STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LLOYD MANSFIELD CO., INC.	:	DETERMINATION DTA NO. 809798
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1986 through February 28, 1989.	:	

Petitioner, Lloyd Mansfield Co., Inc., 506 Delaware Avenue, Buffalo, New York 14202, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1986 through February 28, 1989.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 14, 1993 at 1:15 P.M. and continued to conclusion on May 11, 1993 at 9:15 A.M., with all briefs to be submitted by November 3, 1993. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner was relieved from its duty to collect sales and use taxes on sales of promotional materials to Fisher Price by virtue of its having obtained a blanket exempt use certificate from Fisher Price.

II. Whether, based upon the Division of Taxation's overlapping audit policy, petitioner was entitled to an adjustment based upon the Division's audit of Fisher Price.

III. Whether, due to the fact that the Conciliation Order states that the period at issue is December 1, 1988 through February 28, 1989, the assessment must be reduced to $306.11 which is the amount assessed for such quarter.

IV. Whether, based upon the testimony of petitioner's president that many of the transactions

upon which tax was assessed were, in fact, exempt from the imposition of sales and use taxes, petitioner is entitled to an adjustment in the amount of tax assessed.

V. Whether petitioner is entitled to a refund of tax and/or interest paid on its sales to Fisher Price since it was petitioner, not Fisher Price, which ultimately paid these taxes to the State of New York.

FINDINGS OF FACT

Pursuant to a field audit which commenced in October 1988, the Division of Taxation ("Division"), on November 24, 1989, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Lloyd Mansfield Co., Inc. ("Lloyd Mansfield") assessing total tax due of $80,454.99, plus penalty and interest, for a total amount due of $123,428.91 for the period June 1, 1986 through February 28, 1989.[1]

Prior to the issuance of the notice of determination, consents extending the period of limitation for assessment of sales and use taxes were executed by the parties whereby it was agreed that taxes due for the

period March 1, 1986 through August 31, 1986 could be assessed at any time on or before December 20, 1989.

By Conciliation Order (CMS No. 102270) dated April 26, 1991 (the conciliation conference was held on July 18, 1990), total tax due was reduced to $73,436.03, plus interest computed at the applicable rate. Penalties previously assessed were cancelled.[2]

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[1]Lloyd Mansfield was sold in 1986 and, subsequently, the company name was changed to Wolf, Mansfield, Bolling. Although, at the time of the issuance of the assessment, the name of the company was Wolf, Mansfield, Bolling, the notice of determination was issued in the name of Lloyd Mansfield and the parties agree that, for purposes of this proceeding, petitioner shall be referred to as Lloyd Mansfield.

[2]It must be noted that the Conciliation Order, in the caption thereof, indicated that the year or period at issue was "12/1/88-2/28/89". While tax due was recomputed to $73,436.03, petitioner points out that on the notice of determination, total tax due for the quarter ended February 28, 1989 was $306.11.

At the hearing, an additional reduction was agreed to by the Division, i.e., Lloyd Mansfield was entitled to a credit in the amount of $8,977.84 based upon an overlapping audit of Kittinger Company.

It was also agreed by the parties that Lloyd Mansfield made a payment of $4,843.15 on November 8, 1989 and that another payment of $59,897.76 was made on February 27, 1990. Accordingly, it was agreed (see, tr., p. 14) that the total amount remaining at issue was $15,187.36 which represents interest computed until January 15, 1993 (see, Exhibit "F").

Lloyd Mansfield is an advertising agency which is located in Buffalo, New York. Most of the additional tax assessed resulted from the sale of advertising materials by Lloyd Mansfield to Fisher Price. Lloyd Mansfield began doing work for Fisher Price in July 1987 shortly after Thomas Bolling, Lloyd Mansfield's president, joined the company. Mr. Bolling was Lloyd Mansfield's primary contact with Fisher Price since he had previously done work for Fisher Price while employed at Faller, Klenk & Quinlan Advertising.

Mr. Bolling testified that, while employed at Faller, Klenk & Quinlan, he had asked for and received blanket exempt use certificates from Fisher Price and that once Lloyd Mansfield obtained the Fisher Price advertising account, he made the same request from Fisher Price.

