

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

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| In the Matter of the petition |) | |
| for Redetermination of State |) | DECISION AND RECOMMENDATION |
| and Local Use Tax; |) | |
| |) | |
| |) | |
| <u>Petitioner</u> |) | |

The above-entitled matter came on regularly for hearing on Thursday, June 9, 1983, in Sepulveda, California before Robert H. Anderson.

Appearing for Petitioner:

Appearing for the
Sales and Use Tax Department:

Protest

Petitioner was audited for the period from 1-1-79 through 12-31-81, and a determination for tax and interest was issued on July 26, 1982. On August 23, 1982 petitioner paid \$7,395.74 with a petitioner for redetermination and herein requests a refund of the tax under protest.

Petitioner protests the assessment for use tax identified in the audit as petitioner's cost of directories given away. The means of the tax is \$70,972.

Contentions

The directories given away are like exempt premiums under Regulation 1671.

The directories are exempt works of are per Section 6365 of the Sales and Use Tax Law.

The cost of the directories is built into the marked up charge for portrait photos sold to persons who are pictured in the directories.

Summary

_____ is a corporation that commenced in the Fall of 1964. There was a prior audit of the company that covered a period through September 30, 1979.

The firm was described by the auditor as being engaged in the sales of portraits, slides, prints and directories. The sales are primarily to families who are members of various religious organizations.

This controversy is over a portrait photo sales promotional plan that involves churches of various denominations and their respective congregations.

The promotional sales plan might begin with _____ or other representative of the firm making a call on the pastor, minister, or other person who is the head of a given church organization and congregation, and explain what _____ has to offer, without charge or cost, to the church or its members.

Generally, _____ agrees to take numerous portrait photos of as many of the congregation members as are willing to sit for a photo session. Photos are of individuals, groups making up a family, husband and wife, etc. Ultimately _____ produces a directory of the congregation and the church. It contains, among other things, photos of the member and a directory of names, addresses and telephone numbers.

As an incentive to get the congregation to agree to sit for photos, _____ produces the directory and gives one copy to every family who has taken part in a photo session; the church gets a copy too. There is no charge for the copies originally agreed upon to be given away. However, if members, the church itself or other want additional copies they are sold by _____ and tax is added to the sale price. Directories that were sold do not enter into the audited measure of the tax and the auditor has, by a pro-ration formula, taken into account a portion of the cost of directories that were produced and sold rather than given away without any charge or condition attached.

The church is supplied with what petitioner calls a "stock" letter which the church distributes to its members. The stock letter explains the plan and it contains color photos of persons who, in the past, have been photographed under previous plans. The stock letter is something like a brochure; it is presented in letter form addressed to the members of the church. Following is part of the text of the stock letter:

Dear Friends:

Have you ever wondered what name went with which face as you look over our families at prayer? If you have, we hope to resolve this question.

We are embarking on a project of real interest to all members and friends of this church. Something we feel would meet an essential need of our church: A NEW PICTORIAL DIRECTORY!

The directory will not only contain the names, addresses and telephone numbers of our membership, but will also include photographs of each family and our various church groups.

WHAT IT MEANS TO OUR CHURCH:

- a. We will be spared the expense of producing a directory. The directory publishing company is donating their services. Each participating family qualifies for a directory.
- b. It shall reflect our progress, programs and activities.
- c. We will be able to introduce new members to our church quickly and easily.
- d. Our children will identify more strongly with new friends in our church community.
- e. It will become a wonderful memento of increasing value throughout the years of your family and church friends. And more ...

To be in the directory, the only obligation required on your part is to be photographed here at the church at a prearranged time and to personally view the pictures that were take of your. Should you want pictures made for yourself, you will have a sitting with many poses from which to choose. Since the portraits will be taken in color, please wear colorful clothing; do not wear black.

We again emphasize, however, that you will not be pressured to buy pictures, and there is no commercial follow-up to this program.

Please help us make our directory 100% complete by your participation.

_____ said that all the photos are taken by _____ own staff of photographers and they take a minimum of six poses. The audited measure of tax on the cost is only _____ “out-of-pocket” costs such as buy-outs of the printing and binding, artwork, paste-ups, color separations, etc.

_____ enters into a signed agreement that is not represented to be a contract required of the church organization. It is called a “Schedule Agreement” which _____ commits to honor when accepted in writing.

Under the “Schedule Agreement” _____ agrees to furnish, without charge, a custom designed full color pictorial directory consisting of the following:

1. One pictorial directory for each “participating family.” (Participating family means a member family, single person over the age of 18, couple, etc. who is photographed and who personally views their proofs.)
2. A custom designed cover (for the directory) shall be available.
3. A choice of various stock pre-printed institutional pages.

4. Up to 8 custom designed institutional or activity pages, based upon one page for every 70 participating families.
5. As many picture pages as are necessary to reflect all participating families.
6. One family directory listing for each participating family, plus an additional 20% more names, to insure a complete directory listing section.
7. The number of families per page at not time will exceed 30 pictures to the page in an 8-1/2 x 11 directory, or 16 pictures to a page in a 5-1/2 x 8-1/2 directory.
8. Additional directory pages, other than the foregoing specified free ones, will be \$80.00 per page.
9. If the number of participating families is less than 150, a black and white directory shall be made.
10. If we do not receive a rough layout of activity pages within 6 months after the last day of photography has passed, _____ is released from its commitment to make a Pictorial Directory.

Conclusions

The “free premium” argument is without merit and Regulation 1671 does not apply to the _____ case at all. Accordingly, the case of *Botney v. Sperry & Hutchinson Co.*, (1976) 55 Cal.App.3d 50, and *Eisenberg’s W. House v. State Bd. of Equalization*, (1945) 72 Cal.App.2d 8, cited by Counsel as authority for support of the “free premium” argument are, in no way, on point.

Regulation 1671 covers “Trading Stamps and Related Promotional Plans”. In _____ there are no trading stamps related to the promotional plan involving giving away, free of charge, the membership pictorial directory. Subsection (a) of the Regulation is an introduction to what the Regulation is all about; it reads as follows:

A variety of sales promotion plans involving premiums are in use by retailers. Common to these plans are some indicia furnished by the retailer to his customers based on the amount of purchase. Examples of such indicia are trading stamps, coupons, tickets and cash register tapes. Given quantities of indicia are surrendered by the customer in exchange for the premium. (Underlines added.)

In other words, the customer must purchase something to get the indicia and must surrender the indicia to get the premium. In _____ the church family is not a customer at the outset and may never be. Nonetheless, the family can get a premium free of charge, without indicia, by simply posing for some photographs taken by _____; there is no obligation to purchase anything from

_____. To put it simply, _____ gives the church family a directory in exchange for coming to a photo session and sitting for portrait photography; that is all, the transaction ends there.

The case of *Botney v. Sperry & Hutchinson Co.* (supra) involved two women who filed a class action suit against Sperry & Hutchinson claiming that Sperry charged too much sales tax on property they acquired by surrendering indicia (trading stamps) which were valued at \$3.00 per book of 1200 stamps. Tax was measured by the number of books surrendered to obtain premiums.

Petitioner's trading stamp theory appears to put the cart before the horse. If the church member could redeem the directory for a given amount of portrait photos, the trading stamp (indicia) argument might be a little more in line with what Botney and Regulation 1671 is all about. Obviously, the church family wants the directory, that is why it sits for the picture taking session.

If the church member wants portrait photos he or she must order them and pay for them. The fact that the cost of the portrait photos might include petitioner's overhead costs of promoting the sale, including the production of the photo directories, is no basis for concluding that there should be no use tax on that portion of petitioner's cost of the directories that were given away to potential customers.

It is a matter of practical economics to include promotional or other overhead costs of producing and selling portrait photos in the charge made for the portrait photos. The fact that sales tax is paid on the sale of the portraits does not form a basis for negating the use tax on the use of property purchased and used to promote the sales.

Eisenberg's W. House v. State Board of Equalization (supra) is not on point because, as noted, the facts in _____ does not even involve trading stamps or other forms of indicia surrendered for premiums. Eisenberg involved the question of whether trading stamps amounted to cash discounts when given at the time a customer makes a purchase or does something for the trading stamp company. The Board said no, but the court said yes. The directory is certainly not a cash discount for any purchase of portrait photos; it is not even an incentive to purchase a portrait photo.

The argument that the directory is like the "work of art" that is referred to in Section 6365 of the Sales and Use Tax Law is equally without merit. Works of art referred to in the section are those that the Legislature meant as being the type of art that would be suitable and of value to museums for display to the public without charge. The membership pictorial directory is no more a "work of art" within the meaning of the term as used in Section 6365 than last week's issue of Sports Illustrated Magazine.

Further, Section 6365 is an exemption statute and it is well established that exemptions from sales and/or use tax are to be strictly construed against the taxpayers who are claiming them. (See *Luer Packing Co. v. State Bd. of Equal.*, (1950) 101 Cal.App.2d 00; *Good Humor Co. v. State Bd. of Equal.*, (1957) 152 Cal.App.2d 879; *Santa Fe Transp. v. State Bd. of Equal.*, (1957) 51 Cal.2d 531.)

In summary, directories that are given away, free of charge, merely for a photo session sitting are consumed by _____ and the out-of-pocket cost of such directories is the measure of the use tax on the directories consumed.

Recommendation

Redetermine without adjustment. This calls for a denial of any claim for refund of the tax paid or the audited measure of tax on the cost of directories that were given away.

Robert H. Anderson, Hearing Officer

Jul 21 1983
Date