280.0570

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

APPEALS UNIT

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	HEARING DECISION AND RECOMMENDATION
REDACTED TEXT SERVICES	)	No. SR JHF REDACTED TEXT
Petitioner	)	

The above-referenced matter came on regularly for hearing before Hearing Officer James E. Mahler on November 3, 1989 in Sacramento, California.

Appearing for Petitioner:

REDACTED TEXT
Attorney at Law

REDACTED TEXT
Attorney at Law

REDACTED TEXT
Chief Executive Officer

REDACTED TEXT
Chief Financial Officer

Appearing for the Department of Business Taxes:

Robert Wils
Senior Tax Auditor
Petition Unit

Protested Items

The protested tax liability for the period April 1, 1985, through June 30, 1988, is measured by:

	Item	State, Local and County
A.	Self-consumed prizes purchased for resale	$ 7,998,845
E.	Self-consumed brochures purchased for resale	4,372,182
F.	Supplies purchased for resale	2,240,330
	TOTAL	$14,611,327

Petitioner's Contentions

1. Petitioner sells services and merchandise to fund-raising organizations at wholesale, and does not make the retail sales of merchandise to the ultimate consumers.

2. The sales of fund raising services and products should be treated as sales of single unitary packages and not as sales of component parts.

3. Use tax does not apply to prizes and brochures transferred to fund raising organizations outside California.

Summary

Petitioner is a California corporation engaged in the business of organizing and supporting fund raising campaigns for student groups throughout the United States. Most of the campaigns are for elementary, junior and senior high school student organizations, such as ROTC, drama clubs and sports teams. Some campaigns are for church youth groups or other nonschool organizations, but these account for only one or two percent of petitioner's business. Petitioner focuses its marketing efforts on student groups because schools are easier to locate, and also because schools are in session five days a week so it is easier to coordinate and monitor the fund raising efforts.

Funds are raised by sales of jewelry, "collectibles", calendars and other types of merchandise to the general public. Petitioner provides the merchandise to be sold, as well as all catalogs, order forms, posters, incentive prizes and other incidental items necessary to the sales effort. Petitioner also does most of the accounting work to deep track of sales made and funds raised. The actual selling work is done by the students under the general direction of a "sponsor", that is, the teacher, coach or other person in charge of the student group.

Petitioner charges a set amount for each item of merchandise, usually equal to about 70 percent of the suggested retail price. The organization keeps as its profit any difference between the amount charged by petitioner and the amount charged to the ultimate purchaser. Petitioner

does not charge any separately state fees for the catalogs, posters, prizes and other incidental property, nor does it charge separately for the accounting services.

As described more fully below, the application of tax to the merchandise sales is not directly at issue in this petition. Rather, we are concerned with tax on the catalogs, posters, prizes and other incidental property. The Department of Business Taxes (DBT) contends that petitioner is a consumer liable for use tax on these items. Petitioner contends that it is a seller and, further, that the sales are for the most part exempt sales in interstate commerce or for resale. To provide a background for these issues, we find it necessary to describe petitioner's business operations in rather exhaustive detail.

Sometimes petitioner solicits business by mass mailings to all schools in a given area. More commonly, however, petitioner's employees (called "fund raising directors" or FRDs) visit schools to solicit business in person. We understand that each FRD has a territory of about 300 schools and attempts to visit each school at least once per year.

The FRD's first task is to identify a group or groups most interested in and likely to be successful at fund raising. The group should have not only a large number of students, but more importantly, students who are motivated. For example, a drama club with 50 students might be a better candidate than an entire class with 300 students, since the club members are volunteers more likely to be interested in raising funds for their group.

Once a group is identified, the FRD interviews the sponsor and prepares a "customer needs analysis." The FRD ascertains how much money is needed; whether the need for funds is continuing or for some special purpose; what types of products are most likely to sell well in the school's neighborhood; and whether the students in the group are motivated.

The FRD and sponsor then design a program for the particular group from a number of options offered by petitioner. In a well-to-do neighborhood, they might decide to sell jewelry or "collectibles" rather than calendars or other paper goods. Also, if the students are not highly motivated, the FRD and sponsor may opt for a program which offers "prizes" or "motivational products" to students who meet sales quotas.

The prizes offered to students range in value from novelty items, such as rubber sunglasses, to more valuable property such as stereos and portable CD players. The quality of the prize depends on the number if items sold by the student, not on the value of the items sold. Thus, a student who sells 19 items for a total of $300 is entitled to the same types of prizes as a student who sells 19 items for only $100. With one or two minor exceptions, the retail value of the prizes is not listed in any of petitioner's literature.

If the students are more motivated, the FRD and sponsor may choose a program where a single prize is awarded to the entire group for meeting a sales goal, rather than individual prizes to each student. Alternatively, about 15 to 20 percent of the sponsors choose a plan where no prizes are awarded at all. In those situations, petitioner allows a six- percent credit against the price of merchandise ordered, thereby increasing the group's profit. (Groups in the Los Angeles Unified

School District have sufficient economic leverage that petitioner allows a ten percent credit in lieu of prizes.)

The FRD may visit the sponsor two or three times before completing the design of the program. This is usually done in the spring for fund raising campaigns to be run in the fall. When the plan is complete, the FRD and the sponsor sign a document entitled "I"S Fund Raising Agreement." During the early part of the audit period, the agreement provided:

> "This agreement reserves a date for REDACTED TEXT to make a fund raising presentation to this school's students. School makes no commitment for any maximum or minimum order. REDACTED TEXT will take back any unsold or leftover merchandise. REDACTED TEXT will do all bookkeeping, all sorting of orders, pay for all prizes and shipping, and will refund money to any customer who requests it.
>
> "The date of presentation to students: (date)
>
> "REDACTED TEXT guarantees to have a representative at your school at the above date and time to implement the program set forth above. If, for any reason, sponsor wishes to alter part of the program, sponsor should contact REDACTED TEXT or the District Director."

The language of this agreement was changed sometime in 1986 to provide:

> "Terms: This agreement reserves a date for a fund raising presentation to the students. School makes no commitment for any maximum or minimum orders. REDACTED TEXT will provide professional assistance in all aspects of the sale ensuring a smooth and hassle free project.
>
> "REDACTED TEXT' COMMITMENT
>
> "REDACTED TEXT will provide the following services and features to the school:
>
> "1. "REDACTED TEXT will do bookkeeping and sort student's orders individually.
>
> "2. "REDACTED TEXT will also group orders by individual classroom.