An affidavit of Gerald Magoffin, Jr., Supervisor of Taxes for Fisher Price (the affidavit was sworn to on January 13, 1993), stated that it was the intent of Fisher Price that the original exempt use certificate issued September 16, 1987 cover all sales to Fisher Price by Lloyd Mansfield occurring on or after July 1, 1987. However, the "Single Purchase Certificate" box had been erroneously checked due to an administrative oversight. When the oversight was brought to its attention, Fisher Price issued a corrected certificate, dated August 8, 1988, which indicated on its face that the wrong box had been mistakenly checked on the original certificate and that this corrected certificate was intended to remedy that error and apply to all sales occurring on or after July 1, 1987.

Subsequently, on or about October 6, 1989, Fisher Price learned that the corrected certificate may have also contained some defects and that the Division was questioning the intent of the parties as to the scope of the exemption claimed on the original certificate. Therefore, on October 6, 1989, Fisher Price issued a third certificate which was pre-dated September 16, 1987. This certificate indicated that it was a corrected certificate and should be substituted for the defective certificate originally issued on September 16, 1987 (the original certificate).

Mr. Magoffin's affidavit stated, in paragraph 5 thereof, as follows:

> "It was the intent of Fisher-Price, and our understanding with Lloyd Mansfield, that the original Certificate was to apply to all purchases made by Fisher-Price after July 1, 1987 -- i.e., that the Original Certificate was to be a blanket certificate applicable to all purchases made on or after July 1, 1987."

Lloyd Mansfield's books and records were deemed adequate and a detailed audit was, therefore, performed. Upon audit, it was found that Lloyd Mansfield had in its possession two exempt certificates. Each was dated September 16, 1987 and was signed by Agnes Meyer, Senior Financial Accountant, each was attached to an individual Wolf, Mansfield, Bolling invoice to Fisher Price dated August 10, 1987 (one invoice was in the amount of $241.02; the other was in the amount of $8,851.50), and each certificate indicated that it was a single purchase certificate rather than a blanket certificate.

When the Division's auditor pointed out the fact that the certificates were single purchase certificates (each was accepted for the individual invoice to which it was attached), Lloyd Mansfield obtained a blanket certificate, again signed by Agnes Meyer, Senior Financial Accountant, which was dated August 8, 1988. This exempt use certificate stated thereon that it was intended to apply to purchases beginning July 1, 1987.

Upon receipt of this blanket certificate, the Division's auditor stated that since it was dated August 8, 1988, it would be accepted for sales by Lloyd Mansfield to Fisher Price occurring 90 days prior to August 8, 1988 and for all sales subsequent to that date.

Thereafter, on November 10, 1989, the Division received another exempt use certificate (blanket certificate) signed by Gerald Magoffin, Jr., Supervisor - Taxes, which was dated

September 16, 1987 with a notation that "[t]his is a corrected certificate and should be substituted for the defective certificate originally isued [sic] by us on 9/6/87."[3]

The Division advised Lloyd Mansfield that the single purchase certificates dated September 16, 1987 and the blanket certificate dated August 8, 1988 were not defective and, accordingly, that the blanket certificate received November 10, 1989 would not be accepted as a substitute for either the single purchase certificates or the previous blanket certificate.

An audit of Fisher Price was performed by the Division for the period March 1, 1986 through May 31, 1989.[4] The auditor who performed the Fisher Price audit appeared and testified at the hearing held herein.

The auditor stated that the Fisher Price audit was a computer-assisted audit, i.e., a statistical sampling was done which included purchases from Lloyd Mansfield. He further stated that, at the time of the audit, it was his understanding that Lloyd Mansfield was going to be assessed for these sales to Fisher Price.

The auditor obtained a schedule of tax due on sales from Lloyd Mansfield to Fisher Price (Exhibit "I") from the auditor who performed the Lloyd Mansfield audit. The schedule indicated taxable sales of $832,925.00,

with tax due thereon, at 8%, of $66,634.00. Various invoices were crossed out on the schedule as was the total tax due figure of $66,634.00 and the amount of $59,897.76 was handwritten on the schedule as total additional tax due. The Fisher Price auditor was not certain as to the

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[3]As previously pointed out in Finding of Fact "5", the date set forth on the single purchase certificates was September 16, 1987, not September 6, 1987.

