

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

of

BATHTIQUE ADVERTISING CORP.

DETERMINATION

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 March 1, 1981  
through February 29, 1984.

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Petitioner, Bathtique Advertising Corp., 247 N. Goodman Street, Rochester, New York 14607, 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 March 1, 1981 through February 29, 1984 (File No. 57889).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York on March 9, 1987 at 1:15 P.M., with all briefs to be submitted by June 22, 1987. Petitioner appeared by its executive vice-president, Eugene S. Tonucci. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether petitioner was an agent for individual Bathtique stores when it made purchases in connection with the printing and mailing of advertising catalogs.

11. Whether petitioner **is** liable for tax on the cost of printing advertising catalogs delivered in New York State.

111. Whether certain charges made by petitioner to individual Bathtique stores for the preparation and furnishing of mailing labels and for mailing advertising catalogs constituted the sale of information services.

FINDINGS OF FACT

1. Bathtique International Ltd. operated a chain of retail stores throughout the United States and Canada that sold bathroom accessory merchandise, such as shower curtains, bath rugs, toilet seats and other specialty items. Typically the stores were located in regional shopping centers. Some stores were operated by independent third parties under a franchise agreement. Petitioner, Bathtique Advertising Corp. (BAC), was a wholly owned subsidiary of Bathtique International. BAC was the coordinator of and was responsible for the advertising programs for the products sold at the stores operated by Bathtique International and its franchisees.

2. On December 18, 1984, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against BAC covering the period March 1, 1981 through February 29, 1984 for taxes due of \$14,172.02, plus interest of \$3,189.00, for a total of \$17,361.02.

3. Eugene S. Tonucci, executive vice-president of BAC, executed consents extending the period of limitation for the assessment of sales and use taxes for the period March 1, 1981 through August 31, 1981 to December 20, 1984.

4. The Audit Division, by auditor Eugene A. Williams, conducted a detailed audit of BAC's sales and purchase records. The review of sales invoices disclosed that BAC made sales of advertising banners and labels to various Bathtique stores totalling \$1,387.50 and did not collect sales tax. This resulted in additional taxes due of \$98.06. Additionally, BAC charged the stores for mailing list services which were categorized by the Audit Division as maintenance services on which no sales tax was collected. These charges amounted to \$131,907.00 for the audit period, with tax due thereon of \$9,233.49. BAC was also held liable for use tax of \$4,840.47. The cost of printing

catalogs delivered in New York State represented **\$1,701.09** of that amount. The balance, **\$3,139.37**, was on various recurring expense purchases.

5. At the hearing, BAC conceded to the amount of taxes determined due on the sales of banners, etc. (**\$98.06**) and on the expense purchases (**\$3,139.37**).

6. BAC provided cooperative advertising programs to all company and franchise stores. These programs included yellow pages, direct mail, newspaper, radio and television. BAC provided 10 percent of all yellow pages display costs, 50 percent of all newspaper ads, 100 percent of direct mail book layout and printing, **100 percent of** newspaper advertising and slick production, 50 percent **of** television and radio time buys, **100 percent** production for television and radio tapes, 100 percent of time buy costs from agencies and 100 percent of advertising agency monthly creative services.

7. In order to benefit from the advertising programs offered by BAC, the company and franchisees were required to execute a letter **of** understanding which stated in part, "I wish to receive the BAC co-op services and agree that Bathtique Advertising Corp. will represent my shop in developing professional advertisements and programs using advertising funds generated from suppliers and Bathtique International Ltd."

8. BAC contracts for, collects and dispenses advertising monies earned from approved Bathtique suppliers. Typically, Bathtique suppliers provided advertising revenue to BAC based on a percentage of total merchandise purchases made by all Bathtique shops. These revenues are used to support the advertising programs of BAC. BAC maintains a record of the advertising revenue accumulated by each individual store.

9. BAC produced a direct mail catalog annually from earned advertising funds. The cost of printing the catalogs is recovered by selling advertising

space to Bathtique suppliers. BAC bills the suppliers for their participation in the catalog at a specific cost per page. The supplier pays for this billing from the accrued advertising funds earned by BAC. BAC paid the printer directly for the cost of printing the catalogs.

