

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

**295.1384**

In The Matter Of The Petition Of ) ) U--- B--- U--- ) O--- C---, INC., ) a corporation, ) ) For Redetermination Under The ) <u>Sales And Use Tax Law</u> )	DECISION AND RECOMMENDATION OF HEARING OFFICER  Account No. SR -- XX XXXXXX
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The above entitled matter came on regularly for hearing on Wednesday, February 14, 1973 at 1:30 p.m. in West Los Angeles, California.

Appearing for the petitioner were Mr. A--- O---, its Secretary, and Mr. M--- S. S---, Attorney at Law. Messrs. Laxer and Doctrow appeared for the board.

Protested Items  
(Period 4/1/69 to 3/31/72)

	<u>Measure at 5% Rate</u>	<u>Measure at 1/2% Rate</u>
Item B. Sales of memberships directly related to sales of tangible personal property either completed or anticipated, and membership renewal and maintenance charges.	\$3,424,805	\$863,743
Item C. Bad debts on membership sales.	(234,705)	

(Period 4/1/72 to 11/30/72)

Sales of memberships directly related to sales of tangible personal property, either completed or anticipated, and membership renewal and maintenance charges.		To be determined
Bad debts on membership sales.		To be determined

Petitioner's Contentions

1. Petitioner sold memberships which permitted the purchasers thereof to purchase consumer goods at reduced prices, and the amounts upon which tax was assessed constituted receipts from such membership sales, renewals, and maintenance charges, not receipts from sales of tangible personal property.

2. In the event that receipts from membership sales, renewals, and maintenance charges constituted receipts from sales of tangible personal property, the amounts upon which tax was assessed were excessive because included therein were receipts received from persons who never purchased any goods.

3. The amounts upon which tax was assessed were further excessive because the amount allowed as a deduction for bad debts was an amount less than the actual amount of petitioner's bad debts.

Summary of Petition

Petitioner, regarding itself as a professional buying service, entered into retail installment contracts with persons who desired to purchase consumer goods at less than retail prices. Such contracts provided, in part, as follows:

"U--- B--- U---, INC., hereinafter referred to as 'Seller' or 'UBU', hereby sells, and the undersigned \_\_\_\_\_ hereinafter referred to as 'Purchaser' or 'Member' hereby purchases for the 'deferred payment price' and subject to the terms and conditions hereinbelow and also on the reverse side hereof, the following services.

"DESCRIPTION OF SERVICES	SALES PRICE	
1. CHARTER MEMBERSHIP IN U--- B--- U---, INC. (lifetime of Seller)	\$399.90	A
1 <sup>st</sup> & 2 <sup>nd</sup> Annual Account Maintenance Charges @ \$12.00 per year	24.00	B
Cash Price		C
Cash Down Payment		D
Unpaid Balance – Amount Financed		E
FINANCE CHARGE		F
Total of Payments (E plus F)		G
Deferred Payment Price (C & F)		H

\* \* \*

“Purchaser agrees to the following terms and conditions:

\* \* \*

“7. Both Seller and Purchaser agree that Seller does hereby sell, and Purchaser hereby purchases on charter membership in U--- B--- U--- (extended for lifetime of Seller) which membership shall entitle the Purchaser to the following services and which services the Seller does hereby warrant: (1) For the use of members only, a showroom maintained by the Seller. (2) Seller agrees to provide, during regular business hours, price and product information on products carried by Seller to members only. (3) Obtain on behalf of Purchaser, products including, furniture, décor items, carpets, drapes, appliances, televisions, stereos, photographic equipment, auto parts, wigs and sporting goods. (4) On the following classes of merchandise, except fair traded and franchised items, Seller will not exceed the following prices of such classes of merchandise to members only: (a) Televisions, stereos, washers, dryers, vacuums, refrigerators, freezers, ranges, air conditioners, small appliances, lawn equipment and photographic equipment not more than 5% over distributor invoice prices; (b) Auto prices and sporting goods, not more than 10% over distributor invoice prices; (c) sewing machines and home furnishings (all inclusive), from 5 to 20% over distributor prices.

“8. Seller will handle several brands to select from in most types of products. However, it is impossible for Seller to obtain on behalf of Purchaser, all and every type of products, nor every brand name of categories Seller does handle.

“9. With the exception of those provisions in paragraph 8 above, Seller makes no representation hereby that the Seller sells goods at exact cost or invoice price. . . .

“10. The membership in seller is non-assignable. . . .”

The auditor regarded amounts derived from such contracts under the guise of charter membership charges and annual account maintenance charges as receipts attributable to petitioner's sales of goods which were subject to sales tax. As petitioner did not report or pay sales tax with respect thereto, those amounts were established as the taxable measures of Item B.