[4]The affidavit of Gerald Magoffin, Jr., Tax Supervisor of Fisher Price (Exhibit "4"), indicates that the Fisher Price audit was commenced on or about July 6, 1989. There is no evidence in the record as to the dates on which assessments for additional tax due were issued.

reason for these revisions.[5]

In order to determine whether Fisher Price had paid this tax, the auditor then obtained a Wolf, Mansfield, Bolling invoice to Fisher Price dated February 22, 1990 in the amount of $59,897.76 which stated thereon that it was for New York State sales taxes on invoices included for the audit period August 1, 1986 through February 28, 1989. The auditor also obtained an interoffice memorandum of Fisher Price requesting that a check for sales taxes in the amount of $59,897.76 be issued to Wolf, Mansfield, Bolling and a copy of the check in that amount dated February 23, 1990 (these documents are also contained in Exhibit "I"). As indicated in Finding of Fact "3", Lloyd Mansfield paid the sum of $59,897.76 on February 27, 1990.

The Fisher Price auditor stated that, for the sales tax quarter ended May 31, 1990, Fisher Price claimed a credit of $48,149.34 relating to the tax of $59,897.76 which it had paid to Lloyd Mansfield on its purchases from the advertising company. Of the total credit claimed, $44,353.27 was allowed and the balance ($3,796.07) was denied.

The Fisher Price auditor testified (tr., p. 158) that, as of the date on which the Lloyd Mansfield audit was concluded, the Fisher Price audit was

still ongoing. He further testified (tr., p. 169) that in computing the Fisher Price assessment, he did not include the $59,897.76 already paid to Lloyd Mansfield. There is no other evidence in the record regarding the date on which the Fisher Price audit was concluded (Exhibit "J" is a memorandum dated January 3, 1992 which refers to the claim; however, it does not indicate the date on which the audit was concluded).

A letter dated January 13, 1993 from Gerald Magoffin, Jr., Supervisor of Taxes, to Thomas J. Bolling stated as follows:

"This letter confirms the following:

"1. Fisher-Price Division of The Quaker Oats Company (F-P) has been audited

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[5]Neither of the auditors who performed the Lloyd Mansfield audit were present at the hearing. One of the auditors had retired and the other was deceased.

by the Sales and Use Tax Division of the New York State Department of Taxation and Finance for tax periods beginning March 1, 1986 and ending June 28, 1991.

"2. We have concluded the audit and satisfied our liability with the State resulting from that audit. No outstanding balance remains unpaid.

"3. There was no agreement to exclude purchases from your company as part of our audit.

"4. The F-P Sales Tax Identification Number was NY7379597C. The Quaker Oats Company's Federal Employer ID Number is 36-1655315."

An affidavit from Mr. Magoffin, also dated January 13, 1993, stated, in pertinent part, as follows:

"6. On or about July 6, 1989, the Audit Division commenced a sales and use tax audit of Fisher-Price for the period beginning March 1, 1986 and ending May 31, 1989.

"7. The Division's audit of Fisher-Price covered all purchases made by Fisher-Price, including purchases from Lloyd Mansfield.

"8. Fisher-Price was audited for all taxable purchases, received credit for taxes previously paid, and reached agreement with the Audit Division concerning the balance due.

"9. No agreement existed between Fisher-Price and the Audit Division to exclude purchases from Lloyd Mansfield from those purchases examined by the Audit Division on its audit of Fisher-Price.

"10. On September 13, 1991, Fisher-Price agreed to the final audit findings, and paid the outstanding liability asserted by the Audit Division, thereby fully satisfying its liability to New York State for all sales and use taxes, penalties and interest for the audit periods."

Lloyd Mansfield's president, Thomas Bolling, testified that it was not until the audit that he became aware that the exempt use certificates received from Fisher Price were single use certificates rather than blanket certificates since it had been his practice previously (see, Finding of Fact "4") to request a blanket certificate and since he had again made such a request after joining Wolf, Mansfield, Bolling. A letter from Gerald Magoffin, Jr., Supervisor of Taxes, was produced (Exhibit "2") to corroborate Mr. Bolling's testimony.

Thomas Bolling testified that certain invoices (Exhibit "5") were not subject to sales or use taxes. These invoices were as follows (Ref. No. refers to Division's schedule - Exhibit "I"):

Date	Invoice No.	Ref. No.	Amount	Reason Nontaxable

10-26-87	10454	59	$15,000.00	Partial bill - no product delivered
9-21-87	10361	41	10,505.00	Envelopes shipped to Dallas
11-9-87	10494	64	23,700.24	Progress bill - no product delivered
11-17-87	10507	66	10,150.07	Progress bill - no product delivered
9-21-87	10358	38	10,000.00	Progress bill - no product delivered
10-26-87	10445	54	22,292.80	Progress bill - no product delivered
1-22-88	10685	125	16,389.60	Shipped to show in Dallas
1-29-88	10707	132	22,267.91	Produced and stored in Toronto
11-17-87	10510	69	12,423.48	Progress bill - no product delivered
2-29-88	10790	138	18,148.00	Progress bill - no product delivered
2-29-88	10791	139	18,148.00	Second progress bill - same project as Invoice No. 10790
11-17-87	10511	70	12,361.61	For Juvenile Products Show in Dallas
11-18-87	10515	74	78,511.00	Final bill for catalog shipped to Juvenile Products Show in Dallas
11-18-87	10516	75	16,372.02	VIP teaser mailer - Federal Expressed throughout U.S.
11-18-87	10517	76	11,040.40	No product - job cancelled
2-29-88	10808	154	11,828.69	Final bill (see Invoice No. 10494) shipped to pediatricians & car seat customers
11-24-87	10521	79	10,179.80	Progress bill

4-18-88	10961	175	11,902.52	Shipped to Eastman Kodak
4-18-88	10964	176	25,068.23	Shipped to Data Central and then to children
10-1-87	10366	45	12,000.00	Shipped to Juvenile Products Show in Dallas
12-31-87	10595	90	26,662.50	Juvenile Products Catalog - Dallas
10-26-87	10452	58	15,261.86	Affixed to furniture - shipped
10-26-87	10455	60	33,702.96	Shipped to Dallas
1-19-88	10671	120	16,331.88	Shipped throughout U.S.
1-19-88	10675	174	17,016.81	Shipped throughout U.S.

As indicated in Finding of Fact "3" (footnote "2"), the Conciliation Order issued by the Division's Bureau of Conciliation and Mediation Services ("BCMS") indicated that the period at issue was December 1, 1988 through February 28, 1989, while the notice of determination (Finding of Fact "1") stated that the period at issue was June 1, 1986 through February 28, 1989.

Pursuant to a request made by the Division at the hearing held on May 11, 1993, the hearing record was held open for the submission of an affidavit from William Proefrock, Conciliation Conferee. This affidavit stated that, upon his review of the BCMS file (at the request of the Division's representative), he discovered a typographical error relating to the period at issue on the 5520 Information Sheet which was carried forward on some of the subsequent standardized documents (some of which were attached to the affidavit), most notably, the Conciliation Order. The affidavit pointed out, however, that the conferee's notes from the conference held on July 18, 1990 indicated that he noted in writing and also made a verbal statement to the parties regarding the period in question (6/1/86-2/28/89). In addition, certain other correspondence (a letter from the conferee to petitioner's accounting manager, a consent form and an interest calculation) contained the correct audit period. The affidavit also stated, in paragraph 13 thereof, as follows:

> "At no time did I intend to limit the periods in question to 12/1/88-2/28/89. To do so would have been to deny the Petitioner the hearing they [sic] requested. An initial error was made in the 5520 data sheet which was carried through those documents which were issued pro-forma. The Petitioner was aware of the period under discussion, 6/31/86 [sic]-2/28/89, as all of the documents indicate. If I had noticed the error in the caption of the Order, I would have corrected it and had our Word Processing Unit prepare a corrected 5520 Information Sheet."

SUMMARY OF THE PARTIES' POSITIONS

Petitioner's position may be summarized as follows:

(a) Fisher Price initially provided Lloyd Mansfield with a deficient blanket exempt use certificate, but subsequently cured the defect by providing a properly completed blanket certificate. Accordingly, Lloyd Mansfield was not obligated to collect sales and use taxes on its sales to Fisher Price;

(b) An audit of Fisher Price was performed by the Division which covered a period which completely overlapped the period at issue in Lloyd Mansfield's audit. This audit included all of Fisher Price's purchases from Lloyd Mansfield and resulted in agreed-upon audit findings. Actually, the Fisher Price-Lloyd Mansfield transactions were audited twice, i.e., once in Fisher Price's original audit and later with respect to its refund claim. Applying the Division's policy on overlapping audits should have resulted in no additional tax being assessed against Lloyd Mansfield for these transactions;

(c) The Conciliation Order which narrowed the period at issue to December 1, 1988 through February 28, 1989 is binding upon the Division and, absent fraud, malfeasance or misrepresentation of material facts (which are absent herein), results in the assessment being reduced to $306.11, the amount originally assessed for this particular quarter;

(d) Thomas Bolling, petitioner's president, has provided uncontroverted testimony, based upon his personal knowledge of the transactions, that many of the invoice transactions between Fisher Price and Lloyd Mansfield were exempt from tax; and

(e) Since it was Lloyd Mansfield, not Fisher Price, which paid over $60,000.00 in sales and use taxes to the Division, Lloyd Mansfield is entitled to a refund on these transactions which, admittedly (by the Division), were nontaxable.