10. The printed catalogs were shipped in total to Impco for mailing to prospective customers. Impco is a mail processing service which not only mailed the catalogs but also maintained a computer master file of customer names for each individual Bathtique store, updated the master file, printed mailing labels and affixed the labels to the catalogs. The individual store furnished the names of the customers to receive a catalog to BAC who in turn provided the names to Impco. If a store did not have a sufficient number of names, BAC supplemented the list by renting a mailing list from a broker. The names were on preprinted labels that were given to Impco for affixation to the catalogs.

11. Impco's invoice to BAC showed separate charges for computer service and mailing service. The invoice also accounted for monies for postage advanced by Impco to BAC's bulk mail permit, the actual amount of postage used and the balance or refund due. BAC charged the individual franchisee or company store for all the costs associated with mailing the catalogs. The invoice showed the quantity mailed and had a separate unit price charge for previous names in computer, new names in computer, zip code names ordered and postage. The stores paid the invoice from earned advertising revenue described in Finding of Fact "8".

12. BAC took the position that it was acting as agent for the individual stores in connection with the transactions in dispute, i.e. the printing of catalogs and the services provided by Impco, and as a result, it was 'not the

party to any of the transactions that the Audit Division determined were taxable. Notwithstanding this position, BAC argued that postage identified as such on either the invoices from Impco or its invoices to the stores was a nontaxable item.

13. The position of the Audit Division was that BAC was furnishing a taxable information service to the individual stores and that the total charge, including postage, was the amount of the taxable receipts. With respect to the cost of printing the catalogs, the Audit Division argued that this expense was not part of the charge to the individual stores and therefore was purchased by BAC at retail.

#### CONCLUSIONS OF LAW

A. That in order for a principal-agent relationship to exist for sales tax purposes, the following conditions must be met:

1. the advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent
2. the advertising agency must obtain and retain written evidence of agent status with the client prior to the acquisition of any tangible personal property or service, and
3. the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may not use the property for its own account, such as by charging the item to the account of more than one client.

BAC' failed to establish that a principal-agent relationship existed with the individual Bathtique stores when making purchases of tangible personal property or services. Accordingly, all such purchases are deemed to have been made for its own account. Assuming, arguendo, that BAC was acting as agent for the individual stores, it would have been required to pay the appropriate sales tax to Impco and other suppliers when property or services were delivered to the stores within New York State.

B. That since the cost of printing the direct mail advertising catalogs was borne entirely by BAC, the transaction constituted a purchase at retail under section 1101(b)(1) of the Tax Law. The Audit Division properly held BAC liable for tax on that portion of the printing charge representing catalogs mailed to New York State locations in accordance with section 1119(a)(2) of the Tax Law.

C. That Impco merely converted names provided by BAC to gummed mailing labels. The sale of mailing lists on gummed labels constituted the sale of tangible personal property rather than the sale of information since the labels themselves were directly used in the mailing of catalogs (Matter of Mertz v. State Tax Commission, 89 AD2d 396). BAC purchased the mailing labels and services from Impco for resale to the Bathtique stores. The separately stated charges on BAC's invoices (Finding of Fact "11"), except for postage, were for the sale of mailing labels and subject to the tax imposed pursuant to section 1105(a) of the Tax Law. All of the mailing labels were delivered in New York State, attached to catalogs in New York and then mailed from New York. Accordingly, use of the labels occurred in New York, and the provisions of section 1119(a)(2) and (4) of the Tax Law are inapplicable (Matter of Crown Publishers, Inc. v. Tully, 63 NY2d 660).


D. That the separately stated charge for postage on the invoice to Bathtique stores in connection with the mailing of advertising catalogs was a nontaxable receipt.

E. That the petition of Bathtique Advertising Corp. is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use

Taxes Due issued December 18, 1984; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 111387

  
ADMINISTRATIVE LAW JUDGE