"3. Instant Credit. REDACTED TEXT will ship all products with no minimums required and no advance payment required.

"4. REDACTED TEXT will pay for all prizes and shipping.

"5. REDACTED TEXT will take back any leftover products for any reason whatsoever.

"6. Customers will be protected by a guarantee and entitled to refunds.

"7. Free bonus prizes for no returns.

"8. Presentation by professional Fund Raising Director.

"9. Commitment to 'after the sale' service through our highly trained Customer Service Department.

"10. A toll-free number connecting you to our fund raising consultants.

"Date of presentation to Students _____.

"Preferred Time of Day _____.

"An REDACTED TEXT representative will be at your school on the above date and time to implement the program set forth above. If a situation should arise affecting the implementation of the program, sponsor should contact REDACTED TEXT of District Fund Raising Director."

The FRD returns on the agreed date to meet with the students and explain the fund raising program to them. At that time, the FRD and sponsor sign an "Organizational Data" sheet which includes the specific details of the program, and which also includes the following agreement:

"SIGNATURE: ___(Sponsor)____ I agree to supervise my organization and pay for half of all merchandise sold in 10 days and the other half in 40 days. I understand there is no minimum order and I may return anything we do not sell. I also understand that this fund raising project includes the cost of brochures, order cards, and any prizes awarded and there are no hidden charges. If I order my

> prizes before I pay my bill, I promise to pay my bill in full and return any unearned prizes."

The Organizational Data sheet includes a section which the sponsor can execute to serve as an exemptions or resale certificate. California sponsors may also give a formal resale certificate to petitioner using the school's sellers permit number. (We understand that many California schools had sellers permits.) Copies of two such resale certificates have been presented in evidence by petitioner. Both certificates state that jewelry is being purchased for resale, and neither certificate mentions the catalogs, prizes or other property at issue here.

The FRD furnishes a catalog and order form for each student at these meetings, plus a few extra copies. The catalogs picture and describe the merchandise being sold, including the retail price, and it is apparently anticipated that the students will show them to prospective customers in an effort to make sales. Three sample catalogs have been presented in evidence. Petitioner's corporate logo (a stylized wreath), business address and corporate slogan ("Serving America's Schools Since 1971") appear on the outside back cover of all three catalogs, along with the statement: "Sales tax will be added where applicable." Petitioner's initials appear inside the corporate logo and its full name is printed at the bottom of the page in connections with a copyright claim. Two of the three catalogs also promise a lifetime guarantee that products can be returned for repair or replacement at any time.

Petitioner has also presented several copies of the order cards. The format of these cards has evolved somewhat over the years. In 1984, the card was a single sheet of 8-1/2" x 5-1/2" paper, lined on both sides with spaces for the ultimate purchasers' names and orders. The front page included boxes for the student's name and room number, together with the following suggested sales pitch:

> "We are raising money for our school. Most people get a few items for gifts. I'll bring them to you in three weeks. Please pay me then."

Petitioner's corporate logo was printed near the bottom of the back page with its initials in 5/32" boldface type. The following statement appeared under the logo in fine print: "Sales subject to approval and acceptance by company in Benicia, California." Petitioner's complete name was printed at the very bottom with a copyright claim.

In 1985, the size of the order card was increased to four 8-1/2" x 11" pages. The extra two pages were devoted to pictures and descriptions of the prizes available to students meeting sales quotas. Petitioner's logo appeared near the bottom of the back page with its initials in 3/32" boldface type. The "subject to approval" language was deleted and replaced by petitioner's corporate name and business address. Petitioner's name still also appeared in small print at the bottom with a copyright claim.

The order cards in 1986 and 1987 had six 8-1/2" x 11" pages. One of the additional pages was devoted to prize descriptions and the other included motivational messages from previous

participants in fund raising programs. Petitioner's logo, initials, name, address and copyright claims were printed on the back page in the same amount as the 1985 forms.

The 1988 cards returned to the same format as 1985, except that petitioner's logo, initials, name and address were deleted from the back page and instead were printed on one of the inside pages. Petitioner's corporate slogan was also added. Petitioner's full name still appeared on the back page in connection with the copyright claim.

The 1989 form is identical to the 1988 version, except that a sales tip is printed on the front page. Students are advised to solicit sales from parents, grandparents, other relatives, neighbors, friends and church or club acquaintances.

In addition to the catalogs and order cards, the FRD also provides the sponsor with: posters to be place on the classroom walls to motivate the students; one copy of a "permission letter" to be used in obtaining parents' consent for their children to participate in the program (the sponsor must make copies for each student); and a "classroom order card envelope" which the sponsor can use to return the completed order cards to petitioner.

Finally, the FRD also brings sample prizes and sample merchandise to these meetings. If we understand it correctly, these samples are intended solely for display to the students, and the students are not given sample merchandise for display to prospective purchasers. It appears that petitioner does not rigorously account for these samples. They may be left at the school in the possession of the sponsor, or they may be retained by the FRD. Periodically, when petitioner changes its product lines, any remaining samples may be thrown away or given to charity.

Petitioner purchases about 80 percent of the catalogs from California vendors and normally gives a resale certificate to avoid paying tax reimbursement. In a few cases during the audit period, petitioner may not have given a resale certificate, or perhaps the resale certificate was lost by the vendor, but petitioner later executed XYZ letters stating that the property was purchased for resale. The remaining 20 percent of the catalogs are purchased ex-tax from out-of-state suppliers.

It appears that petitioner sometimes purchases the posters ex-tax and sometimes tax-paid. For example, the audit test of December 1987 discovered tax-paid purchases of "group goal" posters and "prize posters", but ex-tax purchases of "fund raiser" posters. (Audit workpapers, Schedule 12E-2A1.) The test of December 1985 noted ex-tax purchases of "give-away posters."

As for the merchandise and prize samples, petitioner purchased most of them ex-tax under resale certificates, but the audit test also found some tax-paid purchases. It appears that these samples were purchased in small lots for the express purpose of use as samples, rather than being withdrawn from regular inventory purchased for resale.

