

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**APPLE INC.** : DECISION :  
 : DTA NO. 827287 :  
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 December 1, 2009 through :  
November 30, 2012. :  
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Petitioner, Apple Inc., filed an exception to the determination of the Administrative Law Judge issued on November 1, 2018. Petitioner appeared by McDermott, Will and Emery, LLP (Peter L. Faber, Esq., and Mark W. Yopp, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York, on June 27, 2019, which date began the six-month period for the issuance of this decision. After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner properly collected and remitted sales tax on qualifying device sales made during its 2011 and 2012 Back to School promotion.

## ***FINDINGS OF FACT<sup>1</sup>***

We find the facts as determined by the Administrative Law Judge, except we have made a new finding of fact 24 and renumbered the subsequent findings of fact. These facts, so modified are set forth below.

1. Petitioner, Apple Inc., is a corporation organized under the laws of California that designs and markets consumer electronics, software and personal computers. Petitioner's electronic device products included mobile communication devices (e.g., iPhones), personal computers (e.g., MacBook, iMac, MacBook Pro, Mac Mini), portable digital music players (i.e., iPods), device peripherals and accessories (e.g., computer displays), entertainment platforms devices (e.g., Apple TV), and, beginning in 2010, tablets (e.g., iPads).

2. Petitioner sells its products through a variety of channels, i.e., indirectly, through traditional retailers, and directly to customers via its retail stores and over the internet via its online stores.

3. Petitioner's online stores include the Mac App Store, the iTunes Store, the App Store and the iBookstore (online stores).

4. In addition to electronic devices, petitioner's online stores sell digital content, including computer software, digital music, digital movies, applications for phones and tablets, games and digital books.

5. In August 2012, the Division of Taxation (Division) commenced a sales and use tax audit of petitioner. The audit examined petitioner's sales, expense purchases and capital asset purchases. Petitioner and the Division reached agreement on all but one aspect of the audit. The focus of this proceeding relates to the amount of sales tax charged by petitioner on sales of

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<sup>1</sup> The parties executed a stipulation of facts in connection with this matter. Such stipulated facts have been substantially incorporated into the findings of fact set forth below.

electronic devices made during petitioner's 2011 and 2012 Back to School promotion (BTS promotion).

6. In 2011 the Mac App Store was launched. In order to raise awareness of the Mac App Store, petitioner offered a BTS promotion starting in 2011. The BTS promotion was also offered in 2012.

7. During 2011 and 2012, petitioner published terms and conditions for the BTS promotion on its website, which was publicly accessible.

8. Under the terms and conditions of the BTS promotion, Qualified Education Individuals included faculty, staff, students and parents as follows:

“K-12 - Any employee of a public or private K-12 institution in the United States is eligible. In addition, school board members who are currently serving as elected or appointed members are eligible. [Parent-Teacher Association] or [Parent-Teacher Organization] executives currently serving as elected or appointed officers are eligible.”

“Higher Education - Faculty and staff of higher education institutions; and students attending, or accepted into a higher education institution are eligible.”

“Higher Education Parents - Parents purchasing on behalf of their child, who is a student currently attending or accepted into a public or private higher education institution in the United States, are eligible.”

9. Under the terms and conditions of the BTS promotion, “Qualified Education Individuals” who purchase a qualifying Apple Computer or iPad between [a designated time frame] “may receive a Back to School Gift Card in the following amounts that can be used at the Mac App Store, the iTunes Store, the App Store, and the iBookstore.”

10. A qualifying product for the BTS promotion included certain qualifying computers and certain qualifying iPads. Qualifying computers and the qualifying iPads are referred to as the “qualifying products.”

11. A gift card was received by the customer in connection with the BTS promotion (BTS card). The BTS card had a value of either \$100.00 or \$50.00, depending on the qualifying product purchased.

12. The 2011 BTS promotion was the first Apple promotion to include a gift card that could be used in an App Store. Aside from the inclusion of the iPad in the 2012 BTS promotion, the 2011 BTS promotion and the 2012 BTS promotion did not have any material differences.

13. A customer that purchased a qualifying product in a BTS promotion could decline the BTS card. If the BTS card was declined, the full price of the product with applicable tax was charged.

14. Per the terms and conditions, if a qualifying product was returned, the BTS card was required to be returned with the qualifying product in order for the customer to receive a full refund. If the BTS card was not returned or had been redeemed, the full value of the BTS card was deducted from the refund of the qualifying product.

15. The disagreed part of the audit resulted from a one-day test period wherein customer invoices from petitioner's retail stores were reviewed, with the subtotal on the invoice being multiplied by the applicable tax rate. This review led to a discrepancy between the amount of tax the Division determined should have been collected and the amount actually collected by petitioner for sales subject to the BTS promotion. Upon inquiring with petitioner, it was explained that tax was computed on the price of the qualifying device less a discount equal to the value of the BTS gift card received by the customer.