The Division's position may be summarized as follows:

(a) Prior to September 1, 1989 (the effective date of Tax Law § 1115[n][1]), Lloyd Mansfield was required to collect tax on its sales of promotional materials. Lloyd Mansfield, however, accepted an exempt use certificate from Fisher Price. The auditor

accepted the exempt use certificates as single use certificates for the invoices to which they were attached and thereupon accepted the blanket certificate (dated August 8, 1988) for sales 90 days prior to (May 8, 1988) and for all sales subsequent to the date thereon. The second blanket certificate should not be accepted since the certificate which it sought to correct (the August 8, 1988 certificate) was not defective;

(b) The Division's overlapping audit policy does not apply in this matter for the following reasons:

(1) Neither Lloyd Mansfield nor Fisher Price made the request for such an adjustment during its audit; and

(2) Lloyd Mansfield made the policy irrelevant by sending an invoice to Fisher Price for tax due. Lloyd Mansfield objects to the assessment of interest; however, had it thought to bill Fisher Price for interest as well as tax, there would be no dispute remaining. In addition, since Fisher Price's audit was not concluded at the time of the issuance of Lloyd Mansfield's assessment, the overlapping audit policy does not apply to this petitioner.

(c) The affidavit of the Conciliation Conferee, William Proefrock, explains how the error in the Conciliation Order occurred. Moreover, petitioner was clearly apprised of the actual audit period at issue and, therefore, caused no harm or prejudice;

(d) As to Lloyd Mansfield's contention that many of the transactions with Fisher Price were not taxable, the Division agrees. However, it contends that the refund was given to the proper party, i.e., Fisher Price. Any refund now issued to Lloyd Mansfield would be unjust enrichment; and

(e) Since Lloyd Mansfield failed to collect and remit sales tax on its sales to Fisher Price, interest is properly due from petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 1132(c) provides that, for the purpose of the proper administration of Article 28 of the Tax Law (relating to sales and use taxes) and to prevent evasion of tax, it shall

be presumed that all receipts from the retail sales of tangible personal property or services (taxable pursuant to Tax Law § 1105) are taxable unless the contrary is established and the burden of proving that any receipt is not taxable is upon the vendor or the customer.

Tax Law § 1132(c) shifts the burden of proving that a receipt is not taxable "solely upon the customer" where a resale certificate which meets the following requirements has been taken from the purchaser "not later than ninety days after delivery of the property or the rendition of the service":

> "[A] resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the commissioner, the number of his certificate of authority, together with such other information as said commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty four . . . ."

B. Tax Law § 1132(c) provides, in pertinent part, as follows:

> "Where a resale or exemption certificate or an affidavit, statement or additional evidence referred to in the previous sentence is received within the time limit set forth therein [90 days after delivery of the property or rendition of the service], but is deficient in some material manner, and where such deficiency is thereafter removed, the receipt of such resale or exemption certificate or such affidavit, statement or additional evidence shall be deemed to have satisfied all of the requirements of the preceding sentence. Where such a resale or exemption certificate or such an affidavit, statement or additional evidence has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer."

In its brief, petitioner makes a specific reference to the provisions of 20 NYCRR 532.4(c)(4)(ii). It appears that the proper citation is 20 NYCRR 532.4(b)(4)(ii). It should be noted that this section of the regulations, while not promulgated during the period at issue, is merely an explanation of the aforesaid provisions of Tax Law § 1132(c) and, as such, will be considered herein. This provision, as well as subparagraphs (iii) and (iv), provide as follows:

> "(ii) Where an exemption certificate or document timely received by the vendor is found to be deficient in its completion, the vendor will be allowed a reasonable period of time prior to the conclusion of the audit to obtain the necessary information to correct the deficiency. When the deficient certificate or document is corrected within such time allowed, the exemption certificate will be

accepted as having been properly completed and received by the vendor within 90 days of the transaction and is deemed to satisfy the vendor's burden of proof as to the taxability of the particular transaction.

"(iii) Requested exemption certificates and documents which are not submitted to the Department within the allotted time period and exemption certificates and documents determined to be deficient which are not corrected within the additionally allotted time period prior to the conclusion of the audit are deemed not to have been properly completed and timely received by the vendor. Any such exemption certificates or documents later presented by the vendor will not, in and of themselves, be considered sufficient to satisfy the vendor's burden of proof concerning the taxability of the subject transactions.

"(iv) Exemption certificates or documents not received by the vendor within 90 days after the delivery of the property or the rendition of the service will likewise not, in and of themselves, be considered as satisfying the vendor's burden of proof concerning the taxability of the subject transaction."

Petitioner contends that there were two attempts to correct the defective (the defect was that it was intended to be a blanket, not a single purchase certificate) exempt use certificates issued by Fisher Price on September 16, 1987, i.e., the blanket certificate dated August 8, 1988 and the subsequent blanket certificate submitted on October 6, 1989 which was pre-dated September 16, 1987. The Division's position is that it allowed the August 8, 1988 blanket certificate for sales 90 days prior thereto (back to May 8, 1988) and for all subsequent sales and that the last certificate (submitted October 6, 1989 and pre-dated September 16, 1987) was properly disallowed because the certificate which it sought to correct (the August 8, 1988 certificate) was not defective at all.

20 NYCRR 532.4(b)(2)(ii) provides as follows:

"An exemption certificate or other document is considered to be properly completed when it contains the:

"(a) date prepared;

"(b) name and address of the purchaser;

"(c) name and address of the vendor;

"(d) identification number of the purchaser as shown on its certificate of authority, or exempt organization number as shown on the exempt organization certificate, if any such numbers are required by the certificate or document. The farmer's exemption certificate does not have such a number. Also, the exemption certificate for tractors, trailers or semitrailers does not require the number of the purchaser's certificate of authority in all instances. However, if the purchaser completing an exemption certificate for tractors, trailers or semitrailers does not

> have a certificate of authority, such exemption certificate must show the purchaser's highway use tax identification number unless the purchaser is a certificated household goods mover, in which instance it must show its Interstate Commerce Commission or New York State Department of Transportation identification number. Absent such identifying numbers, the exemption certificate for tractors, trailers or semitrailers is incomplete.
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> "(e) signature of the purchaser or the purchaser's authorized representative; and
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> "(f) any other information required to be completed on the particular certificate or document."

An examination of the single purchase certificates dated September 16, 1987 and the blanket certificate dated August 8, 1988 reveals that all of the above information was properly set forth on these exemption certificates.

As pointed out by the Division, prior to September 1, 1989 (when a new subdivision [n] was added to Tax Law § 1115 to provide that promotional materials mailed, shipped or otherwise distributed from a point within this State, by or on behalf of vendors or other persons, to their customers or prospective customers located outside the State, for use outside the State, are exempt from sales and use taxes), the purchaser of promotional materials had to pay the tax and show that such materials were shipped outside the State in order to claim a refund of tax. However, despite the fact that the sale of promotional materials by Lloyd Mansfield to Fisher Price required, prior to September 1, 1989, that Lloyd Mansfield collect tax from Fisher Price, the Division accepted the blanket certificate, dated August 8, 1988, for sales to Fisher Price 90 days prior to the date of that certificate (May 8, 1988) and for all sales subsequent to August 8, 1988. Lloyd Mansfield thereafter obtained another blanket certificate, pre-dated September 16, 1987, from Fisher Price in an attempt to have exempted from the collection of tax all sales to Fisher Price dating back to July 1, 1987.

While it may, in fact, have been the intention of the parties (Lloyd Mansfield and Fisher Price) to have a blanket certificate issued initially, this was not done. Two separate, single purchase certificates were issued for two separate invoices (see, Exhibit "G"). It was only after it was brought to the attention of Lloyd Mansfield during the audit that an attempt was made to rectify an apparent misunderstanding between Lloyd Mansfield and Fisher Price's accounting

personnel by issuance of the blanket certificate dated August 8, 1988. However, since the August 8, 1988 blanket certificate was not defective, the Division properly refused to permit Lloyd Mansfield to correct it. In addition, prior to September 1, 1989 (the effective date of the new subdivision [n] added to Tax Law § 1115), acceptance by Lloyd Mansfield of an exemption certificate was improper since these sales were taxable. Therefore, for sales prior to May 8, 1988, Lloyd Mansfield was required to collect tax on its sales to Fisher Price.