The record before us does not clearly reveal whether petitioner did or did not pay tax reimbursement on purchases of the Fund Raising Agreement forms, the Organizations Data forms and the classroom order card envelopes. The audit test includes ex-tax purchases of "receipt forms" and "forms", as well as tax-paid purchases of receipts, envelopes, forms and supplies. (The test also includes an ex-tax purchase of display cases which petitioner appears not to dispute.)

All of this property, whether purchased in-state or out-of-state, ex-tax or tax-paid, is delivered to petitioner at its warehouse in Benicia. When needed, petitioner sends the property to its FRDs throughout the United States, usually via UPS, and the FRDs distribute the property to the sponsors and students in the manner described above.

Once the students have their catalogs and order cards, the fund raising campaign may begin. About 10 percent of the time, however, the sponsor or students decide for one reason or another not to proceed. The FRD may or may not return to the school to collect the catalogs and other items, depending on whether the number of items is sufficient to justify the time and expense of an additional trip. The sponsors and students have no obligation to pay for catalogs, order cards, posters, samples, envelopes and other items which are not returned.

Normally, however, the fund raising campaign proceeds as planned. Petitioner emphasizes that it is not concerned with the manner in which the merchandise is sold. It does not regulate the hours students work; does not assign sales territories (although students are advised to contact certain persons as prospective customers); does not require any specific sales pitch (although one is suggested on the order cards); does not attempt to impose any rules of behavior or politeness on the students (although the FRDs apparently instruct the students on proper sales techniques); does not handle any complaints if the students misbehave; and does not reimburse any costs, such as travel expenses, which may be incurred in making the sales.

The students enter the purchasers' names and orders on the order cards, or sometimes have the purchasers enter their own names. If the program includes incentive prizes to the students, the student also identifies the desired prize in the space provided on his or her card. The students return the completed order cards to the sponsor for mailing to petitioner.

Petitioner delivers the merchandise to the sponsor, usually by UPS. Merchandise ordered for each student is packed in individual bags in the shipping carton, so the sponsor does not have to sort it. It appears that each item of merchandise includes a card addressed from petitioner to the purchaser describing petitioner's lifetime guarantee. The shipping carton also contains an envelope filled with the following forms and flyers.

(1) An invoice showing petitioner's charge for the merchandise, plus separately stated tax reimbursement, and the total amount due to petitioner. On the invoices to sponsors in California, the amount of tax reimbursement is measured by the retail price of each item as shown in petitioner's catalogs, not by the price petitioner charges to the sponsor. A sample invoice presented by petitioner for a transaction which occurred in 1989 includes the following statement (which may or may not have appeared on invoices during the audit period):

> "The sales tax will be collected as part of the customer price for each item. As a service to you REDACTED TEXT will remit this tax to your State Tax Board on your behalf."

(2) An instruction sheet advising the sponsor what remains to be done and when it should be done, such as the dates when payments to petitioner are due.

(3) "Teacher collection sheets" for the sponsor showing the amount of merchandise shipped for each individual student, the amount of money the student is to collect from the purchasers and the profit earned for the group.

(4) "Student collection sheets" for each student listing each item of merchandise shipped for that student, the amount the student is to collect from the purchaser, the tax to be collected for each item and information as to whether the student has qualified for a prize award.

(5) A customer satisfaction survey which the sponsor is asked to fill out. The questions address the sponsor's satisfaction with petitioner's services, not the ultimate purchasers' satisfaction with the merchandise.

(6) Envelopes and forms to be used in making payments.

(7) A brochure and flyers describing petitioner's policy on merchandise returns, together with a packing list, postage-paid mailing label and forms to be used for returns.

The invoices, instruction sheets, teacher and student collection sheets, packing lists, and other forms are all computer generated by petitioner in-house, and it appears that petitioner purchaser the computer paper tax-paid. The customer satisfaction survey also appears to be prepared in-house. The envelopes and mailing labels are purchased from outside printers, and all such purchases found in the audit test were tax-paid. The brochure and flyers describing the returned merchandise policy may have been purchased ex-tax under resale certificates, but the record is not clear on this point.

Upon receipt of the merchandise from petitioner, the sponsor distributes it to the students for delivery to the purchasers. According to petitioner, the terms for payment by the purchasers are strictly a matter between the students or sponsor and the purchasers. Petitioner believes that payment is normally required upon delivery, either by cash or by check payable to the school. If a bad debt is incurred, e.g., a payment check is dishonored by the bank, collection from the purchaser is the responsibility of the sponsor and petitioner does not become involved.

In accordance with the terms on the Organizational Data Sheet, the sponsor can return any unsold merchandise to petitioner. This might be necessary, for example, where a purchaser ordered merchandise but then moved prior to delivery. While petitioner will allow full credit for returns, it naturally prefers that all merchandise be sold. Petitioner therefore offers the sponsor "bonus prizes," ranging from watches to video recorders and Hawaiian vacations, if the sponsor pays petitioner's invoice in full with no returns. Except for the Hawaiian vacation, which of course is not tangible personal property, petitioner's literature does not specify any price or value for these prizes. Petitioner believes that, in order to qualify for the bonus prizes, sponsors will often sell off extra merchandise at discount prices rather than return it to petitioner.

Petitioner states that sponsors always have complete authority to set their own prices for the merchandise. The prices stated in petitioner's catalogs are merely suggestions. According to testimony at the appeal hearing, the FRDs always explain this pricing policy to the sponsors orally. In support of this testimony, petitioner has submitted an internal memorandum, apparently from

petitioner's headquarters to the FRDs, dealing with one particular item of merchandise. The memorandum states:

> "The [merchandise] retails between $5.00 and $6.00 with $5.00 being the most common price. The school is free to establish their [sic] own retail. REDACTED TEXT will assume the retail price is $5.00 when calculating taxes."

The sponsors collect the money from the students and draft a payment check to petitioner. Petitioner states that most of these checks are drawn on the school's bank accounts, rather than the sponsors' personal accounts, and sample copies of some such checks have been presented. Occasionally, a sponsor does not pay petitioner's full invoice amount and petitioner has to initiate collection action. Petitioner normally proceeds against the sponsor but, according to testimony at the appeal hearing, in a few cases petitioner has attempted to collect from the school when the sponsor could not be located.

About six days after shipping the merchandise, which is usually before it receives any payment, petitioner ships to the sponsor any prizes for which the students or group may have qualified. (We understand that petitioner purchases the prizes from California vendors ex-tax under resale certificates.) The shipping container includes a computer generated list showing the available prizes, each student's name, the number of merchandise items ordered for each student, and the prize ordered by each qualifying student. The sponsor is advised that if merchandise is later returned, so that a student who qualified for a prize no longer qualifies, the prize must also be returned. Postage-paid shipping labels are included for that purpose. Another customer satisfaction survey is also included.

* * *

Petitioner states that this business was operated by a predecessor corporation during the years 1977 through 1980. In California transactions, the predecessor allegedly reported and paid sales tax measured by the price it charged to the sponsors for merchandise. According to petitioner, the predecessor was audited by the Board and this reporting method was accepted as correct. Petitioner states that the predecessor also received a letter from the Board "acquiescing in" this reporting method. No copy of this letter has been presented in evidence and we have been unable to locate anything in the Board's files.

Petitioner itself was audited for the period January 1, 1981, through December 31, 1983 (hereinafter the "prior audit"). In California transactions, petitioner had reported and paid sales tax measured by the charges to the sponsors. The audit concluded that petitioner was liable for tax on the full retail selling price of the merchandise, and therefore asserted a deficiency for the "unreported markup." The prior audit also asserted tax on petitioner's purchases of supplies, artwork, brochures and prizes. The determination, which was issued in January 1985, was upheld by a Hearing Officer and ultimately by the Board itself. Petitioner has paid the tax and sued for a refund. The case is awaiting trial.

Petitioner changed its reporting methods for merchandise sales during this audit period. It collected tax reimbursement and reported and paid tax measured by the full retail-selling price listed in its catalogs (except for a relatively minor understatement due to clerical error). Nevertheless, petitioner believes that its California sales should be subject to tax measured only by the charge to the sponsors, or perhaps not taxable at all. Petitioner advises us that it changed its reporting methods as an accommodation to the sponsors since, in its sales literature, it promises to do all accounting and tax work for the sponsors.

According to petitioner, California is the only state which requires petitioner to pay tax on the full retail-selling price. In many states there is no tax, either because the state does not have a sales tax or because there is some statutory exemption. A few states regard the transfer of merchandise from petitioner to the sponsor as a taxable retail sale measured by the wholesale price. Most states regard the transfer from petitioner to the sponsor as a sale for resale (and require petitioner to obtain a resale certificate) with the sponsor or school being the retailer liable for tax on the retail sales. In these latter states, petitioner voluntarily reports and pays the tax on behalf of the sponsors as part of its promise to do all accounting work.

Petitioner does not allege that it paid tax to any other state on its purchases of the catalogs, prizes and other property at issue in this petition.

Analysis and Conclusions

DBT contends that petitioner makes retail sales of merchandise to the general public. The sponsors and students are seen as agents or sales representatives of petitioner, and not themselves as sellers or retailers for sales and use tax purposes. According to DBT, the catalogs and other items at issue are used by petitioner and its representatives to facilitate the retail merchandise sales, and petitioner is therefore a consumer of these items.

Petitioner contends that it sells a "fund raising package" or "kit" which includes the merchandise to be sold as well as the catalogs and other items at issue. According to petitioner, its customers are the schools, not the sponsors or the students and certainly not the ultimate purchasers of the merchandise.

Petitioner argues that the schools are "equivalent to" Parent-Teacher Associations and are therefore classified by statute as consumers of the fund raising kits. (Citing Rev. & Tax. Code § 6370.) If the schools are located outside California, petitioner argues that its sales are nontaxable sales in interstate commerce. If the schools are located in this state, petitioner admits that the sales of fund raising kits are taxable, but argues that the taxes already reported and paid are more than sufficient to cover the liability.

Alternatively, petitioner contends that it sells the merchandise to the schools for resale. Under this analysis, petitioner believes that the prizes are sold to the schools for resale to the students. (Citing Sales and Use Tax Annotation 280.0760 [3/21/57].) Petitioner classifies the catalogs and other items as premiums sold along with the merchandise, arguing that sales to out-of-state schools are exempt sales in interstate commerce and sales to in-state schools are already tax-paid.

The fundamental disagreement between the parties, therefore, is whether petitioner is a seller or a consumer of the catalogs and other items. DBT argues that petitioner is using or consuming the property, while petitioner argues that it sells the property. Resolution of this issue depends on whether petitioner's transfer of the catalogs and other items to the sponsors is a "use" or a "sale" as those terms are defined in the Sales and Use Tax Law.

Subsection (a) of Revenue and Taxation code Section 6006 defines "sale" to mean and include any "transfer of title or possession…in any manner or by any means whatsoever, of tangible personal property for a consideration." The term "use" is defined in Section 6009 of the Code as "the exercise of any right or power over tangible personal property incident to the ownership of that property…except that it does not include the sale of that property in the regular course of business."

As the California Supreme Court has noted, the "transfer of the goods other than by sale in the regular course is, almost by definition, use." (Wallace Berrie & Co. v. State Bd. of Equalization, 40 Cal.3d 60 at 68, footnote omitted.) The precise question for us is therefore whether the transfers meet the statutory definition of "sale", or more specifically, whether the transfers are "for a consideration". We find it helpful in analyzing this question to divide the property into four categories: (1) catalogs, posters and other items (except samples) which petitioner stores in its Benicia warehouse, then ships to FRDs for distribution to sponsors; (2) samples of prizes and merchandise; (3) envelopes, mailing labels, flyers and other items (except prizes) which petitioner ships directly to the sponsors from California; and (4) prizes, including those for students or groups and the bonus prizes for sponsors.

(1) This category consists primarily of the catalogs and posters. It appears that many of the other items, such as envelopes and forms, may have been purchased by petitioner tax-paid and therefore not included in the determination. Nevertheless, since some of the other items may have been purchased ex-tax, we include in this category all property (except samples) shipped to the FRDs (hereinafter "category one property").

Petitioner argues that the sponsors (or schools) bargain to obtain the complete fund raising kits at a set price. Although the price is expressed in terms of a charge for each item of merchandise, with no separate charge for the other items, petitioner contends that a portion of the price is actually intended as compensation for the category one property. In support, petitioner alleges that it calculates its merchandise prices in a manner sufficient to cover all its costs, including the costs of the category one property. Petitioner also points out that the Organizational Data sheet, which serves as the contract between petitioner and the sponsors, expressly provides that the "fund raising project includes the cost of brochures…." Petitioner concludes that its transfer of category one property is supported by consideration and is therefore a sale.

We disagree. The terms stated on the Organizational Data sheet require the sponsor to pay only for the merchandise sold. The sponsor is not required to pay anything for category one property and is not even required to order any minimum amount of merchandise. Furthermore, petitioner admits that if the sponsor cancels the fund raising program after receiving the category on property, but before any merchandise is sold, the sponsor may sometimes keep the category on property without paying anything. Because

no consideration is charged for category one property, petitioner is a consumer and not a seller of all such property.

With specific regard to catalogs and posters, classification of petitioner as a consumer is also compelled by Sales and Use Tax Regulation 1670. Subdivision (b) of the regulation provides:

> "The tax applies to sales of advertising material, display cases, counter display cards, racks, and other similar marketing aids to persons acquiring such property for use in selling other property to customers. A marketing aid is deemed to be 'sold' if a consideration at least equivalent to 50 percent of the purchase price of the aid is obtained from the customer, either by the making of a separate charge or by increasing the regular sales price of other merchandise sold to the customer and delivered with the marketing aid.
>
> "Manufacturers or other who provide marketing aids to persons engaged in selling their products without obtaining reimbursement equivalent to 50 percent of the purchase price of the aid are deemed to be the consumers of the property provided…."

Catalogs and posters are advertising materials. Petitioner charges no consideration for those materials, either by separate charge or by increasing the regular selling price of merchandise. (Petitioner does offer credits against the price of merchandise to persons who elect not to receive prizes, but this has no relevance to the catalogs and posters.) Petitioner is therefore a consumer of the catalogs and posters under the regulation.

Petitioner contends that the catalogs and posters are "premiums" under subdivision (c) of Regulation 1670, rather than "marketing aids" under subdivision (b). Subdivision (c) of the regulation provides:

> "When a person delivers tangible personal property as a premium together with other merchandise sold, and the obtaining of the premium by the purchaser is certain and not dependent upon chance or skill, the transaction is a sale of both articles…."

This identical argument was raised by the plaintiff and rejected by the California Supreme Court in Wallace Berrie, supra, 40 Cal.3d at 69, footnote 12:

> "…Berrie alternatively contends that …transfer of a marketing aid as part of a 'packaged deal' is indistinguishable from delivery of a 'premium,' and should therefore be taxed as a sale….
>
> "Although the regulation does not otherwise define 'premium,' the term itself connotes a reward or some other inducement offered to encourage a particular transaction. Thus, the Board could

> reasonably determine that the premium is a bargained-for part of the sales transaction. This is not necessarily true with marketing aids. Th wholesaler's primary purpose in providing such devices may well be to obtain point-of-purchase advertising, rather than to induce a specific sale. This would be particularly true where the retailer carries several competing brands, such as soft drinks, tires or aspirin. The free advertising aspect of marketing aids distinguishes them from merchandise premiums and provides ample justification for the Board's decision to treat the differently."

Since the price of the merchandise is intended to cover all of petitioner's costs, petitioner argues that the sponsors do in fact "bargain for" the catalogs and posters in the same sense as they might bargain for premiums. Again, this identical argument was raised and rejected in Wallace Berrie, supra, 40 Cal.3d 60 at 70-71:

> "Berrie's testimony at trial that the firm actually recouped 100 percent of the purchase price of the cardboard racks, and made a small profit as well, does not invalidate the Board's classifications.
>
> "For tax purposes, gross receipts on retail sales of tangible personal property are determined by the amounts received in consideration for sale of the property, not by profit realized or the gross income of the retailer…. The agreed price, as opposed to market value or some subsequently revealed price, dictates the appropriate sales and use tax treatment…. Because the agreed price for the cardboard display racks was zero, it is inconsequential, for tax purposes, that Berrie factors its overhead, including the cost of the display racks, into the price of its merchandise. Tax law necessarily is based upon what has been done, not what might have been done. The form of the transaction governs….
>
> "In its sales literature, Berrie offers the cardboard display rack free with a minimum purchase. The only price communicated is the price of the merchandise to be displayed on the rack. The price per unit remains constant, regardless of volume purchased. Thus, it is virtually impossible for the retailer or the Board to determine what consideration, if any, is being exchanged for the display rack. Berrie's word alone, that it recoups the entire cost through the combination sale, does not suffice …." (Citations omitted.)

Petitioner further contends that the assertion of tax on catalogs and posters, separate from the tax on the retail sales of merchandise, results in double taxation. In fact, the exact opposite is true. If petitioner's contentions are accepted, no tax at all would be paid on the catalogs and posters. The tax already reported and paid by petitioner is measured by the retail-selling price of the merchandise, and is paid solely upon and as a result of the retail sale of the merchandise. Like any other successful business, the price of the merchandise is sufficient to reimburse all costs,

including the costs of consumable supplies used in promoting sales or transferred to customers without charge, but it does not follow that paying tax on the merchandise sales thereby covers all tax on the supply purchases. Like any other business, petitioner must pay tax on supply items, absent a specific statutory exemption.

This point can best be illustrated by example. Assume petitioner transfers 100 catalogs to a sponsor who then cancels the fund-raising program without selling any merchandise. Next, assume that the same number of catalogs are transferred to another sponsor who generates sales of $1000, on which $60 tax is paid. Finally, assume that the same number of catalogs are transferred to a third sponsor who generates $5000 in sales, on which $300 tax is paid. How much tax has been paid on catalogs in these three situations? Since the measure of tax on 100 catalogs must remain constant, and cannot vary depending on the amount of merchandise sold, the only rational answer is zero. All of the tax was paid on merchandise sales and no tax was paid on catalogs. Petitioner's attempt to avoid all tax on the category one property in the tax paid on merchandise sales is simply an attempt to avoid all tax on the category one property.

For these reasons, we agree with DBT that petitioner is a consumer and not a seller of the category one property. Since petitioner is not selling the property, it follows that the exemption for interstate commerce sales is not available.