16. The Division's audit also examined petitioner's on-line sales made during the BTS promotion. Unlike retail store sales, the Division did not find a discrepancy in the computation of sales tax due on the purchase of qualifying products as part of petitioner's BTS promotion. The

Division explored why the issue discovered with retail store sales was not occurring with on-line sales and found an online message board posting of a chat exchange between one of petitioner's employees and a customer. The exchange reflects a customer trying to complete an on-line BTS transaction but having a problem because when the \$100.00 gift card was an item in his shopping cart, petitioner's on-line system was charging him for it. Petitioner's employee advised the customer to remove the gift card from his shopping cart, telling him "[t]hat will set you up with the proper price" and "[o]ur processing department are [sic] manually adding cards to your orders today."

17. Alexis Sapsford was the primary contact for marketing promotions in petitioner's retail stores in 2011 and 2012 and was responsible for implementing the BTS promotion in the retail stores. According to Mr. Sapsford, it took approximately six to seven months to implement and roll out the BTS promotion in retail stores. During this time, Mr. Sapsford and his team tested the feasibility of the offer, drafted the terms and conditions for the BTS promotion, and designed marketing materials for the BTS promotion. Mr. Sapsford also worked with the point of sale (POS) systems team to make sure that petitioner's POS system could support the offer. Petitioner's tax, accounting, and legal teams were required to approve the terms and conditions of the BTS promotion before the BTS promotion was rolled out. Similarly, petitioner's tax and legal teams were required to approve the marketing materials for the BTS promotion before it was released. In addition, the petitioner's POS, tax, accounting, and legal teams reviewed sample invoices for sample BTS promotion transactions before the BTS promotion was rolled out.

18. According to Mr. Sapsford, when the promotion was brought to the POS team to make sure that the POS system could support the offer, the POS team told him that the POS system was unable to discount a gift card and, thus, that the BTS Card could not be processed as

free. The only way that the POS system could process the BTS promotion was to discount the price of the qualifying product (the computer or the iPad) and charge the customer for the full value of the BTS card. According to Mr. Sapsford, the BTS promotions were structured such that the BTS card was not free because the POS system could not process the transaction otherwise.

19. Sheila Bayley was the person on petitioner's tax team responsible for reviewing and approving the BTS promotion. Ms. Bayley was Mr. Sapsford's primary contact on the tax team with respect to the BTS promotion. When Mr. Sapsford approached Ms. Bayley about the BTS promotion, she said that the BTS card should not be given to the customer for free because if the BTS card was given to the customer for free petitioner would over-collect sales tax when the BTS card was used to purchase a taxable item and, thus, petitioner could be subject to class action lawsuits for such overcollection. Petitioner has been subject to over-collection suits in the past and overcollection is always a primary concern of the tax team when reviewing promotions.

20. Ms. Bayley also indicated that petitioner did not treat the BTS gift card as current revenue on petitioner's books for accounting purposes but booked the gift card as deferred revenue.

21. Consistent with the terms and conditions, the word "free" was not used in petitioner's advertising. The advertisements consistently state that if the customer buys a qualifying product, he or she will receive a gift card or get a gift card or some variation thereof.

22. One particular advertisement reviewed by the Division states in part:

"Congratulations. Your Mac will come with a \$100 Back to School Gift Card. We'll add your \$100 Back to School Gift Card to your order. You'll see it appear in your cart, but you will not be charged for it at checkout."

23. In a FAQ contained on petitioner's website related to the 2012 promotion the following question and answer were published:

“Why was I charged for the free Back to School Gift Card?”

“Your invoice or receipt will also show an equivalent discount amount to cancel out the charge for the card. As a result, your invoice or receipt will amount to the cost of the Mac or iPad only including applicable shipping cost and sales tax.

24. An exhibit consisting of a customer’s invoice, submitted as part of the parties’ joint stipulation of facts and exhibits, shows the itemized charges for the qualifying device and gift card, among other items, but does not indicate whether the BTS discount was applied against the qualifying device or, in the alternative, the gift card (*see* Ex 6). It is noted that an individual educator discount appears on the same line as the device on the invoice, but the BTS discount is included on the invoice as its own separate item. Another invoice submitted as part of the stipulated exhibits shows similar treatment where the BTS promotional discount and the charges for the gift card and qualifying device are separately itemized (*see* Ex 8).

