

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

J. C. PENNEY COMPANY, INC.)	Docket 526	Page 087
)		
vs. Petitioner,)		ORDER
)		
M. BERRI BALKA, Tax Commissioner)		
of the State of Nebraska, the)		
NEBRASKA DEPARTMENT OF REVENUE)		
and STATE OF NEBRASKA,)		
)		
Respondents.)		

This is an appeal pursuant to NEB. REV. STAT. §§ 77-27,127, 77-27,128 (1990) and 84-917 (1994) from an Order of the State Tax Commissioner denying a petition for redetermination of Nebraska use tax issued by the Nebraska Department of Revenue ("Department") to J.C. Penney Company, Inc. ("Penney"). The issue before the Commissioner was whether Penney's distribution of direct-mail catalogs sent by common carrier and/or United States mail to Nebraska residents constituted a taxable "use" of tangible personal property subject to Nebraska's use tax. The Commissioner, following a hearing before a designated hearing officer sustained the deficiency assessment, together with interest and a penalty, and dismissed Penney's petition for redetermination.

1. The review by this court is de novo on the record of the agency. NEB. REV. STAT. §84-917 (5) (a) (Reissue 1994). The matter was submitted to the hearing officer pursuant to a stipulation of facts and certain exhibits.

2. Penney is a Delaware corporation with its principal offices located outside the State of Nebraska. It does operate retail stores in Nebraska. The issue here concerns the taxability of catalogs designed, printed, and mailed from outside Nebraska to prospective customers in

Nebraska, at no charge to the recipients. The Department has imposed a use tax based on the amount paid by Penney for the cost of producing the catalogs.

3. Nebraska's use tax is imposed on:

. . . the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer and on any transaction the gross receipts of which are subject to tax under subsection (1) of this section on or after June 1, 1967, for storage, use or other consumption in this state at the rate set as provided in subsection (1) of this section on the sales price of the property or, in the case of leases or rentals, of the lease or rental prices.

NEB. REV. STAT. § 77-2703 (2) (Supp. 1995).

"Use is defined in NEB. REV. STAT. § 77-2702.23 (Supp. 1994) to mean "the exercise of any right or power over tangible personal property incident to the ownership of that tangible personal property. . .

4. The sole matter before the court involves statutory interpretation since the facts are not in dispute. As a practical matter, my role is that of a mere intermediary since my decision certainly will be appealed allowing the court of appeals or supreme court to make its own independent conclusion irrespective of my opinion. See *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, ___ N.W.2d ___ (1996).

5. One thing is clear - there is a split of authority among jurisdictions with respect to this issue. Generally, the cases relied upon by Penney hold that when catalogs, or other promotional material, are placed in the mail at a location outside the state in question, such materials are no longer under the possession or control of the taxpayer and not subject to the use tax. This would be consistent with the language of Section 77-2703 (2) that imposes a use tax on ". . . the storage, use or consumption in this state. . ." (Emphasis supplied).

6. The Department relies upon allegedly contrary holdings in *Mervyn's v. Arizona Dept. of Revenue*, 845 P.2d 1139 (Ariz. Tax Ct. 1993), *Sharper Image Corp. v. Miller*, 42 Conn.

App. 310, 678 A.2d 977 (1996), *Comfortably Yours, Inc. v. Director, Division of Taxation*, 272 N.J. Super. 540, 640 A.2d 862 (1994), and *J. C. Penney Co., Inc. v. Olsen*, 796 S.W.2d 943 (Tenn. 1990). However, a close review of these cases reveals certain distinguishing factors in each.

7. The facts in *Mervyn's* involved advertising supplements that were inserted in newspapers, not catalogs mailed directly to the recipients from outside the state. In fact, the Arizona Tax Court distinguished such cases stating:

Unlike this case, the Taxpayers there lost control of the materials as soon as they were put in the mail by either the out-of-state printer or the carrier hired to deliver the material to the post office.

845 P.2d at 1143.

8. In *J. C. Penney v. Olsen*, *supra*, the use tax statutes included the word "distributed," and the Tennessee Supreme Court based its decision on the statutory language of the state. Likewise, in *Sharper Image Corp. v. Miller*, *supra*, the Connecticut court based its decision on the Connecticut statute that imposed the use tax on property purchased for "storage, acceptance, consumption or any other use." (Emphasis supplied). The court found that the words "any other use" broadened the scope of the statute to include "distribution." The Nebraska statutes are much narrower than those of Tennessee and Connecticut.

9. A number of courts that have interpreted statutes identical or substantially the same as the Nebraska Statutes, under facts such as these, have concluded that catalog mailings from outside the state are not subject to the use tax. See *Hoffman-LaRoche, Inc. v. Porterfield*, 16 Ohio St.2d 158, 243 N.W.2d 72 (1968); *Mart Realty, Inc. v. Norberg*, 111 R.I. 402, 303 A.2d 361 (1973); *Bennett Brothers, Inc. v. State Tax Commission*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (1978); *District of Columbia v. W. Bell & Company, Inc.*, 420 A.2d 1208 (D.C.App.

1980); *In re: Sears, Roebuck and Co. v. State, Dept. of Revenue*, 97 Wash.2d 260 643 P.2d 884 (1982) appeal *dismissed* 459 U.S. 803 (1982); *May Dept. Stores Co. v. Director of Revenue*, 748 S.W.2d 174 (Mo. 1982); *Wisconsin Department of Revenue v. J. C. Penney Company, Inc.*, 108 Wis.2d 662, 323 N.W.2d 168 (1982); *Modern Merchandising, Inc. v. Department of Revenue*, 397 N.W.2d 470 (S.D. 1986). Generally, the courts found that the taxpayer exercised no right or control over the catalogs after they were deposited in the mail. Further, there was no control exercised within the taxing state.

10. There is also an issue of legislative intent that is unique to Nebraska. In 1991, the Department supported the introduction of LB 773, a bill to clarify and make technical changes to the revenue code. Among the proposals was an amendment to define "other consumption" to include the distribution of catalogs such as those involved in this case. Eventually, after reaching general file, this provision was deleted in order to allow further study. Certainly this indicates that in 1991, neither the Department nor a number of legislators believed that free catalogs mailed, from outside the State of Nebraska to residents of this state, were subject to the use tax.

11. Penney is not claiming an exemption, which would place the burden of establishing the entitlement to the exemption on the taxpayer. Rather, the burden is on the Department to show that the particular activity is subject to tax and any doubt must be resolved in favor of the taxpayer. *See Modern Merchandising, Inc. v. Department of Revenue*, 397 N.W.2d 470 (S.D. 1986); *Bennett Brothers, Inc. v. State Tax Commission*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (1978). I find that the mailing of catalogs under the facts of this case is not subject to use tax under Section 77-2703 (2). I base this conclusion on the absence of terms such as "distribution" or "any other use" in Section 77-2703 (2) and the position of the Department with respect to L

B 773 in 1991.

IT IS ORDERED that the order of the State Tax Commissioner dated March 6, 1995, be reversed; that the protest of J. C. Penney Company, Inc. be allowed and that the Department of Revenue refund all amounts paid pursuant to the assessment made herein. All costs are taxed to the Department of Revenue.

Dated December 17, 1996.

BY THE COURT:



District Judge