It should be noted that our analysis does not depend on whether petitioner is a retailer or a wholesaler of the merchandise itself. Petitioner is a consumer of the category one property because it charges no consideration for that property, regardless of who retails the merchandise.

Having concluded that petitioner is a consumer of the category one property, the next question is: What, if any, is the applicable tax? Normally, of course, consumers are liable for use tax under Revenue and Taxation Code Section 6201 (it the property is purchased at retail) or under Sections 6094 and 6244 of the Code (if the property is purchased for resale). In certain situations, however, consumers who issue resale certificates may be liable, not for use tax, but for the sales tax on their purchases. Specifically, Revenue and Taxation Code Section 6094.5(b) provides:

> "Any person, including any officer or employee of a corporation, who gives a resale certificate for property which he or she knows at the time of purchase is not to be resold by him or her or the corporation in the regular course of business is liable to the state for the amount of tax that would be due if he or she had not given such resale certificate. In addition to the tax, the person shall be liable to the state for a penalty of 10 percent of the tax or five hundred dollars ($500) whichever is greater, for each purchase made for personal gain or to evade the payment of taxes."

The prior audit classified petitioner as a consumer of category one property and asserted tax. The determination was issued in January 1985, at least two months before the start of the current audit period. Petitioner immediately changed its reporting practices with respect to merchandise sales in compliance with the prior audit, but did not change its practices with regard to category one property. It continued to issue resale certificates for such property to all or

substantially all of its California vendors. Since petitioner was notified by the prior audit that it is a consumer and not a seller of category one property, but refused or otherwise failed to change its reporting practices, we conclude that petitioner misused its privilege to issue resale certificates. Petitioner is therefore liable for the amount of sales tax which would have been due but for the resale certificates.

We have no doubt that petitioner believed in good faith that the prior audit was incorrect, and that it was entitled to issue resale certificates for category one property. Petitioner's remedy, however, was to pay tax as a consumer in accordance with the prior audit's findings, and then file a claim for refund. Petitioner's decision to ignore the prior audit and determination, and instead to adopt a "self-help" remedy, warrants a finding that petitioner misused its resale certificates.

Section 6094.5 also imposes severe penalties for misuse of resale certificates. For some reason not clear to us, DBT has chosen not to assert the penalties in this audit period. We advise petitioner that, if it continues to issue resale certificates for category one property, penalties may well be imposed and upheld in future audits. In this audit period, however, since DBT has not asserted the penalties, we do not recommend adding them at this time.

Finally, petitioner argues that its storage or use of the category one property in California should be excluded from the term "use" pursuant to Revenue and Taxation Code Section 6009.1, and therefore not subject to use tax. Section 6009.1 provides:

> " 'Storage' and 'use' do not include the keeping, retaining or exercising any right, or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state."

To the extent petitioner purchased category one property from California vendors under resale certificates (including XYZ letters), the applicable tax is the sales tax and Section 6009.1, which applies only to use tax, is therefore irrelevant. Our discussion of Section 6009.1 is thus limited to the property which petitioner purchased outside California.

The category one property purchased outside California was stored for a time in petitioner's Benicia warehouse. Presumably, some of this property was then sent to FRDs in California for distribution to California sponsors and students. Since such property never left California after entering this state, the Section 6009.1 exclusion is not available and petitioner is liable for use tax.

Some of the property, however, was presumably sent to out-of-state FRDs for distribution to sponsors and students there. Since the distribution by the FRDs was a use by petitioner outside California, any such property was temporarily stored in this state for purposes of use thereafter solely outside the state. The Section 6009.1 exclusion applies and petitioner is not liable for use tax. We recommend a reaudit to delete such property from the measure of tax.

Parfums-Corday, Inc. v. State Bd. of Equalization, 187 Cal.App3d 630, is not to the contrary. Plaintiff in that case transferred possession of marketing aids to carriers in California for delivery to its customers outside the state. The Board's position was that the "gift" or use of the marketing aids had occurred in California, and plaintiff itself had not thereafter used the property outside this state. In contrast, petitioner's gift or use of the category one property did occur outside the state when the out-of-state FRDs distributed the property to sponsors and students.

(2) The second category includes the samples of prizes and merchandise. Our analysis of these samples is the same as that for category one property. Petitioner is a consumer and not a seller because it charges no consideration for the samples. Petitioner is liable for the amount of sales tax on all samples purchased in California under resale certificates (including XYZ letters); petitioner is liable for use tax on samples purchased outside the state but distributed to FRDs in California; and petitioner is not liable for sales or use tax on samples purchased outside California and distributed to out-of-state FRDs for use thereafter outside the state. We have listed samples in a separate category only because there is one additional issue which must be addressed.

Subdivision (a) of Revenue and Taxation Code Section 6244 provides:

> "If a purchaser who gives a resale certificate or purchases property for the purpose of reselling it makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used."

Petitioner seems to have used the samples for purposes of demonstration or display. The problem is that petitioner did not purchase or hold the samples for sale in the regular course of business. The samples were purchased in small lots for the express purpose of use as samples, not withdrawn from regular merchandise inventory purchased for resale. After using the samples, petitioner made no attempt to sell them, but simply allowed the FRDs or sponsors to retain possession.

The exclusion for demonstration or display applies only when property is held "for sale in the regular course of business." Since petitioner was not holding the samples for sale, it is not entitled to the exclusion. (See also Sales and Use Tax Annotation 280.0960 [12/22/53].)

(3) This category includes flyers, envelopes and other miscellaneous items (hereafter "category three property"). The difference between this property and the category one property is that the category one property was shipped to FRDs for distribution to sponsors, while the category three property was shipped to the sponsors by carrier directly from Benicia. We are uncertain of the extent to which category three property is actually in dispute, since petitioner appears to have purchased much of it tax-paid.

Regarding the sales tax, we reach the same conclusion for the category three property as for the category one property. Petitioner is a consumer because it charges no consideration, and is liable for tax under Section 6094.5 for any such property purchased in California under resale

certificates (including XYZ letters). Regarding the use tax, however, our analysis is somewhat different. We conclude that the Section 6009.1 exclusion is not available for any category three property.

Petitioner contends that title in property shipped outside the state does not pass from petitioner to the sponsor (or school) until completion of delivery by the carrier. Accordingly, petitioner believes that the category three property should be treated the same as the category one property for use tax purposes: that is, when the property is shipped to an out-of-state destination, a gift or use occurs outside this state, so that the Section 60093.1 exclusion should apply.

In support of its title-passing argument, petitioner relies on Uniform Commercial Code Section 2401(2), which provides:

> "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.
>
> "(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
>
> (b) If the contract requires delivery at destination, title passes on tender there."

Petitioner had no explicit agreements with the sponsors regarding passage of title. Petitioner argues that title passage was therefore governed by Section 2(b) of this statute, and that petitioner retained title until delivery at the out-of-state destination.

By its express terms, Uniform Commercial Code Section 2401 applies to property which is sold to a "buyer". The statute therefore does not directly apply to situations, such as this one, where the property is transferred for no consideration and is not sold.

Even if the statute applies by analogy, however, we do not agree with petitioner's conclusion. Petitioner's contracts with the sponsors, as reflected in the Organizational Data sheets, require or authorize petitioner to sent the property to the sponsor, but do not require petitioner to deliver at destination. Indeed, petitioner does not deliver at destination; it simply places the property in the hands of a carrier. The pertinent provision of the statute would therefore be subdivision 2(a), which provides that title passes at the time and place of shipment.

Petitioner has also submitted a letter and a "service explanation" from UPS. These documents deal with risk of loss, the duty to pay shipping charges and similar matters. Petitioner reads them as showing that UPS regards petitioner as the "owner" of the property during shipment.

However, the terms of petitioner's contract with UPS shed no light on the terms of petitioner's agreements with the sponsors, and we therefore find these documents irrelevant here.

Since title to the category three property passes at the time and place of shipment, which is in California, there is a use in this state by petitioner and no subsequent use by petitioner outside the state. Petitioner is therefore not entitled to a Section 6009.1 exclusion for the category three property. (Parfums-Corday, Inc. v. State Bd. of Equalization, supra, 187 Cal.App.3d 630.)

(4) The final category is the prizes, including individual student prizes, group prizes and bonus prizes for sponsors.

Unlike the property in the other three categories, petitioner awards prizes only in exchange for a quid pro quo. The student and group prizes are awarded only if specific sales goals are met; and the bonus prizes are awarded only when all merchandise ordered is sold (or at least not returned). Petitioner's transfers of title and possession of the prizes are therefore supported by valid consideration, and petitioner is properly classified as a seller rather than a consumer of the prizes.

Our decision is consistent with recent unpublished decisions of the Board and its staff regarding incentive awards transferred to "hostesses" of "sales parties". It is also consistent with prior published opinions. For example, Sales and Use Tax Annotation 280.0760 (3/21/57) provides:

> "Where, under a plan, the salesmen and distributors of a corporation are awarded points redeemable in merchandise, the transfer of the merchandise to a salesman or distributor constitutes a sale because it is a transfer of title to personal property, and the measure of the sales or use tax is the amount paid for such merchandise by the corporation."

Similarly, sales and Use Tax Annotation 280.0720 (9/11/67) provides:

> "Premium houses are retailers of premium merchandise which they transfer to recipients in exchange for stamps, coupons or points, which constitute valuable consideration.
>
> "Where an employer gives its salesmen 'points' or other indicia as incentives, and a premium house redeems the points for merchandise which it transfers to the salesmen, the premium house and not the employer is the retailer. If the merchandise is transferred by the employer directly to the salesmen as an incentive award, the employer is the retailer. In either case, the retail sale is made to the salesman. The salesman and not the employer is subject to any use tax that may apply."

Since petitioner is a seller of the prizes, shipments to out-of-state sponsors may qualify for the interstate commerce exemptions of Revenue and Taxation Code Section 6396. The reaudit should review the available shipping documents, either on a test or an actual basis, and allow exemption as appropriate.

As for the in-state shipments, two questions remain. Are the sales taxable retail sales and, if so, what is the measure of tax?

DBT contends that petitioner is a retailer of the merchandise sold to the general public, with the sponsors and students acting as its sales representatives. If that analysis is correct, the sales of prizes would be taxable retail sales from petitioner to its representatives.

Petitioner contends that it is a wholesaler of the merchandise and that the sponsors (or schools) are the retailers. If that view is correct, the transfers of group prizes and bonus prizes to the sponsors would still be taxable retail sales from petitioner to its customers. However, petitioner contends that the transfers of individual student prizes to the sponsors would be sales for resale to the students. Petitioner's theory, apparently, is that the teachers are employers and the students are their employees.

We must therefore decide the issue we have avoided in the previous sections of this Decision and Recommendation. Is petitioner a wholesaler or retailer of the merchandise? We first note that if petitioner is correct, tax on the sales of the individual student prizes would be due from the sponsors (or schools), and the Board would be required to issue determinations to each sponsor (or school). This would undoubtedly be disruptive, not only to the persons involved, but also to petitioner's own business. Petitioner might even find itself morally if not legally required to pay any such determinations in view of its stated commitment to handle the accounting and tax aspects of these transactions. We do not recommend issuing determinations against the sponsors at his time, however, since we have concluded that petitioner's analysis is incorrect.

The Board classified petitioner as a retailer of the merchandise in the prior audit. As petitioner points out, the Hearing Officer's Decision and Recommendation relied in part on the "subject to approval" language on the order cards. He stated:

> "The order cards provide that sales are subject to approval and acceptance by petitioner. The legal consequence of the appearance of this language on the order card prepared by the consumer is that the consumer is making an offer to petitioner. The fund-raising group has no power to accept the offer. Upon acceptance of the offer by petitioner, there is a binding contract of sale between petitioner and the consumer. Title passes directly from petitioner to individual purchasers. Although the fund-raising group receives possession of the property, it does not receive title…."

Petitioner points out that the "subject to approval" language no longer appeared on the order cards in this audit period. Also, petitioner's name and business logo no longer appeared on

the back of the order cards (except in small print in connection with the copyright claim), but instead were printed on the inside where they might not even be seen by the ultimate purchasers.

