

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

THE PRESENT COMPANY, 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, 1977 :
through May 31, 1981. :

Petitioner, The Present Company, Inc., 82 St. Paul Street, Rochester, New York 14604, 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, 1977 through May 31, 1981 (File No. 36713).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1985 at 1:30 P.M., with all briefs to be submitted by February 28, 1986. Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler (Peter L. Faber, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether payments to petitioner represented a rebate or a reduction in the price of catalogs purchased by it or a distribution of advertising revenues.

FINDINGS OF FACT

1. On December 14, 1981, 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, The Present Company, Inc. (the "Company"), assessing sales and use taxes due in the amount of \$21,273.03, plus interest of

\$3,533.34, for a total amount due of \$24,806.37 for the period September 1, 1977 through May 31, 1981.

2. On December 5, 1980, the Company executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through February 28, 1978 to June 20, 1981. A second consent was executed on June 5, 1981, extending the period of limitation for assessment of sales and use taxes for the period September 1, 1977 through May 31, 1978 to September 20, 1981. A third consent was executed on September 15, 1981 which extended the period of limitation for assessment of sales and use taxes for the period September 1, 1977 through August 31, 1978 to December 20, 1981.

3. The Company was engaged in the catalog showroom business. The merchandise catalogs distributed to the public by the Company were purchased from Merchandisers' Association, Inc. ("MAI"). MAI was a not-for-profit corporation located in Illinois. Its members included the Company and twelve other companies engaged in the business of selling merchandise by catalog. MAI's sole activity was the production of catalogs for its members.

4. The audit revealed that the Company had failed to pay sales or use tax on its catalog purchases. Using billing invoices from MAI to the Company, the auditor calculated total taxable catalog purchases of \$958,620.23 for the audit period. The Company conceded that use tax was owed on its catalog purchases; however, it maintained that its purchases should be reduced by payments of \$303,900.41 made to the Company by MAI, since it took the position that the payments represented a refund of a portion of the catalog purchase price. The Audit Division treated those payments as revenue to the Company from advertising.

The assessment under consideration reflects use tax imposed on the disputed amount of \$303,900.41 only.

5. In the fall of each year, MAI entered into contracts with printers, lithographers and other persons necessary for catalog production. The following January, the Company would transmit to MAI its catalog needs for the upcoming year. MAI would then begin issuing billing invoices to the Company based on projected catalog production costs, including MAI's operating expenses.

6. MAI also executed contracts with vendors and manufacturers who paid MAI for listing their products in the members' catalogs. Payments from these vendors and manufacturers were made directly to MAI and became part of its general fund. These funds were not segregated for the benefit of members and were subject to the claims of MAI creditors.

7. MAI owned the copyrights on the catalogs it produced and granted its members the right to use them. MAI realized no profit on its operations. When MAI determined that its receipts were greater than its combined production and operating costs, the excess receipts were distributed to its members in proportion to the number of catalogs which the member had purchased.

8. The auditor treated payments made by MAI to the Company as advertising revenues, having their basis in the funds collected by MAI from the vendors and manufacturers listed in member catalogs. The Company presented conflicting testimony regarding the nature of these payments. On the one hand, the payments were characterized as adjustments or refunds in the purchase price of the catalogs, reflecting changes in projected production costs. However, it was conceded by the Company that the source of these payments was funds received by MAI from vendors and manufacturers.

9. The billing invoices utilized by the Audit Division in determining the Company's taxable catalog purchases took into account only the costs of production.

The projected cost of producing the catalogs was not adjusted to take into consideration anticipated revenues from advertising. The billing invoices did not reflect the distribution of funds from MAI to the Company.

CONCLUSIONS OF LAW

A. That Tax Law §1110 imposes a use tax for the use within New York State of any tangible personal property purchased at retail except to the extent that such property may be subject to sales tax under Articles 28 and 29 of the Tax Law. The tax is imposed upon "the consideration given or contracted to be given for such property" (Tax Law §1110). For purposes of the use tax, the regulations define the term "consideration," in part, as "the amount paid for any property...valued in money." (20 NYCRR 531.2[a].)

B. That the funds paid to the Company by MAI represent a reduction to the purchase price of the catalogs. The essence of the transaction between the buyer and the seller is that petitioner pays actual production cost: the projected cost less the refund. The amount of consideration, therefore, was the net cost to MAI of producing the catalogs, and the funds paid to the Company were necessary to balance MAI's net costs with the Company's payments on the billing invoices.

C. That the petition of The Present Company, Inc. is hereby granted, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 14, 1981 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER