STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **HAMMACHER SCHLEMMER CO., INC.** 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 December 1, 1990 through February 28, 1997.	: : : : :	DETERMINATION DTA NOS. 816215 AND 816216

Petitioner, Hammacher Schlemmer Co., Inc., 303 W. Erie Street, 6th Floor, Chicago, Illinois 60610, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1990 through February 28, 1997.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 13, 1998 at 10:00 A.M., with all briefs to be submitted by June 16, 1999 which date began the six-month period for the issuance of this determination. Petitioner appeared by Jenner & Block (David J. Bradford, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Robert Tompkins, Esq., of counsel).

ISSUES

I. Whether the imposition of use tax on the cost of printing petitioner's catalogues violated the First Amendment or Commerce Clause of the United States Constitution.

II. Whether the mailing of catalogues into New York State from outside of the State constituted a "use within the State" within the meaning of Tax Law § 1101(b)(7) and § 1110.

III. Whether petitioner is entitled to a refund on the portion of the tax which was based on the distribution of catalogues in New York City.

IV. Whether it was proper for the Division of Taxation to impose use tax on the cost of printing petitioner's catalogues in Tennessee.

FINDINGS OF FACT

1. During the years in issue, petitioner, Hammacher Schlemmer Co., Inc. ("HSC"), was a company which sold products through a catalogue and at retail locations. HSC also advertised in Blue Sky which is an airline in-flight catalogue that featured many different catalogues. HSC's corporate headquarters were in Chicago, Illinois and all of HSC's corporate executives maintained their offices in Illinois.

Background

2. The Division of Taxation ("Division") conducted a sales and use tax audit of HSC for the period December 1, 1990 through November 30, 1993. To the extent in issue, the Division concluded that petitioner distributed catalogues in New York and that tax was due on the paper and printing charges incurred to create the catalogues. Consequently, HSC was assessed $298,587.54 in New York use tax for catalogues delivered into New York plus interest in the amount of $81,330.82 for the period December 1, 1990 through November 30, 1993. Petitioner paid the tax and interest and filed a claim for refund which was denied on August 20, 1996.

3. On November 6, 1996, HSC requested a conciliation conference. The conciliation conference was held on August 5, 1997 and in an order dated September 26, 1997, the conciliation conferee denied the request for a refund. On November 17, 1997, petitioner filed a petition with the Division of Tax Appeals.

4. HSC was also audited for the period March 1, 1994 through May 31, 1995. As a result, HSC was assessed an additional $80,217.92 of New York use tax plus interest of $17,447.19 for catalogues shipped to New York residents. HSC remitted the additional tax plus interest.

5. HSC purchased a printing service and paper. These were the two items which comprised the cost of the catalogues for the audits. Approximately 40 percent of the use tax assessments was based on the cost of printing and approximately 60 percent of the use tax assessments was based on the cost of the paper.

6. In order to avoid potential future use tax liability, HSC voluntarily remitted use tax of $120,121.90 for the period February 1994 through February 1997.

7. In June 1997, HSC filed a claim for refund for such amounts, totaling $217,787.01 ($80,217.92 + $17,447.19 + $120,121.90 = $217,787.01). On August 28, 1997, this claim was denied. Petitioner did not request a conciliation conference. Instead, a petition to the New York State Division of Tax Appeals was filed on November 17, 1997 along with a request to consolidate the cases.

8. Petitioner collected and remitted New York State sales tax on catalogue sales which were shipped to New York customers.

HSC's Corporate Headquarters

9. As noted, HSC's corporate headquarters and all of its corporate executives were located in Chicago. None of HSC's corporate decisions were made in New York. It employed, in total, from 150 to 300 employees annually depending upon the season. Of the total number of people employed, approximately 70 people worked in Chicago.

10. Petitioner's product buyers were all located in its Chicago corporate offices. In determining what products should be included in the catalogue, HSC's product buyers reviewed samples which were sent to them or that they saw at trade shows or in trade publications. The product buyers evaluated the product and determined whether the item met HSC's overall criteria for inclusion in the catalogue.

11. HSC's primary purpose was to offer its customers only the best and unexpected in product line. Its mission was to ensure that the products selected for inclusion in the catalogue were either the very best of their kind or provided some kind of unique or unusual feature that no other product provided.

12. Generally, after the buyers identified possible products for inclusion in the catalogue, the products were sent to the Hammacher Schlemmer Institute ("Institute") which was located in Chicago. The Institute, which employed four or five individuals, was an independent research group which performed market research on products offered by HSC and rated those products in comparison to other products. It used customer panelists as well as other outside sources to test and rate products and to inform the Institute which products were best in their particular category. The Institute performed testing only for HSC. It paid its expenses from funds received from HSC. HSC determined how much money would go to the Institute on the basis of the cost of operating the Institute. None of the Institute's employees were located in New York.

13. The Institute was a separate and distinct legal entity from HSC. However, the Institute and HSC had the same shareholders. According to the controller of HSC, it was organized as a not-for-profit corporation under the laws of the State of Illinois. The Institute filed a U.S.

Corporation Income Tax Return for Subchapter S Corporations (Form 1120S) with the Internal Revenue Service.

14. After products were selected for inclusion in the catalogue, HSC's buyers and creative staff started assembling the catalogue based upon the selections made by the Institute. Neither the buyers nor the creative staff were located in New York.

15. HSC's buyers in Chicago negotiated with vendors for a price for purchasing the product. When the product was initially purchased, HSC maintained physical possession of the product in Chicago. If needed, the product was turned over to the rebuying staff in Chicago for further purchasing. None of the rebuying staff was located in New York.

HSC's Catalogue

16. Once the product was purchased, the product, product literature, and any test result from the Institute and any comments from the buyers were passed on to HSC's creative or advertising departments to prepare the pictorials and the written copy for the catalogue. HSC's copy-writing staff prepared and submitted copy for the catalogue based upon product literature, the buyers' comments and the Institute's tests and comments.

17. HSC's copy staff and production staff were located in Chicago.

18. HSC maintained its inventory of catalogue products in Ohio. Although the retail stores would occasionally order merchandise directly from vendors, most of the inventory sold by the retail stores was obtained from the Ohio facility. HSC employed approximately 50 to 200 people in Ohio, depending upon the season.

19. The following statement contained on page one of HSC's catalogue for Winter 1991 referred to HSC's primary mission as well as its tradition: "Offering the Best, the Only, the

Unexpected for Over 149 years." The statement "the best" referred to those products that the Institute had selected through its testing results as the "best" in a particular category. The statement "the only" referred to products that were generally not otherwise available and the statement "the unexpected" referred to a unique product that could not be found in normal product selections through the marketplace.

20. Petitioner's Winter 1996 catalogue contained the following historical statement relating to HSC:

> During the 1930's and 40's, the name Hammacher Schlemmer would become synonymous with innovation. We introduced the first pop-up toaster (1930), the electric razor (1934) and the first steam iron (1948). Later, we would offer the first electric pencil sharpener, food processor, electric can opener and automatic coffee maker . . . . [;] the first microwave oven (1968), telephone answering machine (1968) and cordless telephone (1975). At their introduction, these products were viewed by many as intriguing gadgets, we saw them as functional problem solvers. (Hammacher Schlemmer Co., Inc. Catalogue, Winter 1996, p.2.)

21. All text and product photographs contained in the catalogue were prepared in Chicago. New York personnel were not involved in either the preparation of the text or product photographs for the catalogue.

22. After the text and product photographs to be set forth in the catalogue were prepared, the catalogue layout and design were created and placed on a computer system. This process took place in Chicago. New York staff were not involved in this process.

23. The film for the catalogue was created in either Chicago, Illinois or Milwaukee, Wisconsin in preparation for the printing of the catalogues. HSC's production staff arranged for the creation of the film. New York personnel were not involved in the creation of the film or any aspects of ordering the film. After the film was procured from either Chicago or Milwaukee, it was sent to HSC's printer, World Color Press, located in Tennessee.

24. A typical catalogue during the audit period did not contain an index to articles. There were pages with product pictures, descriptions, item numbers and prices. A review of the catalogues in the record shows that HSC did not make a practice of comparing competing products that were not sold in the catalogue. Many catalogues contained little prose except product descriptions. The catalogues contained order forms and solicited orders.

25. The following is a representative product description from the Winter 1996 Hammacher Schlemmer Co., Inc. catalogue:

> **THE ONLY SELF-RIGHTING WALKING CANE**. Winner of the Grand Prize in the 1995 Hammer Schlemmer Search for Invention competition and featured in the *Journal of the American Medical Association*, this walking cane returns itself back to an upright, vertical position anytime it is dropped or knocked over. Weighing just over one pound, its patented design incorporates a curved, wire-cage base that relies on the force of gravity to always return the cane to an upright stance (in much the same way that a child's inflatable punching bag does). Its sturdy shaft and handle are made from a lightweight, graphite epoxy composite material, the same used in high performance aircraft. The ergonomically designed handle grip is made of flexible black foam rubber for comfort. The seven-inch diameter base was designed to easily clear the user's foot and is made from metal and rubber components. Shaft is rosewood covered; base has a black finish. Available in 30-, 34- and 36- inch lengths - please specify.
> 62321X..$99.95

Printing and Mailing of the Catalogues

26. HSC printed catalogues approximately 14 times a year, including two printings, with different covers, of each of the four seasonal editions, i.e., winter, spring, summer and fall editions. In addition, a holiday catalogue was produced and other catalogue mailings might be done periodically. Approximately 30 million catalogues were distributed annually. There were approximately 100,000 new annual registrations for catalogues. Thus, the new registrants would receive in total 1,400,000 catalogues over the course of a year (100,000 x 14 catalogues each

year). Approximately 9,000 of the 100,000 new annual subscribers resided in New York. The balance of the 30 million catalogues which were distributed each year were sent to those who were already on the mailing list.

27. Recurring customers who were already on the mailing list did not have to pay a subscription fee. With respect to new customers, the advertisements in the record show that sometimes the catalogues were offered for free. In another instance, there was a charge of $3.00 for the catalogue but the customer received a $3.00 credit toward a purchase. In other instances there was a charge of $2.00 or $3.00 for a full-year subscription. HSC offered subscriptions to its catalogue by, among other things, advertising the subscriptions in other publications. Petitioner has advertised for subscriptions to its catalogue in, by way of example, the Smithsonian, the New Yorker, Town and Country and Harpers Magazine. HSC has advertised its subscriptions as "It's a classic. It's one of a kind."

28. Petitioner made a small percentage of its total distribution of catalogues available for free to customers of the New York retail store. Approximately two one-hundreds of one percent of the total distribution of the catalogues were distributed in this manner.

29. The catalogue was not available at newsstands but was available for circulation to the public.

30. The ultimate purpose of the catalogue was to have customers purchase the products advertised therein. Petitioner has found that putting the "best" rating next to a product results in a more favorable response.

31. HSC's marketing staff, which was located in Chicago, decided who was to receive the catalogue. It created the mailing list for the catalogue out of HSC's customer computer database.

The computer database, from which the mailing list was created, was located in Chicago. Petitioner drew its customer database from the following sources. (1) Customers at the retail stores (New York, Chicago, Beverly Hills) could request that they be placed on a mailing list. The customer's information could be taken on a piece of paper at the store by the clerk or the information could be placed on a card furnished by the store that the customer could send in the mail. (2) The store would obtain the name and address of those customers which asked that a product be shipped. (3) Customers that acquired petitioner's 800 number could call and register to receive the catalogue. That number could be obtained from other catalogues or from ads which were placed in magazines. (4) Customers that previously made purchases over a specified period of time would be included in the mailing database. (5) Customers may have been on the list from prior purchasing history. (6) Petitioner rents mailing lists. New York personnel were not involved in any of the decisions regarding the mailing list for the catalogue. HSC's staff in Chicago determined the number of copies of the catalogue the printer would print; no New York personnel were involved in these decisions. The mailing list and information regarding the number of copies to be printed were then sent to the printer.

32. From 1992 through the end of the audit period, all of HSC's catalogues were printed by World Color Press in Dyersburg, Tennessee. Prior thereto, all of HSC's catalogues were printed by R. R. Donnelly & Co. in Mattoon, Illinois. The printers affixed the qualified names and addresses to the catalogues at its facilities in Tennessee and Illinois. All affixing of names and addresses to the catalogues was done by the printer at its facilities in Illinois and Tennessee. The catalogue provided that it would be delivered to the identified recipient or the current resident.

World Color Press in Dyersburg, Tennessee also performed a mailing qualification which is a postal rate qualification.

33. Petitioner's catalogues were mailed third class mail because that is the U.S. postal service mailing class for catalogues. Second class mailing was not used because that is the class for periodicals.

34. New York employees did not have any involvement with the activities or functions of the printer. They did not have any communication with the printer. HSC contracted for the printing and distribution of the catalogues from its Illinois headquarters. HSC's New York operations did not have anything to do with the distribution of the catalogue. HSC did not engage in any activities within the State of New York related to the production or distribution of the catalogue. HSC's employees did not enter New York State to distribute or otherwise make arrangements for the distribution of the catalogues. No employees with responsibility for catalogue operations worked in New York.

35. World Color Press obtained the paper used in the production of the catalogue from a paper broker located in Chicago. HSC's production staff in Chicago communicated with the paper broker who procured the paper and sent it directly to HSC's printer in Tennessee. The paper, as well as the printer's services, was paid for out of HSC's accounts payable department in Chicago.

36. HSC's New York employees did not have any involvement in the paper procurement process, or the payment for the paper or printer.

37. After the catalogues were printed, the printer prepared the catalogues in bundles for distribution to the various regional or sectional centers of the postal service for final distribution.

The catalogues were bundled with catalogues from other companies in order to achieve a better postal and shipping rate. HSC's Tennessee printer determined how the catalogues were to be bundled. The printer transported the labeled catalogues to the United States Postal Service outside of New York. The bundles from World Color Press were weighed at the post office in Tennessee to determine the amount of postage. The postage was then paid in Tennessee.

38. After the bundles were weighed and the postage was paid, the bundles from World Color Press were placed on skids, the skids placed on trucks, and the trucks sealed in Tennessee. Once the trucks were sealed in Tennessee, HSC could not change the composition of the bundles. Further, at this juncture, HSC had no right or ability to further direct where the catalogues would go or what would happen to them. Neither HSC nor the printer authorized the return of undeliverable catalogues and if a catalogue was deemed "undeliverable" by the Postal Service, the catalogue was not returned to HSC.

39. Upon delivery of the catalogues to a United States Post Office, neither HSC nor its printers withdrew the catalogues from the United States mails or otherwise redirected the catalogues. HSC could not and did not retrieve its catalogues from the United States mail. Any catalogues distributed in New York were distributed through the United States mail originating outside of New York.

40. Customers who wished to purchase a product from the catalogue dialed an 800 number which corresponded to an HSC call center located in Ohio. The customer placed his or her order with the customer representative located in Ohio. The customer representative answered any questions about the ordering process and placed the customer's order into the computer system located in Ohio. The products were then shipped from Ohio directly to the customer.

41. All decisions regarding HSC's catalogues were made in Illinois, including content of the catalogues, the volume of the catalogues to be printed, the decision as to whom to mail the catalogues, and the frequency of the mailings.

42. The catalogue provided promotion or advertising for the local store. The last page of most of the catalogues stated "Please Visit Our Stores" and then listed the name and address of the three stores, including the New York store. While the catalogue revealed the location of each of HSC's retail stores, the purpose of the reference, in terms of the preparer's job responsibility, was to promote the catalogue, not the retail stores. It is petitioner's belief that the reference to the stores promotes the catalogue by showing that petitioner is a real company.

43. HSC has been informed by many of its subscribers that they subscribed to the catalogue solely for its informational value. They also informed petitioner that they subscribe to the catalogue to be better informed as the best and/or most innovative products commercially available.

44. HSC catalogue articles were detailed and gave as much information about the product as possible because subscribers liked to read the catalogue's content.

45. HSC selected its products and made business decisions as to what products to include in the catalogue based upon the criteria that the products were rated the best or the only one of a particular product category, or represent a product innovation in a particular product category. The catalogue advised its subscribers of products that had been rated the best or the only one of a product in a particular category. The articles on products in HSC's catalogue were written by different authors.

46. The Institute regularly conducted tests to help customers make easier buying decisions. The products were tested in side-by-side comparisons under actual conditions of use. Whenever possible, the Institutes's personnel conducted these tests with the help of customer panelists, who examined factors such as performance, design and ease of use. Through testing by the Institute, HSC has been able to offer the easiest-to-operate VCR, the best digital answering machine, and the best electronic blood pressure monitor. HSC's catalogue offered such unique products as "[t]he only self-righting walking cane," which, after testing, was rated a grand prize winner by the Institute and also was featured in the Journal of the American Medical Association; the advanced interactive flight simulator pod; the Bose wave radio (which received the Best of What's New Award by Popular Science); and the feline drinking fountain, which was recommended by veterinarians.

47. The Institute's analysis and test results regarding products were not sold or shared with anyone other than HSC. Accordingly, the Institute's analysis of strength, quality, innovativeness and uniqueness of products was not available to consumers except through the HSC catalogue.

48. In 1991, HSC's catalogue contained advertisements for Dodge car products under the headline "Innovation Defined." HSC was paid by Dodge to advertise its car products in the HSC catalogue. HSC did not sell Dodge car products through its catalogue or otherwise. It was rare for petitioner to accept advertising from other customers.

49. The catalogue was devoted to the field of innovation. HSC's products have been displayed at Walt Disney World's Epcot Center, featured as "Innoventional."

Retail Stores

50. HSC had retail stores located in Chicago, Illinois, New York, New York and Beverly Hills, California. As noted, HSC employed approximately 70 people in Chicago. Petitioner employed approximately 20 to 25 people in New York and approximately 10 people in California.

51. The retail operations and the catalogue operations were run by HSC like separate companies. They were viewed by HSC as entirely separate businesses with different objectives. The retail operations and the catalogue operations had separate books and records, including separate profit and loss statements. Approximately 10 to 15 percent of the total sales occurred through the retail stores. At some juncture, the company produced one profit and loss statement for the entire company although the retail segment was always broken out so that it could be evaluated separately.

52. The retail stores obtained some of their merchandise directly from vendors. However, most of the merchandise came from the Ohio warehouse. Generally, the products advertised for sale in the catalogue were also offered for sale in the store.

53. Occasionally, if the retail store did not have a particular item in stock, it would place an order for the customer in the catalogue. In the later years, the store had a method of accessing the catalogue system on behalf of the customer.