The "subject to approval" language was not the only fact relied upon by the prior Hearing Officer, however. He also found:

> "The fund-raising groups have no inventories, set no prices, and assume no economic risks. The do not conduct business as sellers of tangible personal property. The fund-raising groups act as agents of the petitioner in receiving payment of the price from the consumer and forwarding the payment (less the authorized commission) to petitioner. Sales tax reimbursement was collected from consumers measured by the full retail price, with the fund-raising groups forwarding reimbursement based on the amount remitted to the sponsor. At the time of the transactions, petitioner understood it was obligated to pay the sales tax. Proper reimbursement was collected…."

Petitioner disagrees and argues that its status as a wholesaler is established by the following: (1) The sponsors agree to pay REDACTED TEXT; (2) the orders and invoices are phrased in terms of a sale from petitioner to the sponsor, including exemption and resale certificates; (3) petitioner ships its products to the sponsors; (4) the sponsors or schools pay petitioner; (5) the sponsors bear the risk of physical loss of all merchandise received, as well as the risk of nonpayment by the ultimate purchasers; (6) petitioner does not control the marketing strategies or resale prices of the products to the ultimate purchasers; and (7) the sponsors or schools earn a profit equal to the difference between petitioner's price and the retail price.

We agree with the prior Hearing Officer. Although petitioner now alleges that the sponsors are free to establish their own retail prices, the fact is that the retail prices are set out in petitioner's catalogs, which are intended to be shown to the purchasers. While it may be theoretically possible for sponsor to change the prices, no evidence has been presented to show how often that might occur, and it would seem to happen rarely if at all. Petitioner always assumes, for tax purposes and all other purposes, that the price charged by the sponsor is the retail price shown in its catalogs.

Petitioner also alleges that the sponsors agree to pay REDACTED TEXT for the merchandise received and bear the risk of loss on such merchandise. These allegations are not quite accurate. The sponsors agree either to pay for or to return unsold merchandise; there is no unequivocal commitment to pay. Nor do the sponsors bear any risk of physical loss of the merchandise. The Organizational Data sheet expressly requires the sponsor to pay for "all merchandise sold", but there is not requirement to pay for merchandise lost. If the sponsor bear any risk at all, it is only for nonpayment by purchasers to whom merchandise has been delivered, but even then the sponsors may reclaim the merchandise and return it to petitioner for full credit. More importantly, petitioner has presented no evidence to show that any sponsor ever actually suffered a loss. Absent such evidence, we are unwilling to assume that the sponsors in fact bear any significant risk of loss.

Some sponsors do sign resale or exemption certificates stating that they are purchasing the merchandise from petitioner for resale. We would find this more significant if the sponsors clearly recognized a consequent obligation to report and pay sales tax on the retail sales, but in fact they do not. Any sponsor who signs a resale or exemption certificate does so in the context of petitioner's express promise to handle all tax aspects of the transaction. Insofar as we can tell from the record in this case, the certificates are signed at petitioner's behest, as part of the fund raising paperwork, with no recognition or understanding of the potential legal consequences. We also note that, while many schools do hold sellers permits, they are not registered to engage in the business of selling merchandise to the general public. On the contrary, that is petitioner's business.

It is also true that petitioner's name and business logo no longer appear prominently on the back of the order cards, but they do appear prominently on the backs of the catalogs. The catalogs state the retail price of the merchandise, recite petitioner's lifetime guarantee of its product, and provide that sales tax will be added to the retail price. The ultimate purchasers are therefore notified of petitioner's involvement in these fund raising programs, although they may not be aware of the precise details. We believe that any reasonable purchaser would regard petitioner as the seller of its merchandise, and would not regard the children or their teachers as being engaged in business as retailers.

The last paragraph of Revenue and Taxation Code Section 6015 provides:

> "When the board determines that it is necessary for the efficient administration of this part to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors, or employers under whom the operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, or employers the board may so regard them and may regard the dealers, distributors, supervisors, or employers as retailers for purposes of this part."

The Board unquestionably has authority under this statute to regard petitioner as the retailer of the merchandise. As a matter of policy, classification as a 6015 retailer is normally bone on a prospective basis only. In this case, however, petitioner was notified of its retailer status in the prior audit. We see no reason to change that classification in this audit period.

For these reasons, we conclude that petitioner is the retailer of the merchandise. Petitioner's sales of the individual student prizes are therefore retail sales, not sales to the sponsors for resale.

Petitioner's contention that the schools or student organizations are "equivalent to" Parent-Teacher Associations has no merit. The children's parents are not members of any of the organizations with which petitioner deals. (See, generally, the Board's pamphlet No. 18, Tax Tips for Volunteer and Nonprofit Fund Raising Organizations, page 10.) However, if the organizations were deemed to be statutory consumers, this would also require the conclusion that petitioner's California sales of prizes were taxable retail sales.

Finally, the measure of tax on the California sales of prizes is petitioner's "gross receipts" from those sales. Revenue and Taxation Code Section 6012(a) defines "gross receipts" to mean "the total amount of the sale or lease or rental price…valued in money, whether received in money or otherwise…."

The consideration which petitioner receives for the prizes is the increased sales effort of the students or groups, and the increased effort of sponsors to avoid returns. Valuation of such intangibles is always a difficult task. It is even more difficult in this case , since petitioner awards the individual and group prizes based on the number of merchandise sold, not on the money generated by such sales.

In recent cases involving incentive awards to sales party hostesses, the Board has held that if the retailer's written offer to award prizes includes a stated value for the prizes, that value is deemed to be the selling price of the prizes. In this case, however, with a few minor exceptions, petitioner's literature does not state any value for the prizes. Accordingly, we believe the proper rule here is the one set out in Annotation 280.0760, supra. We conclude that the selling price of the prizes, and the measure of tax, are equal to petitioner's purchase price of the prizes. Since the audit already asserts tax measured by petitioner's purchase price, no reaudit adjustment is necessary for state and local tax on in-state sales of prizes. (But some transit tax adjustment may be necessary for prizes sold to sponsors in transit districts.)

* * *

We realize that some of our conclusions herein are inconsistent with the Board's decision in the prior audit period. This is because petitioner has presented much more extensive evidence and arguments in this audit. We express no opinion as to whether the evidence presented herein would have any relevance or effect on the decision for the prior periods.

Recommendation

Reaudit in accordance with the views expressed herein. Redetermine in accordance with the reaudit and without other adjustment to the tax.

James E. Mahler, Hearing Officer — 4/26/90 Date