrier to the New York addresses at the request of the nonresident purchasers. Petitioner did not collect tax on the receipts from such sales.

5. Petitioner's position is that the aforesaid sales were similar to purchases by nonresidents at petitioner's out-of-state stores as gifts for other persons with New York addresses, which purchases were shipped into New

¹ Two corporate officers of petitioner were also included in the notice; however, the officers' assessments were later cancelled.

York by the purchasers themselves. The Audit Division concedes that the receipts from such sales would not be subject to tax. Petitioner maintains that, in both cases, the purchasers of the merchandise exercised right or control over the merchandise only outside New York State and that the persons with New York addresses who used the merchandise were donees of the merchandise and thus not subject to use tax.

6. The Audit Division maintains that the sales tax is a "destination tax" and that the point of delivery or point of transfer of possession controls the tax incident. Petitioner argues that, since the Audit Division stipulated that the purchases were subject to use tax, sales tax regulations are irrelevant in this case and that only purchasers and not donees are subject to use tax.

CONCLUSIONS OF LAW

A. That the term "'vendor' includes...[a] person making sales of tangible personal property..., the receipts of which are taxed by..." Article 28 of the New York Tax Law [Tax Law §1101(b)(8)(i)(A)]. Section 1131(1) of the Tax Law defines "[p]ersons required to collect tax" and "person required to collect any tax imposed by this article" to include every vendor of tangible personal property or services.

B. That 20 NYCRR 526.10(e)(1) provides:

"(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, who solicits the sales in New York, as defined in subdivision (d) of this section, or who maintains a place of business as defined in subdivision (c) of this section, is required to collect the sales tax on the tangible personal property delivered in New York or the services performed in New York."²

² The regulations cited herein were effective September 1, 1976; however, they expressed the policy of the State Tax Commission as it existed during the period at issue.

C. That by virtue of the Tax Law sections 1101(b)(8)(i)(A) and 1131(1) and 20 NYCRR 526.10(e)(1), petitioner is a vendor required to collect sales tax.

D. That the New York sales tax is both a "transactions tax" and a "destination tax" [20 NYCRR 525.2(a)(2) and (a)(3)]. Liability for the sales tax arises at the time of the transaction [20 NYCRR 525.2(a)(2)]. Moreover, "...the point of delivery or the point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate" [20 NYCRR 525.2(a)(3)]. Since the merchandise was transferred to the purchasers' designees in New York, the Audit Division properly determined that New York sales tax should have been collected (see Matter of World Book Childcraft International, Inc., State Tax Commission, May 2, 1984).

E. That the State Tax Commission is not bound by stipulations as to the meaning or purpose of legislation. Parties, by stipulation, cannot make ineffective the operation of a statute (see E. Fougera & Company, Inc. v. City of New York, 224 N.Y. 269, 278-79; People v. Shifrin, 198 Misc. 348, 352, rev'd on other grounds, 301 N.Y. 445). Whether the tax in issue is a sales tax or a use tax is a matter of law to be determined by this Commission and, inasmuch as the ultimate destination of the sales in issue was New York State, the appropriate tax to impose was the sales tax.

F. That the petition of Bloomingdale Bros., Division of Federated Department Stores, Inc. is granted to the extent indicated in Finding of Fact "4"; that the Audit Division is directed to modify the Notice of Determination and Demand


for Payment of Sales and Use Taxes Due issued August 23, 1976 accordingly; and that, except as so granted, the petition is in all other respects denied.

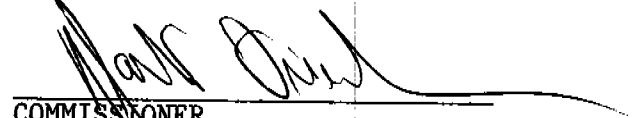
DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER