

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LINEN WORLD, INC.

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and
29 of the Tax Law for the Period June 1, 1982 :
through May 31, 1984.

DECISION

In the Matter of the Petition

of

ALBERT J. CHAVANNE
D/B/A LINEN N THINGS

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,
1980 through May 31, 1982.

Petitioner Linen World, Inc., 1650 William Street, Buffalo, New York 14206, 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 June 1, 1982 through May 31, 1984 (File No. 55951).

Petitioner Albert J. Chavanne, d/b/a Linen N Things, 1650 William Street, Buffalo, New York 14206, 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, 1980 through May 31, 1982 (File No. 55952).

A consolidated hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 2, 1986 at 9:00 A.M. Petitioner Linen World, Inc. appeared by Albert J. Chavanne, President. Petitioner Albert J. Chavanne appeared pro se.

The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioners were properly assessed sales tax on receipts designated as "shippinglhandling".

FINDINGS OF FACT

1. On September 20, 1984, as the result of a field audit, the Audit Division issued against petitioner Albert J. Chavanne d/b/a Linen N Things a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$2,346.15 plus interest for the period September 1, 1980 through May 31, 1982. On September 27, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Linen World, Inc. in the amount of \$1,760.56 plus interest for the period June 1, 1982 through May 31, 1984. Mr. Chavanne began doing business as Linen N Things in 1976, and incorporated as Linen World, Inc. as of June 1, 1982.

2. On November 30, 1983, Mr. Chavanne 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, 1980 through February 28, 1981 to June 20, 1984. On June 13, 1984, Mr. Chavanne signed a second consent extending the period of limitation for assessment for the period September 1, 1980 through May 31, 1981 to September 20, 1984.

3. Petitioner¹ sold linens, pillows and other items through a merchandising scheme known as a party plan. Sales persons, called demonstrators,

1 Although technically there are two petitioners in this action, there is only one business entity. References to petitioner Albert J. Chavanne are meant to include both petitioners.

displayed petitioner's merchandise and solicited sales at parties organized by hostesses, usually in the hostess's home. Persons in attendance at these parties ordered merchandise by completing one of petitioner's order forms. Upon receipt of the orders, petitioner ordered the needed merchandise from his own suppliers who shipped it to his place of business in Buffalo, New York. Petitioner repackaged the merchandise and had it delivered by United Parcel Service ("UPS") to the hostess. The hostess either delivered the ordered merchandise to the customer or arranged to have the customer pick it up. If desired, petitioner would ship the merchandise directly to the customer.

4. Petitioner's order form instructed the customer to add a flat fee of 99 cents for "shippinghandling". The same 99 cent fee was charged regardless of the size or weight of the order, the number of boxes needed to package it or the actual cost to petitioner of shipping. The bill rendered to the customer, which was also the order form, stated this fee separately, and no sales tax was collected on it.

5. On audit, the Audit Division determined that the 99 cent fee was part of the sales price of the merchandise and was subject to sales tax. Petitioner's reported gross receipts were increased accordingly, and tax was assessed on the resulting additional sales.

6. The Audit Division rested its determination that the 99 cent fee was subject to sales tax on two grounds. First, it treated the hostess's home as the vendor's place of business. Thus, it took the position that the fee was not a charge for transportation of goods to a customer, but part of the cost of transporting goods from petitioner's warehouse to one of his own distribution points and as such includible in the sales price. Second, based on a State Tax Commission Advisory Opinion requested by petitioner and issued on March 6,

1984, the Audit Division determined that the entire fee was subject to taxation because (1) it was for handling as well as transportation; (2) it bore no relationship to petitioner's actual cost of transportation; and (3) the portion of the charge which constituted transportation as opposed to handling was not separately stated.

7. When petitioner began doing business in 1976, he hand delivered all orders to either customers or hostesses and charged nothing for this service. As the business grew, this practice became unfeasible and petitioner began shipping orders by UPS. During the audit period, UPS imposed a minimum charge of \$1.20 for each package up to twenty-five pounds, with additional charges for heavier packages. The 99 cent fee was intended by petitioner to cover the UPS charges. He chose the term "shipping/handling" to denote transportation costs because he saw it used on order forms by businesses similar to his own. No part of the fee actually constituted handling. Petitioner's decision to charge a flat fee was based on the practical difficulties involved in calculating shipping charges by weight in a party plan situation. Since orders varied considerably in weight and size, it would have been prohibitively complicated to ask each customer, at a party typically attended by ten to fifteen people, to compute shipping charges on his or her own order.

8. Persons acting as hostesses for petitioner organized parties in their homes, collected payments from customers after the party and distributed the merchandise to the purchasers. Merchandise was shipped to the hostess C.O.D. In return for their services, the hostesses received merchandise or discounts on their orders. Customers could order goods directly from petitioner through a catalog.

CONCLUSIONS OF LAW

A. That Tax Law §1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property. As defined in Tax Law §1101(b)(3), a receipt includes the amount of the sale price of any property and the charge for any service taxable under Article 28 of the Tax Law, but excludes "the cost of transportation **of** tangible personal property sold at retail where such cost **is** separately stated in the written contract."

B. That 20 NYCRR 526.5(g)(2) provides as follows:

"To qualify for the exclusion, transportation costs must be for the delivery of the tangible personal property to the purchaser. Any charge made to a retail purchaser, whether labeled transportation, handling or some other designation, which represents the cost of transportation between a supplier, manufacturer, warehouse, or catalog or other distribution point, and the vendor's place of business constitutes part of the receipt subject to tax."

C. That petitioner's fee for "shipping/handling" was entirely for transportation of tangible personal property sold at retail and was separately stated on the bill rendered to the customer. In Matter of Lillian Vernon Corp. (State Tax Comm., November 22, 1982), the Commission found that 40 percent of the charge denominated as postage and handling constituted the handling charge. In petitioner's case, there was uncontroverted evidence presented at hearing that the shipping/handling charge contained no element other than transportation. This charge was separately stated on the bill rendered to the customer.

D. That the term "place of business" as used in 20 NYCRR 526.5(g)(2) encompasses petitioner's use of each hostess's home as a temporary showroom and distribution location for its products. The petitioner relies on each hostess to serve as distributor of its goods to the ultimate consumer. The fees for transportation from Buffalo to each hostess's home are not for delivery to the


purchaser. Therefore, the transportation charge is not excluded from sales taxation pursuant to 20 NYCRR 526.5(g)(2)

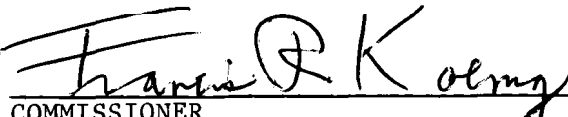
E. That the petitions of Albert J. Chavanne d/b/a Linen N Things and Linen World, Inc. are denied and the notices of determination and demands for payment of sales and use tax due issued on September 20, 1984 and September 27, 1984 are sustained.

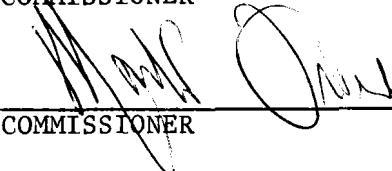
DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987


PRESIDENT


COMMISSIONER


COMMISSIONER