C. A memorandum to District Office sales tax audit personnel from the Sales Tax Audit Administrator, District Office Audit Bureau, dated November 4, 1988, set forth the Division's policy concerning an overlapping audit in which the vendor and vendee are both audited for the same audit period. This memorandum stated, in pertinent part, as follows:

> "Under existing policy, a taxpayer requesting an adjustment to audit findings due to an overlapping audit situation must obtain from the other taxpayer a written statement containing the following information:
>
> "1. The period of audit.
>
> "2. Whether or not they agreed to the audit findings; and
>
> "3. Whether or not there was agreement to exclude the particular transaction(s) from their audit.
>
> "This does not preclude the Section Head from contacting their counterpart in the office which conducted the other audit to determine if a duplication of tax would occur and to determine the appropriate action(s). Moreover, if the other taxpayer did not agree to their audit findings, no adjustment for the overlapping audit should be allowed.
>
> "The above policy is sufficient on audits of vendors (the ones making the sale). However, on audits of vendees (the purchasers), the statement to be obtained from the vendor must in addition to the above, also provide that the vendee has not issued an exemption certificate for the transaction(s) in question. If the vendor did receive an exemption certificate from the vendee (purchaser), no adjustment for the overlapping audit is allowable.
>
> "Where a vendor or vendee obtains a statement with the required information and an adjustment is made to your audit findings, the audit report should include the following information:
>
> "1. The name of the other audit case and identification number.
>
> "2. The district office that conducted the other audit.
>
> "3. A listing or description of the transactions in question."

Petitioner maintains that all of the aforementioned conditions, as set forth in the Division's memorandum, were met. At the time of the audit of Lloyd Mansfield, such was not the case, i.e., Fisher Price had not agreed to the audit findings. According to the affidavit of Gerald Magoffin, Jr., of Fisher Price (see, Finding of Fact "8"), the audit of Fisher Price did not commence until July 6, 1989 and Fisher Price did not agree to the Division's audit findings until September 13, 1991. The field audit report for the audit of Lloyd Mansfield (Exhibit "D") indicates that the audit was concluded in October 1989; the notice of determination was issued to Lloyd Mansfield on November 24, 1989 (see, Finding of Fact "1"; Exhibit "A"). Therefore, the Division could not have granted an audit adjustment to Lloyd Mansfield, based upon its overlapping audit policy, due to the fact that Fisher Price had not agreed to the Division's audit findings and would not do so until nearly two years after the issuance of the assessment to Lloyd Mansfield.

D. With respect to petitioner's contention that, by virtue of the fact that the Conciliation Order states that the period at issue is "12/1/88-2/28/89", the assessment against petitioner must be cancelled for all but the aforesaid quarter, this contention is totally without merit.

The notice of determination issued to petitioner on November 24, 1989 (see, Finding of Fact "1"; Exhibit "A") properly advised petitioner that the period at issue was June 1, 1986 through February 28, 1989. Other correspondence (see, Exhibits "B", "D" and "E" attached to affidavit of Conciliation Conferee, William Proefrock) indicate that petitioner and/or its representative were aware that the audit period consisted of more than the single sales tax quarter December 1, 1988 through February 28, 1989. Clearly, petitioner has not shown that it was, in any way, harmed by the mistake (see, Finding of Fact "11") in the Conciliation Order or that it was unaware of the actual periods at issue. Absent such a showing, the assessment for the period June 1, 1986 through November 30, 1988 cannot be voided (see, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892; Matter of Kadish, Tax Appeals Tribunal, January 12, 1989; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989).

E. The remaining issues, i.e., the taxability of certain of the sales to Fisher Price by Lloyd

Mansfield and the entitlement, by Lloyd Mansfield, to a refund for sales and use taxes which it paid to the Division, will be addressed together since they are interrelated.

On July 7, 1992, the Division issued a memorandum entitled "The Sales and Use Tax and Promotional Materials" (TSB-M-92[4]S) which set forth an explanation of the amendments to the Tax Law, effective September 1, 1989, which impacted upon the tax status of promotional materials. This memorandum stated, in pertinent part, as follows:

> "Before the addition of this exemption, the purchaser of promotional materials had to pay tax and show that such materials were shipped outside the state for use outside the state in order to claim a refund of the tax from the Tax Department pursuant to section 1119 of the Tax Law. Services performed on mailing lists in this state were taxable without any right to refund. Accordingly, this new exemption with respect to mailing list services represents a major change in the taxability of such services in that, among other things, the exemption can be claimed in the first instance, rather than through a refund claim."