54. Although it was not something that petitioner encouraged, customers who purchased merchandise through the catalogue could return products to the store in New York. HSC offered an unconditional guarantee through its catalogue which included postage and handling. So if a customer wanted to return the product obtained through the catalogue it would be at no cost. It

was also usually simpler because it could be picked up and shipped through UPS to the warehouse where it would ultimately end up.

55. The performance of the HSC employees responsible for the retail operations was not evaluated or in any way based upon the success or failure of the catalogue operations. The performance of the HSC employees responsible for the catalogue operations was not evaluated or in any way based upon the success or failure of the retail operations.

56. During the period in issue, information related to the retail operations was maintained on a point of sale computer system separate from the mainframe used for the catalogue operations. Each retail store had its own computer for the transaction of business, on which was maintained inventory information and sales transactions unique to that retail store. The computers for the retail stores did not maintain any financial or expense information relating to the catalogue operations.

57. During the audit period, information for the catalogue operations was maintained on a mainframe computer located in Ohio, on which was stored inventory data for the catalogue operations, catalogue order information, as well as financial data for the catalogue operation.

58. The computer systems for the retail business had no ability to communicate with the computer system for the catalogue business, and vice versa.

59. Inventory information from the retail store's computer was transferred to Chicago so that inventory control personnel could monitor the store's inventory level. The same management personnel who performed financial and treasury functions in Chicago on behalf of the catalogue operations also performed financial and treasury functions on behalf of the retail stores. Further, the same accounts payable staff who paid the bills for the catalogue operations

paid the bills for the retail stores. At the senior management level, corporate staff oversaw both functions.

60. HSC's New York employees did not have any responsibility or authority for the printing or distribution of the catalogue. HSC did not engage in any activities within New York with regard to the distribution of the catalogue. It did not exercise any control over the catalogues within New York State.

61. The presence of HSC's retail store in New York did not have any effect on HSC's distribution of catalogues in New York.

62. HSC employees involved in preparing the catalogue did not have any responsibility for promoting sales in the New York retail store.

63. Had HSC known that the State of New York would seek to impose sales or use tax on HSC catalogues shipped into New York, HSC would have set up separate legal entities for its retail business and catalogue business

64. HSC's corporate accounting department charged the New York store for catalogues which were available for distribution out of the New York retail store during the audit period. There were no telephones or computer terminals dedicated for customer use in placing catalogue orders.

65. In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have generally been accepted and incorporated herein. However, proposed findings of fact "7," "14," "66," and "69" were modified to reflect the record. In this regard, it is noted that the hearing in this matter arose from petitions filed with the Division of Tax Appeals. In addition, the record does not establish that HSC sent *all* of its products to the Institute for

review. Proposed findings of fact "61," "126," and "175" were rejected as redundant. Proposed findings of fact "41," "83," "153" and "154" were rejected as irrelevant. Additional findings of fact were also made.

SUMMARY OF THE PARTIES' POSITIONS

66. In its brief, petitioner asks for a full refund of the tax. Petitioner submits that the imposition of the tax on its catalogue while not imposing tax on periodicals violates the First Amendment of the United States Constitution. Petitioner analogizes its publication to Consumer Reports and submits that its catalogue constitutes a periodical that contains articles on the subject of innovation. It is submitted that by taxing its publication on the grounds that it is a catalogue while not taxing other catalogues, New York is making content-based distinctions between commercial speech and noncommercial speech in violation of the First Amendment. Petitioner next argues that the assessment of use tax against HSC for the mailing of the catalogue into New York violates the Commerce Clause of the United States Constitution because there is no substantial nexus between the activity to be taxed (the mailing of a catalogue from Tennessee to New York) and the State of New York. Lastly, petitioner argues that, as a matter of law, the mailing of the catalogue into New York from outside of the State does not constitute a "use within the state" within the meaning of Tax Law § 1110. In the alternative, petitioner argues that the portion of the tax based on distribution of catalogues in New York City and the portion of the tax that is based on the costs of printing should be refunded.

67. In response to the foregoing, the Division first argues that Tax Law § 1101(a)(7), which defines use, includes the mailing of catalogues at petitioner's direction from outside New York to addresses in New York. Second, relying upon ***National Geographic Socy. v. California***

Bd. of Equalization (430 US 551, 51 L Ed 2d 631) and ***D.H. Holmes Co. v. McNamara*** (486 US 24, 100 L Ed 2d 21) the Division argues that there is a sufficient nexus for applying New York's use tax to catalogues delivered into New York since petitioner maintained a presence in New York through its retail store. The Division submits that it does not matter that the catalogues may have been designed and printed in another state or that the catalogues were mailed to New York from another state. Third, the Division states that the catalogues were promotional material for selling petitioner's products and therefore were not periodicals which qualified for the periodical exemption pursuant to 20 NYCRR 528.6(c) and Tax Law § 1115(a)(5). Lastly, the Division argues that the assessment of New York use tax on promotional material does not violate the First Amendment.

68. In its reply brief, petitioner argues that its catalogue meets the requirements for the periodical exemption in 20 NYCRR 528.6(c). In this regard, petitioner contends that HSC's catalogue is constitutionally indistinguishable from a typical magazine. Petitioner also argues that the application of the New York sales tax to HSC's catalogue violates the First Amendment; that the distribution of its catalogues into New York is not a taxable use under the statute; that imposing New York use tax on the distribution of these catalogues would violate the Commerce Clause; that imposing tax on the cost of printing the catalogues in Tennessee also violates the Commerce Clause because it takes place outside the State of New York and is conducted by an entity that has no nexus to the State of New York.

CONCLUSIONS OF LAW

A. New York imposes a sales tax on receipts from the retail sale of tangible personal property and the receipts from providing certain enumerated services (Tax Law § 1105). Tax

Law § 1115(a)(5) exempts from sales tax and the compensating use tax all receipts from the sale of newspapers and periodicals. There is no definition of a "periodical" in Article 28 of the Tax Law. However, sales tax regulations issued by the Division define the word "periodical" as used in section 1115(a)(5) as follows:

> In order to constitute a periodical, a publication must conform generally to the following requirements:
>
> (I) it must be published in printed or written form at stated intervals, at least as frequently as four times a year;
> (ii) it must not, either singly or, when successive issues are put together, constitute a book;
> (iii) it must be available for circulation to the public;
> (iv) it must have continuity as to title and general nature of content from issue to issue; and
> (v) *each issue must contain a variety of articles by different authors devoted to literature, the sciences, or the arts, news, some special industry, profession, sport or other field of endeavor*. (20 NYCRR 528.6[c][1]; emphasis added).

Section 528.6(c)(3) of the Division's regulations provides that advertising materials are not exempt as periodicals. It states: "Nothing in this section shall be construed to exempt as a periodical the following: . . . advertising material, such as catalogs, flyers, pamphlets and brochures" (20 NYCRR 528.6[c][3][I]).

B. Here, the Division has not raised an issue with respect to the first four criteria listed above. Rather, it is the Division's position that petitioner does not meet the fifth requirement of 20 NYCRR 528.6(c). In support of its position the Division states that the catalogues show that "every page contains only pictures of products, descriptions of those new products, a price tag and an order number. In other words publications (which declare themselves to be catalogues) are simply catalogues with the usual purpose of promoting the products for sale." (Division's brief, pp.22-23.) The Division also states there are no articles about innovation in a particular product area; there are only brief descriptions of products being sold, and the fact that many of the products may have recently come to market cannot be enough to convert routine product descriptions into articles about innovation. It is further contended that petitioner does not reveal test results of multiple competing products; that there is insufficient evidence to show that people read the magazine for content; that there could not have been more than a nominal amount of advertising revenue to contribute to the support of the catalogue; and that only a small percentage of catalogues are sold by subscription. In response, petitioner submits that the catalogue has all of the attributes of a periodical including a variety of articles devoted to the field of innovation.

C. The regulation quoted above sets forth three criteria to qualify as a periodical: (1) each issue must contain a variety of articles; (2) the articles must be written by different authors; and (3) the articles must be devoted to literature, the sciences, or the arts, news, some special industry, profession, sport or other field of endeavor. (20 NYCRR 528.6[c][1].) Since there is no definition of the term "article" in the Tax Law or the Commissioner's regulations, it is reasonable to consult a dictionary for the ordinary, everyday meaning (***Matter of Leisure Vue v. Commissioner of Taxation & Fin.,*** 172 AD2d 872, 568 NYS2d 175, 176; McKinney's Cons Laws of NY, Book 1, Statutes § 232; ***see***, ***Cortland-Clinton v. NYS Dept. Of Health,*** 59 AD2d 228, 399 NYS2d 492; ***cf., Matter of Clark,*** Tax Appeals Tribunal, September 14, 1992 [where resort to a dictionary was not helpful]). Article is defined as "a generally short nonfictional prose composition usu.[ally] forming an independent portion of a publication" (Webster's Third New International Dictionary 123 [1986 ed]).

The HSC catalogues contain such articles. Each of the product descriptions constitutes short nonfictional prose and they form an independent portion of the publication. In addition, the articles are apparently written by different authors. However, the articles are not devoted to literature, the sciences, or the arts, news, some special industry, profession, sport or other field of endeavor within the meaning of 20 NYCRR 528.6(c)(1)(v). The articles are devoted to selling the products in the catalogue and consequently do not satisfy the definition of a periodical in the regulations. This conclusion is compelled by 20 NYCRR 528.6(c)(3) which provides, in part, as follows:

> (3) Nothing in this section shall be construed to exempt as a periodical the following:
> (I) advertising material, such as catalogues . . .
>
> * * *
>
> Example 9: A store issues catalogues monthly describing merchandise offered for sale. Such catalogues are not periodicals.

D. In its brief, petitioner asserts that reliance on the foregoing regulation requires the type of content-based analysis prohibited by the First Amendment. Among other points, the Division responds that the Division of Tax Appeals has no jurisdiction to examine petitioner's first amendment argument. It is the Division's position that petitioner's argument is, in substance, a challenge to the facial validity of Tax Law § 1115(a)(5) and that this argument is beyond the jurisdiction of the Division of Tax Appeals. The Division submits that the key point is that petitioner is really objecting to the Legislature's limiting the sales tax exemption to newspapers and periodicals.

E. It has been recognized that the jurisdiction of the Tribunal and the Division of Tax Appeals is prescribed by its enabling legislation (***Matter of Fourth Day Enterprises***, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (***see, e.g., Matter of Bucherer***, Tax Appeals Tribunal, June 28, 1990; ***Matter of Phelps,*** Tax Appeals Tribunal, November 2, 1989; ***Matter of Fourth Day Enterprises, supra***; ***cf.***, ***Matter of J. C. Penney Co.,*** Tax Appeals Tribunal, April 27, 1989 [holding that the issue of the constitutionality of the Tax Law as applied was properly before the Tribunal]). The foregoing rule does not apply to regulations promulgated by the Commissioner. The Legislature has given the Tax Appeals Tribunal "the authority to rule on the validity of the regulations of the commissioner of taxation and finance where such regulations are at issue" (Tax Law § 2006[7]). It follows that the Division of Tax Appeals has the authority to determine whether a regulation is a proper interpretation of a statute.

F. It is the Division's position that petitioner is really objecting to the Legislature's limiting the exemption to newspapers and periodicals. This argument is rejected. The exemption set forth in the statute is brief and does not contain a definition of the word periodical. It is possible that petitioner's publication would constitute a periodical depending upon how the word periodical is defined. Therefore, it is concluded that petitioner's objection is to the regulation and there is no barrier to a consideration of petitioner's constitutional argument.

G. The leading Supreme Court precedents in this area are ***Regan v. Taxation with Representation*** (461 US 540, 76 L Ed 2d 129) and ***Leathers v. Medlock*** (499 US 439, 113 L Ed 2d 494). In ***Regan*** a nonprofit corporation known as Taxation With Representation of Washington ("TRW") sought a declaratory judgement that it qualified for the exemption granted by IRC § 501(c)(3). The Internal Revenue Service had previously denied TRW's application for tax-exempt status because it appeared that a substantial part of TRW's activities would involve lobbying which is prohibited by IRC § 501(c)(3).[1] TRW claimed, among other things, that the prohibition against lobbying violated the First Amendment. It sought to eliminate the prohibition against lobbying in IRC § 501(c)(3) because it wanted to use tax-deductible contributions to support its lobbying activities. The Court noted that "both tax exemptions and tax deductibility are a form of a subsidy that is administered through the tax system." (***Regan v. Taxation with Representation***, ***supra***, 461 US at 544, 76 L Ed 2d at 136.) It also noted that the system created by Congress subsidized civic welfare organizations generally and provided an additional benefit to those that did not participate in lobbying. In rejecting petitioner's argument, the Court stated:

> The Code does not deny TWR the right to receive deductible contributions to support its lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right. (***Regan v. Taxation with Representation***, ***supra***, 461 US at 545, 76 L Ed 2d at 137.)

Through the foregoing analysis the Court distinguished between a valid legislative decision to support certain forms of expression and not others, and an impermissible suppression of speech or ideas. A violation of the First Amendment violation would occur "if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." (***Regan v. Taxation with Representation***, ***supra***, 461 US at 548, 76 L Ed 2d at 138 [internal quotation marks and brackets omitted].) In this instance there was no indication that the statute was designed to suppress ideas or that the statute had that effect.

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[1] Taxpayers are permitted by section 170(c)(2) to deduct their contributions to section 501(c)(3) organizations on their Federal income tax returns while contributions to section 501(c)(4) organizations are not deductible. However, section 501(c)(3) organizations are not permitted to engage in lobbying while section 501(c)(4) are permitted to lobby to advance their exempt purpose.

In ***Leathers v. Medlock*** (499 US 439, 113 L Ed 2d 494) a cable television operator, among others, brought a class action against the Arkansas Commissioner of Revenues arguing, *inter alia*, that Arkansas' sales taxation of cable television services while exempting or excluding from the tax newspapers, magazines and satellite broadcast services violated the First Amendment. After the lawsuit was commenced, the imposition of the tax was extended to all television services. The Court noted that cable television provides its subscribers with news, information and entertainment and is engaged in "speech" under the First Amendment. However, the fact that it is taxed differently from other media did not by itself violate the First Amendment. The Court explained that it is the suppression of particular ideas or viewpoints which violate the First Amendment and that this may arise from singling out the press for a special burden, targeting a small group of speakers or discriminating on the basis of content ***(Leathers v. Medlock*** , 499 US at 447, 113 L Ed 2d 503). The Arkansas tax did not present these types of discrimination.

It is noteworthy that the Court of Appeals recently had an opportunity to consider the foregoing cases in ***Stahlbrodt v. Commr. of Taxation & Fin.*** (92 NY2d 646, 684 NYS2d 466). In ***Stahlboldt***, the taxpayer published and distributed without charge a shopping newspaper. The Division assessed sales tax on the charges that petitioner had incurred for printing services despite petitioner's claim that it was entitled to an exemption from sales tax on the purchase of printing services as a shopping paper under Tax Law § 1115(i). The Tax Appeals Tribunal sustained the assessment because the taxpayer did not meet the requirement of Tax Law § 1115(i)(C) that its advertisements not exceed 90% of the printed area of each issue.

The taxpayer then commenced a declaratory judgment action challenging the 90% rule. On its appeal before the Court of Appeals, the taxpayer argued that by making its entitlement to the shopping paper sales tax exemption depend on whether advertising constitutes not more than 90 percent of the printed area, the provision violates the First Amendment by making the exemption dependent upon content.

Initially, the Court noted that the sales tax is not directed at the press or at a particular class of new entities, but is a tax of general application for the taxation of sales of goods and services. The Court then noted that the 90 percent rule was adopted to ensure that at least 10 percent of the publication would be devoted to news, thereby restricting the exemption to advertising papers which at least partially serve the same informational purposes as that served by newspapers and news periodicals. After reviewing ***Regan*** and ***Leathers***, the Court explained that it rejected the taxpayer's argument because the tax imposed was one of general application and neither the print media nor shopping papers were singled out for special treatment. Moreover, the 90 percent rule did not create differential treatment based on ideas or viewpoints. In this regard, the Court noted that it is acceptable for the Legislature to decline to subsidize shopping papers which do not serve the same social purpose as conventional newspapers by informing the public of matters of community interest.

H. On the basis of ***Regan***, ***Leathers*** and ***Stahlbrodt*** it is concluded that petitioner's First Amendment objections are without merit. First, it is clear that the sales and use tax at issue is a tax of general application and is not directed at particular publications. It is generally imposed on the sales of goods and services in the State of New York (***Stahlbrodt v. Commr. of Taxation & Fin., supra,*** 684 NYS2d at 467). The Legislature has not granted other forms of published commercial speech which are distributed without charge the benefit of an exemption from sales tax for the purchase of printing services ***(Stahlbrodt v. Commr. of Taxation & Fin., supra,*** 684 NYS2d at 468). Second, it was obviously the intent of the Legislature to restrict the benefits of the exemption to particular publications and exclude those publications of purely commercial interest. The legislative selection of particular entities for a benefit is not open to judicial review under the circumstances presented here (***see***, ***Regan v. Taxation with Representation***, ***supra***, 461 US at 548, 76 L Ed 2d at 138; ***Stahlbrodt v. Commr. of Taxation & Fin.***, ***supra,*** 684 NYS2d at 469). The situation would be different if there were an attempt to discriminate invidiously in the granting of benefits in order to suppress ideas or a demonstration that the statute had that effect (***see***, ***Regan v. Taxation with Representation***, ***supra***, 461 US at 548, 76 L Ed 2d at 138). However, the exemption at issue in this matter does not enforce differential treatment on the basis of ideas or viewpoints set forth in petitioner's catalogue (***see also, Matter of Sharper Image Corp.***, Tax Appeals Tribunal, November 24, 1999).

I. The arguments presented by petitioner do not warrant a different result. In ***Arkansas Writers' Project v. Ragland***, (481 US 221, 95 L Ed 2d 209) there was a challenge to a tax scheme which imposed a tax on the receipts from the sales of tangible personal property but exempted from tax receipts from the sale of all religious, professional, trade and sports magazines. The Arkansas tax scheme imposed tax on the receipts from the sales of general interest magazines.