25. On or about June 2, 2014, the Division issued two statements of proposed audit changes that asserted additional tax and interest. The first was for adjustments that petitioner agreed to that asserted additional tax of \$620,466.22, interest of \$76,542.20, and a credit of \$28,077.37 (agreed proposed audit change). The second statement asserted tax of \$955,197.44 and interest of \$141,744.70 related to the BTS promotion (BTS assessment); this statement was based upon the Division’s determination that petitioner had under-collected tax on qualifying device sales made during the BTS promotion.

26. Prior to June 2, 2014, petitioner made a \$1,000,000.00 prepayment of sales tax to the Division.

27. On or after June 2, 2014, the Division applied the prepayment to the agreed proposed audit change and the BTS assessment.

28. On June 26, 2014, the Division issued a notice of determination (notice #

L-041615716) to petitioner, for the periods ending August 31, 2011, November 30, 2011, August 31, 2012, and November 30, 2012 (notice). The notice reflects a balance due of \$731,882.84, consisting of tax of \$995,197.44, interest of \$144,296.55 and credit for payments of \$407,611.15.

29. On or about March 27, 2014, petitioner made a second payment to the Division for \$805,873.19 which was applied to the balances of the agreed proposed audit change and the BTS assessment. Both the agreed proposed audit change and the BTS assessment have been paid in full.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began his determination by citing to the sections of the Tax Law that describe how the sales tax is imposed on the receipts from every retail sale of tangible personal property, except as otherwise provided. The Tax Law sets forth a presumption of taxability of all receipts for tangible personal property and places the burden of establishing the contrary on the vendor or its customer. According to the Administrative Law Judge, the regulations set forth that when a discount is provided through a store-issued coupon, and the store is not reimbursed by a third party, the amount of such discount is not included in taxable receipts. Similarly, sales tax is not imposed on the sale or transfer of a gift card to a customer, but rather sales tax is imposed when the gift card is redeemed by the customer for items subject to sales tax.

The Administrative Law Judge then restated the issue presented as whether the BTS promotion required the purchaser to purchase a gift card to receive a discount equal to the value of the gift card to be applied to the qualified device or whether the BTS promotion required the purchase of a qualified device in order to receive a gift card for free. The Administrative Law



Judge explained that, under the Tax Law, the sales tax implications of these scenarios would differ. If the customer purchased the BTS promotional gift card at its face value together with a discounted qualifying device, sales tax would only be imposed on the discounted purchase price of the qualifying device. However, if the BTS promotional gift card was given away for free with the purchase of a qualifying device at full price, then sales tax would be imposed on the full price of the qualifying device.

According to the Administrative Law Judge, resolving the issue turns on the terms and conditions of the BTS promotion and the surrounding facts and circumstances. The Administrative Law Judge concluded that the BTS promotion's terms and conditions indicated that a purchase of a qualifying device was required to receive the BTS gift card for free. According to the Administrative Law Judge, such a conclusion was indicated by the promotion's terms and conditions and description in advertisements. Furthermore, according to the Administrative Law Judge, petitioner's argument that the BTS promotion included the purchase of the gift card was belied by petitioner's different treatment of in-store purchases versus online purchases.

The Administrative Law Judge also addressed petitioner's argument that imposition of sales tax on the full purchase price of the qualifying device would result in double taxation insofar as sales tax would be imposed on the full price of the device and when the BTS promotion gift card is redeemed. However, the Administrative Law Judge dismissed this argument by pointing out that the purchase of the qualifying device and the redemption of the BTS promotion gift card are in fact two separate transactions. Because the BTS promotion gift card was something of value, it qualified as a receipt under the Tax Law, according to the Administrative Law Judge.

The Administrative Law Judge denied the petition and sustained the notice of determination.

***ARGUMENTS ON EXCEPTION***

Petitioner argues that the Administrative Law Judge erred in concluding that the BTS promotion was premised on the full retail price of a qualifying device and a free gift card. In support of its argument that the gift card was purchased rather than given away, petitioner points to the return policy for the BTS promotion, which required contemporaneous return of the unused gift card, otherwise only the discounted price of the qualifying device would be refunded. Petitioner argues that imposing sales tax on the full value of the qualifying device and gift card would result in impermissible double taxation, and thus the transactions at issue must be interpreted as not giving away the BTS promotion gift card for free, but rather sold at face value to the customer and not subject to sales tax until redemption. Furthermore, petitioner claims that the Division's technical memoranda and advisory opinions support petitioner's contention that the gift cards at issue here are not subject to tax.

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge. It argues that the terms and conditions of the BTS promotional offer plainly show that the qualifying device was sold at full price and accompanied by a free gift card. The Division describes the BTS promotion refund policy where the gift card has been redeemed as supporting this view of the transaction. The Division also points to petitioner's advertising of the BTS promotion as evidence that petitioner's customers would receive a free gift card with the purchase of a qualifying device. Furthermore, the Division found that petitioner's treatment of the BTS promotion correctly applied sales tax to its online sales, which was at odds with its in-store treatment of identical transactions.