Per the petition and at the hearing, it was asserted that petitioner sold memberships which permitted the purchasers thereof to purchase goods at reduced prices, and that the amounts upon which tax was assessed constituted receipts from such membership sales, renewals, and maintenance charges, not receipts from sales of tangible personal property. In that regard, Mr. S--- stated that if a purchaser could purchase an appliance for \$20.00 at retail, for \$17.00 at a discount, or for \$16.00 from petitioner, the receipts which should be taxable should be the \$20.00, \$17.00, or \$16.00, not \$399.90 plus \$24.00 plus \$16.00.

In the event that receipts from membership sales, renewals, and maintenance charges constituted receipts from sales of tangible personal property, it was asserted that the amounts upon which tax was assessed were excessive because included therein were receipts received from persons who never purchased any goods. In that regard, Mr. Doctrow stated that he had been unable to determine which persons, if any there were, entered into such contracts with petitioner but did not purchase any goods.

Also in that event, it was asserted that the amounts upon which tax was assessed were further excessive because the amount allowed as a deduction for bad debts was an amount less than the actual amount of petitioner's bad debts. In that regard, Mr. S--- stated that in order to ascertain the actual amount of its bad debts, petitioner would require the services of an accountant. As it did not desire to employ an accountant at that time, however, petitioner could not present any figures to support that assertion.

#### Analysis and Conclusions

1. For the privilege of selling tangible personal property at retail, sales tax is imposed upon all retailers and is measured by their gross receipts from such sales (Sales and Use Tax Law Section 6051). "Gross receipts" mean the total amount of the sale price of the retail sales of retailers without any deduction on account of labor or service cost or any other expense, but including any services that are a part of the sale and all receipts and cash (section 6012).

Per the contract provisions hereinabove set forth, petitioner sold and purchasers purchased, subject to certain terms and conditions, designated services in connection with their sales/purchases of tangible personal property/goods. For purposes of the Sales and Use Tax Law, amounts charged and received for such services constitute taxable gross receipts, and the board has so held in other petition matters wherein the petitioners sold like services in connection with their sales of goods. Accordingly, it is concluded that amounts charged and received by petitioner for its services in connection with its sales of goods similarly constituted taxable gross receipts. Absent evidence that such sales were otherwise exempt, as petitioner did not report or pay sales tax in connection with such sales, the amounts of such receipts were properly established as the taxable measures.

While it was asserted that petitioner sold memberships which permitted the purchasers thereof to purchase goods at reduced prices, that petitioner was aware that it was selling services in connection with its sales of goods, not memberships, is clearly indicated by its use of retail installment contracts in doing so as required by Civil Code Sections 1801-1812.10. Pursuant thereto, "goods" included tangible chattels bought for use primarily for personal, family, or household purposes (section 1802.1); "services" included services furnished in connection with the sale of goods (section 1802.2); "seller" meant a person engaged in the business of selling goods or furnishing services to purchasers (section 1802.3); "retail installment sale" meant the sale of goods or the furnishing of services by a seller to a purchaser for a deferred payment price payable in installments (section 1802.5); and "retail installment contract" meant any contract for a retail installment sale between a purchaser and seller, entered into or performed in California, which provided for repayment in installments (section 1802.6).

2. As sales tax applies to the gross receipts from sales of tangible personal property, amounts charged and received by petitioner for its services in connection with its sales of goods became taxable when purchasers purchased foods. If purchasers never purchased any goods, the amounts they paid to petitioner pursuant to the contracts were excludible from petitioner's gross receipts.

Every retailer is obligated to keep such records, receipts, invoices, and other pertinent papers in such form as the board requires (section 7053). Among others, such records are to show gross receipts from sales of tangible personal property, including any services that are a part of the sales, made within California, irrespective of whether the seller regards the receipts as taxable or nontaxable, and all deductions allowed by law and claimed in filing returns (regulation 1698).

In view of the section and the ruling, the burden of proving that some purchasers never purchased any goods is upon petitioner. Thus, to the extent that petitioner can establish from its records that such was the case, the amounts paid by such purchasers should be deleted from the amounts of the taxable measures. Otherwise, the amounts of the taxable measures should remain unchanged.

3. Again, in view of section 7053 and regulation 1698, the burden of proving that the amount of its bad debts was an amount greater than that allowed by the auditor is upon petitioner. Although petitioner has not met that burden, it may attempt to do so if it so desires. Thus, to the extent that petitioner can establish from its records that such was the case, the amount allowed as a deduction for bad debts should be increased accordingly. Otherwise, that amount should remain unchanged.

#### Recommendation

It is recommended that the amounts of the taxable measures of Items B and C be recomputed pursuant to Conclusions 2 and 3 and that the tax assessed be adjusted accordingly, if appropriate. If recomputation and adjustment is not appropriate, it is recommended that the amounts of the taxable measures remain unchanged and that the tax assessed be redetermined without adjustment.

Adjustments, if any, to be made by --- --- --- District – Auditing.

Close-out audit for the period April 1, 1972 to November 30, 1972 to be made in accordance with the conclusions set forth herein.

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J. Kenneth McManigal, Hearing Officer

April 12, 1973

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Date