In ***Stahlbrodt***, the Court of Appeals made the following observation in concluding that ***Arkansas Writers' Project*** was inapposite:

> Crucial to the decision was that the burden of the tax fell on a very small group of magazines - at most three publications, including plaintiff's. Thus, as the

> Court noted, 'the fundamental question is * * * whether [the tax] targets a small group within the press' (***Arkansas Writers' Project v. Ragland, supra,*** 481 U.S., at 229, 107 S.Ct. 1722). This Constitutional infirmity was also identified in ***Leathers v. Medlock (supra)***, but is totally absent in the instant case where numerous publications must pay sales tax on the purchase of printing services (***see, e.g.***, Tax Law § 1115[I][D]). Moreover, the imposition of the tax on the plaintiff in Arkansas Writers' Project could not have been avoided, as here, by a minor adjustment between the relative advertising and the news copy in plaintiff's shopping paper. Rather, avoidance of the tax by plaintiff in that case could only have been achieved by a shift in its entire theme, commentary and reportage on matters of general interest, thereby effectively penalizing the magazine for providing coverage of some entire topics (***Arkansas Writers' Project v. Ragland,*** 481 U.S., at 230, 107 S.Ct. 1722). (***Stahlbrodt v. Commr. of Taxation & Fin.***, ***supra,*** 684 NYS2d at 469).

Here, unlike ***Arkansas Writers' Project***, the tax burden does not fall on a small group of publications. Rather, the tax in issue is also imposed on, among other things, other catalogues, advertising fliers, travel brochures, telephone directories, shipping and restaurant guides, and shopping center advertising sheets (Tax Law § 1115[D][I]); ***see, Stahlbrodt v. Commr. of Taxation & Fin.***, ***supra,*** 684 NYS2d at 469). Second, unlike ***Arkansas Writers' Project***, this is not a case where a publication is being penalized for the particular coverage it provides. This is a case where the Legislature has decided not to subsidize a particular type of publication which does not serve the same social purpose by informing the public of matters of community interest rather than matters of purely commercial interest. Lastly, the determination made herein is not based on the content or viewpoint of any material found in petitioner's publication. It is simply based on the conclusion that petitioner's publication satisfies what is commonly understood to be a catalogue and does not meet the usual definition of a publication (***see, Gallacher v. Commr. of Revenue Services,*** 221 Conn 166, 602 A2d 231).

J. Petitioner has cited cases from three other states in support of its position: ***H.J. Wilson Co. v. State Tax Commn.*** (737 So2d 981 [Miss]), ***cert denied***, ***Mississippi Tax Commn. v. J.J.***

Wilson Co. (___ S Ct ___ (October 4, 1999); ***Newsweek v. Celauro*** (789 SW2d 247 [Tenn], ***cert denied,*** 499 US 983, 113 L Ed 734, ***reh denied*** 501 US 1214, 115 L Ed 2d 990); and ***Sharper Image Corp. v. Department of Revenue*** (704 So2d 657; ***review denied***, 722 So2d 193 [Fla], ***cert denied***, ___US ___, 143 L Ed 2d 347). In ***H.J. Wilson Co.*** the taxpayer was a retailer which sent catalogues into Mississippi which were prepared and printed outside of the state. Mississippi assessed use tax for the cost of the publications which were printed and mailed to the residents of the state while excluding newspapers from the tax. The Court concluded that the criteria employed by the Mississippi State Tax Commission to determine whether a newspaper qualified for an exemption from sales and use tax was content-based in violation of the First Amendment. In the ***Newsweek*** case, the court found that imposing tax on news magazines subscription sales while exempting newspapers from the tax was also not content neutral and therefore violative of the First Amendment. In the ***Sharper Image*** case, relied upon by petitioner, the question presented was the proper remedy when the taxpayer raised an issue regarding the constitutionality of an exemption for religious publications and newspapers. In the course of its opinion the court noted that it had been previously found that an exemption for newspapers was unconstitutional because it required a content-based analysis.

K. The cases relied upon by petitioner are not persuasive. In my opinion, the decision in ***Stahlbrodt*** also supports the conclusion that New York would also not follow the reasoning of the cases relied upon by petitioner. According to ***Stahlbrodt***, the type of content-based analysis which violates the First Amendment is that which discriminates on the basis of ideas or viewpoints (***see, Stahlbrodt v. Commr. of Taxation & Fin.***, ***supra,*** 684 NYS2d at 469; ***see***, ***Arizona Department of Revenue v. Great Western Publishing***, 1999 WL 739519 [Ariz App Div

1] [which also followed this approach]). Here, there is nothing in the record to indicate that the Division's regulation discriminates on the basis of ideas or viewpoints. It is noted that there are other jurisdictions which have disapproved of the line of authority cited by petitioner (***see, Arizona Department of Revenue v. Great Western Publishing***, 1999 WL 739519 [Ariz App Div 1]; ***Gallacher v. Commr.,*** 221 Conn 166, 602 A2d 996).

L. Petitioner's reliance upon a determination of an Administrative Law Judge has been disregarded because such determinations may not be considered as precedent (Tax Law § 2010 [5]). Further, the respective arguments by the parties concerning whether petitioner's catalogues qualify for an exemption if 20 NYCRR 528.6(c)(1)(v) is unconstitutional has been rendered moot and will not be addressed.

M. Petitioner next argues that the assessment of use tax for literature sent to New York residents violates the commerce clause of the United States and New York State Constitutions. According to petitioner:

> The tax at issue is based on the cost of: (a) paper; and (b) printing the Literature. (Tr. 98, 104-05.) HS engages in no activities in New York in connection with either of the activities taxed -- printing of the catalogue in Tennessee or distribution of the catalogue in New York. This lack of substantial nexus between the activity which is taxed and New York is fatal to any proposed assessment. (Petitioner's brief, p 16.)

Petitioner contends that HSC is not involved in the printing or distribution of the catalogues and engages in no printing or distribution within New York. According to petitioner, once the catalogues are sent by the printers from Tennessee, it had no control over the catalogues.

N. Tax Law § 1110(a) imposes "on every person a use tax for the use within this state" of any tangible personal property purchased at retail. Tax Law § 1101(b)(7) defines "use" as

> *[t]he exercise of any right or power over tangible personal property by the purchaser thereof and includes*, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. Without limiting the foregoing, use also shall include *the distribution of only tangible personal property, such as promotional materials*. (Emphasis added.)