Since it has heretofore been determined that, for sales prior to May 8, 1988, there existed no valid blanket exempt use certificate (see, Conclusion of Law "B"), Lloyd Mansfield was required to collect tax on its sales to Fisher Price prior to that date and to remit such tax to the Division. This was not done in a timely manner, but was, instead, done by means of payments made by Lloyd Mansfield of $4,843.15 on November 8, 1989 and of $59,897.76 on February 27, 1990 (see, Finding of Fact "3"). Tax was collected by Lloyd Mansfield not on a sale-by-sale basis, but by an invoice dated February 22, 1990 (see, Finding of Fact "7"; Exhibit "I") from Lloyd Mansfield to Fisher Price which resulted in the issuance of a check from Fisher Price to Lloyd Mansfield (actually Wolf, Mansfield, Bolling) in the amount of $59,897.76.

Thereafter, Fisher Price claimed a credit (in lieu of filing a claim for refund) of $48,149.34 relating to the tax of $59,897.76 which it paid to Lloyd Mansfield on its sales tax return for the quarter ended May 31, 1990. A credit in the amount of $44,353.27 was allowed (see, Finding of Fact "7").

Despite Lloyd Mansfield's assertion that its payment, on February 27, 1990, of the $59,897.76 to the Division was not a payment made in its role as a registered sales tax vendor/collection agent, such assertion is not supported by the evidence herein. Petitioner was doing, on February 27, 1990, what it should have done on a sale-by-sale basis from the

beginning of the audit period, i.e., collect and remit tax.

Petitioner maintains that, by virtue of the provisions of 20 NYCRR 532.1(e), Fisher Price was required to pay the tax directly to the Division and, had this been done, interest would have been assessed against Fisher Price rather than against Lloyd Mansfield. This regulation provides that where a customer has failed to pay sales tax to the person required to collect the tax, the tax shall be payable directly to the Division. However, by virtue of Fisher Price's payment to Lloyd Mansfield of the sum of $59,897.76 on February 23, 1990 (prior to Lloyd Mansfield's payment of the same amount four days later), this section was rendered inapplicable.

The applicable regulation, after February 27, 1990, is 20 NYCRR 534.8(a)(3) which states:

> "No refund or credit may be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the Department of Taxation and Finance, as provided in section 534.2 of this Part, that he has in fact repaid such tax to the customer."

Petitioner has made no such refund to Fisher Price and, accordingly, is not entitled to a refund of any portion of the tax which it collected and remitted.

It must be noted herein that the Division concedes that a number of the transactions between Lloyd Mansfield and Fisher Price were not subject to tax (see, letter brief of Division, p. 5). This is evidenced by the allowance of a credit of $44,353.27 to Fisher Price by the Division. It cannot be ascertained from the record herein whether the transactions ultimately deemed nontaxable included those testified to by Thomas Bolling. Nevertheless, as previously pointed out, Lloyd Mansfield, having refunded no portion of the $59,897.76 collected from Fisher Price, is not entitled to a refund.

Exhibit "F" sets forth a computation of the $15,187.36 (interest as of January 15, 1993) which remains at issue (see, Finding of Fact "3"). In its letter in lieu of a reply brief, petitioner sets forth a calculation which, through the subtraction of $44,000.00 (referred to as "Erroneously Assessed Tax") in tax ultimately credited to Fisher Price, results in a refund being due and owing to petitioner. This contention by Lloyd Mansfield that it is entitled to a refund

based upon the subsequent determination by the Division that certain of Lloyd Mansfield's sales to Fisher Price were nontaxable, must be rejected. As previously noted, prior to the enactment of subdivision (n) of Tax Law § 1115, the vendor (Lloyd Mansfield) was required to collect tax on all sales of promotional materials and it was for the purchaser (Fisher Price) to show that the purchases were nontaxable and, accordingly, to claim a refund of tax paid on such purchases. Petitioner failed to carry out its duty to collect and remit tax, in a timely manner, on its sales of promotional materials to Fisher Price and, accordingly, assessment of interest on the total amount (rather than the amount ultimately determined to be taxable) of Lloyd Mansfield's sales to Fisher Price is proper.

F. The petition of Lloyd Mansfield Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated November 24, 1989, except as modified in Finding of Fact "3", is sustained.

DATED: Troy, New York
April 28, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE