

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

In the Matter of the Petition)
for Redetermination Under the)
Sales and Use Tax Law)
)
)
)
)
 Petitioner)

DECISION AND RECOMMENDATION

Petitioner waived appearance in the above entitled matter and requested redetermination based on arguments and facts presented in a letter dated February 16, 1979. This hearing report is based on that letter and material in the file. H. L. Cohen, Hearing Officer

PROTEST

Petitioner protests the assertion of tax on transfers of premiums. Tax was asserted on the basis of an audit covering the period from April 1, 1973 through June 30, 1977, and pursuant to a determination dated January 24, 1979. The amount upon which the protested tax is based is \$12,500 for state, local, and county tax purposes and \$1,248 for transit district tax purposes.

CONTENTIONS

Petitioner contends that it was not the seller of the property in question and is not liable for the tax.

SUMMARY

1. Petitioner is a corporation engaged in manufacture and sale of aluminum and aluminum products. The last previous audit was for the period through September 30, 1972.

2. Petitioner manufactures aluminum foil for household use which is sold at retail principally through grocery stores. As part of a retail marketing program, the cartons containing the foil also contained an offer to sell to the foil purchaser needlepoint kits manufactured by ---. The contract between petitioner and --- provided that --- would create, manufacture and sell the kits and that petitioner would at its own expense advertise the kits to consumers. Each kit was to contain an offer for additional kits which was printed by petitioner at its own expense. The advertisements were to be reviewed and approved by --- was to establish a post office box in the name of --- in the vicinity of Providence, Rhode Island. --- was responsible for processing all orders and for mailing the kits to customers. The advertising stated that the kits were available only from --- petitioner's product. Petitioner guaranteed the sale of a minimum of 25,000 kits and agreed to purchase from --- the number of kits equal to the difference between 25,000 and the number actually sold. Petitioner was to handle only that correspondence concerning the quality of the kits and their conformity to advertising representations and related matters. --- was to handle all other correspondence. --- was to prepare a list of all customers which became the sole property of petitioner. Petitioner was to receive a commission on all sales of kits. --- has no place of business or agents in California. The price of the kits ranged from \$4.50 to \$5.00 depending on the quantity ordered.

3. The auditor, relying on the wording of the offer that the kits were available only from --- held that petitioner was the retailer of the kits and liable for the tax. Because no records were made available, the auditor estimated receipts based on sale of all 25,000 kits, 10 percent of sales in California, and \$5 per kit.

ANALYSIS AND CONCLUSIONS

Petitioner's contract with --- clearly provided that --- retained possession of the kits and the power to transfer title. Although petitioner's advertising stated that the kits were available only through petitioner, the mailing instructions specified a fictitious name which was in fact ---. Payment for the kits was to the --- fictitious name and not to petitioner. Petitioner received only an accounting and commissions from. In a similar case we have held that the supplier of the premium rather than the premium advertiser was the seller. See Business Taxes Law Guide, Annotation 280.0220, April 1, 1965.

RECOMMENDATION

Delete the protested item from the measure of tax. Petition Unit to make adjustment. Redetermine without other adjustment.

H.L. Cohen, Hearing Officer

3/30/1979

Date