Although HSC's catalogs were distributed within New York State, petitioner claims that it made no use of them in New York since all of its activities pertaining to the publication and distribution of the catalogs occurred outside of New York. It further claims that it exercised no power and control over the catalogs within New York because the catalogs were in the exclusive control of the USPS once they were loaded on the USPS trucks in Tennessee.

O. Petitioner's argument runs contrary to the statutory scheme. "Use," as that word is used in section 1110(a), encompasses the distribution of advertising catalogs. The "use" in question, i.e., the distribution of the catalogs, occurred within New York when those catalogs were received by HSC's customers in New York. Thus, the catalogs were used within New York. Even though the Postal Service carried out the actual delivery of the catalogs, petitioner exercised complete power and control over the distribution. Petitioner provided the names and addresses of the catalogue recipients to and directed their mailing to residents in New York. Thus, petitioner made a taxable use of the catalogues within New York within the meaning of Tax Law 1101(b)(7) (***see, Matter of Sharper Image Corp.***, Tax Appeals Tribunal, November 24, 1999).

The rationale employed by the Tax Appeals Tribunal in ***Matter of The Ohio Table Pad Co., Inc.*** (Tax Appeals Tribunal, April 22, 1999) is instructive on the issue of whether the imposition of the tax violates the Commerce Clause. In ***Ohio Table Pad*** the taxpayer argued that there was an insufficient nexus between it and the State of New York to require it to register as a vendor and collect sales and use taxes from its New York customers. In its decision, which concluded that there was a sufficient nexus between it and the State of New York to require the taxpayer to register as a vendor, the Tribunal relied upon the following language from ***Matter of Orvis Co. v. Tax Appeals Tribunal*** (86 NY2d 165, 630 NYS2d 680, ***cert denied*** 516 US 989, 133 L Ed 2d 426):

> We think the foregoing survey of the decisional law discloses the true import of the physical presence requirement within the substantial nexus prong of the ***Complete Auto*** [***Complete Auto Transit v. Brady***, 430 US 274, 51 L Ed 2d 326] test under contemporary Commerce Clause analysis. While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a "slightest presence" (***see, National Geographic Socy. v. California Bd. of Equalization,*** 430 US 551, 51 L Ed 2d 631). And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf (***Matter of Orvis Co. v Tax Appeals Tribunal***, ***supra,*** 630 NYS2d, at 686-687).

P. Clearly, the record establishes that petitioner has far more than the slightest presence in New York. As noted by the Division, petitioner operated a retail store in New York. In addition, the catalogues provided advertising for the New York retail store. The retail stores, in turn, assisted the catalogue sales by accepting returns of merchandise from catalogue customers, by accepting names and addresses of customers for the catalogue mailing list, by distributing registration cards, by automatically entering names of store customers that request delivery in a mail order database and by placing catalogue orders for store customers when a product is unavailable at the store. Clearly, these contacts satisfy the standards established in ***National Geographic Socy. v. California Bd. of Equalization*** (430 US 551, 51 L Ed 2d 631) and ***Matter of Orvis Co. v. Tax Appeals Tribunal*** (86 NY2d 165, 630 NYS2d 680, ***cert denied*** 516 US 989, 133 L Ed 2d 426). Further support for this position may be found in ***D. H. Holmes Co. v.***

McNamara (486 US 24, 100 L Ed 21) where, on a similar set of facts, the Supreme Court applied the standards employed in ***National Geographic*** and concluded that there was a sufficient nexus to support the imposition of use tax on catalogues which were printed outside of Louisiana and shipped to prospective customers within the State.

Petitioner has attempted to distinguish this case from ***D.H. Homes*** on the basis that in ***D.H. Homes*** the taxpayer contracted from its Louisiana headquarters to have the catalogues printed and distributed in Louisiana. Further, undeliverable catalogues were returned to D.H. Homes in Louisiana. As a result, petitioner submits that in ***D.H. Homes*** there was a nexus between the printing and distribution of the catalogues and Louisiana.

A careful reading of ***D.H. Homes*** does not support petitioner's argument. The Court found a nexus because Homes ordered and paid for the catalogues and directed to whom they were sent; Homes initiated the distribution to improve its name recognition; Homes had a significant presence in Louisiana; and, the distribution was aimed at expanding and enhancing its Louisiana business. Although the Court noted that undeliverable catalogues were returned to Homes, it is obvious that this was a minor factor.

Petitioner's reliance upon ***Modern Merchandising, Inc. v. Department of Revenue*** (397 NW2d 470 [SD 1986]) and ***Sharper Image Corp. v. Department of Treasury*** (216 Mich. App. 698 [Mich Ct App 1996] ***lv to app denied*** 454 Mich 867 [Mich 1997]) to establish that the delivery of the catalogues into New York did not constitute a use is misplaced. In each instance, the delivery language which was added by the New York State Legislature to Tax Law § 1101(b)(7) in 1989 was not present in other state statutes.

Q. Petitioner contends that the New York City portion of the tax must be abated because New York City has not amended its definition of "use" to include the distribution of property. This argument is without merit because it overlooks Tax Law § 1107(a) which mandates that the definition of use for a tax imposed within New York City be the same as that used by New York State.

R. Lastly, petitioner argues that HSC is entitled to a refund of 44 percent of the tax paid for the first audit period and 41 percent for the second audit period because these percentages constitute the cost of printing the catalogues in Tennessee. Petitioner submits that the statute does not apply to printing and any application of the tax laws to out-of-state printing violates the Commerce Clause.

S. Tax Law § 1110 imposes a compensating use tax on the use within New York of any tangible personal property upon which the service of printing has been performed. The tax is based upon the consideration given or contracted to be given for the service. Accordingly, the Division properly concluded that tax was due on the cost of the printing service.

Petitioner's reliance upon ***Allied-Signal, Inc. v. Director, Div. of Taxation*** (504 US 768, 780, 119 L Ed 2d 533) for the position that the imposition of the use tax violates the Commerce Clause is specious. ***Allied-Signal*** involved an attempt by New Jersey to tax investment income which had no connection with the state. In contrast, this case involves the right of New York to tax the distribution of property within New York. The two situations are completely unrelated.

T. The petitions of Hammacher Schlemmer Co., Inc. are denied.

DATED: Troy, New York
December 16, 1999

/s/ Arthur S. Bray

ADMINISTRATIVE LAW JUDGE