***OPINION***

We begin with section 1105 of the Tax Law, which provides for the imposition of sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. “Receipts” are defined under the Division’s regulations as “. . . the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise” (20 NYCRR 526.5 [a]). A presumption that tangible personal property is subject to sales tax is set forth in Tax Law § 1132 (c) (1) and the burden of proving the contrary is borne by the vendor or its customer (20 NYCRR 532.4 [a] [1]; [b] [1]). In addition, the amount of a discount of a store-issued coupon, where the store is not reimbursed by a third party, is not included in taxable receipts (20 NYCRR 526.5 [c] [3]). According to guidance issued by the Division, gift cards are not subject to sales tax at the time of transfer; instead, sales tax is imposed when the gift card is exchanged, in whole or part, for an item subject to sales tax (*see* NY St Tax Bulletin TB-ST-806).

We agree with the Administrative Law Judge that the question here is whether the BTS promotion required the purchase of a gift card with a discounted qualifying device or whether such gift card was given to the customer with the purchase of a qualifying device at full price. In order to prevail on its argument, petitioner bears the burden of establishing that the gift card that is the subject of the BTS promotion was purchased at the same time as the qualifying device (Tax Law § 1132 [c]; 20 NYCRR 532.4 [b]). Petitioner can show this by demonstrating that the terms and conditions of the BTS promotion and the surrounding facts are congruent with such treatment.

We concur with the Administrative Law Judge that petitioner has not borne its burden of establishing that the gift card was purchased and thus should be excluded from the value of the

receipt. While it is true that the marketing materials in the record do not use the word “free” with respect to the BTS promotion gift card, the language used in the BTS promotion’s terms and conditions, advertisements, sample invoices and online FAQ strongly implies that receiving a gift card is the direct consequence of purchasing a qualifying device and otherwise complying with the terms of the promotion. Particularly telling is the fact that if a customer declined the gift card as a part of the BTS promotion, the full price of the qualifying device with applicable tax would have been charged. Such treatment was also reflected on the sample invoices that petitioner offered at hearing, which indicated that the gift card could not be returned separately. Ultimately, the invoices did not clearly indicate whether the BTS promotional discount was applied against the qualifying device or against the gift card. Other examples, such as the explanation in petitioner’s FAQ that an “equivalent discount amount to cancel out the charge for the [gift] card” would appear on the invoice or receipt so that the total invoice amount “will amount to the cost of the Mac or iPad only,” support the Administrative Law Judge’s conclusion that the gift card was free.

We recognize the fact that petitioner’s treatment of the revenue from the gift cards for accounting purposes as deferred revenue supports its position. However, when considering the totality of evidence in this case, we conclude that petitioner has not borne its burden of proof by clear and convincing evidence that the BTS promotional gift card was not included gratis with the purchase of a qualifying device.

In regard to petitioner’s argument that its return policy supports a conclusion that the gift card was purchased, we find the argument circular in nature insofar as it is premised upon the ultimate conclusion petitioner seeks, namely, that the discount is applied to the qualifying device

at the time of the transaction. We do not find that petitioner has proven that the BTS promotion's discount was applied to the qualifying device rather than the gift card.

Petitioner also asserts that even if it were unclear whether the gift card that was the subject of the BTS promotion was free or purchased, the presumption against double taxation must result in a conclusion that the gift cards were not free to petitioner's customers. However, this is only because petitioner attempts to collapse the sale of the qualifying device under the BTS promotion with the eventual redemption of the gift card into a single transaction. The future redemption of the gift card and whether such redemption is subject to sales tax is not at issue in this proceeding.

In any case, under either the Division's or petitioner's characterization of the transaction, no sales tax was paid on the gift card at the time of its issuance, therefore the gift card cannot be subject to double taxation at its redemption. Petitioner's own characterization of the BTS promotion and the eventual redemption of the gift card belies its argument of the risk of double taxation (*see* petitioner's Ex 17). Under petitioner's hypothetical scenario, which it claims matches the transactions here at issue, a qualifying device is offered for \$1000.00 together with a gift card for \$100.00. The device is discounted by \$100.00, resulting in \$900.00 in taxable sales and \$100.00 in non-taxable sales. In contrast, if the same device were offered without a discount but the gift card was discounted, the result would be \$1000.00 in taxable sales. Ultimately, it is important to note that sales tax is not imposed at the acquisition of the gift card under either scenario, but only at its redemption for taxable goods or services in a separate, future transaction.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Apple Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Apple Inc. is denied; and
4. The notice of determination dated June 26, 2014, is sustained.

DATED: Albany, New York  
December 24, 2019

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner