

385.0164

Memorandum

To: Shalu A. Jogin
Santa Ana District Office Audit - EA

Date: December 7, 1993

From: Ronald L. Dick, Staff Counsel
Legal Division - MIC:82

Subject: F--- N--- INC.
SR -- XX-XXXXXXX dba O--- C--- R---
SR -- XX-XXXXXXX dba D--- S--- P---
SR -- XX-XXXXXXX dba A--- B---
SR -- XX-XXXXXXX dba T--- D--- J---
SS -- XX-XXXXXXX dba A--- D---

This is in reply to your September 15, 1993 memorandum regarding the application of sales tax to sales to F--- N---, Inc. of materials incorporated into newspapers. You explained the following:

"This office is currently performing an audit of F--- N--- Inc and their subsidiaries. These entities publish and distribute qualifying daily and weekly newspapers for general circulation. Some of the newspapers are distributed for a charge and some are distributed without any charge.

"Newsprint and Ink for publishing all the newspapers are purchased ex-tax.

"Some copies of an issue of a newspaper that have been published for distribution for a charge, such as "The R---" are given away free to full time employees of the Company, as samples to solicit sales and to Vip's or family members of the Associates. Some copies are used internally by the Taxpayer."

You note that F--- N--- distributes copies as follows:

"(a) A complimentary copy delivered to a full time employee of the Company residing in a "delivery area" by a carrier.

"(b) A complimentary copy delivered at work to a full time employee of the Company residing outside the 'delivery area.'

"(c) Complimentary copies staged inhouse thru out the Company in different departments for anyones use.

"(d) Complimentary copies mailed by U.S. Mail to VIPs, political organizations etc.

"(e) Copies used by the "Advertisement" department as "Advertising Tearsheets"

"(f) Copies distributed as "samples" by inhouse or subcontracted sales representatives for soliciting sales."

Given this information, you asked for the application of tax given the Board's interpretation of Revenue and Taxation Code section 6362.7. In this regard subdivision (b)(2) of proposed Regulation 1590, Newspapers and Periodicals, provides:

"DISTRIBUTIONS OF NEWSPAPERS AND PERIODICALS WITHOUT CHARGE. Effective October 2, 1991, tax does not apply to the sale or use of tangible personal property which becomes an ingredient or component part of a copy of a newspaper or periodical regularly issued at average intervals not exceeding three months when that copy of such newspaper or periodical is distributed without charge, nor does tax apply to such distribution."

Under this provision, if the publisher of a newspaper or periodical that is a publication normally sold (such as the R---) distributes complimentary copies, the sale to the publisher of tangible personal property incorporated into those copies is exempt.

When the employer provides the newspaper subscriptions to the employees, the issue arises as to whether the employer is a retailer of the newspapers (i.e., barterers them for the employment services) or is the consumer of the newspapers by providing them free of charge. We have apparently taken the position that, under such arrangements, the employer is the consumer of such property. (cf. Bus. Taxes Law Guide Anno. 280.0240.)

Based on the foregoing, we conclude that tax does not apply to sales of property incorporated into the newspaper distributed in accordance with the facts you describe in situations (a), (b), (d), and (f). As to situation (c), if you mean that the copies are distributed throughout the department for the benefit of the individuals, then we believe the copies are distributed without charge, and the sale of the material to F--- is exempt. If the copies are "staged in-house" merely for the employees to use in producing the newspaper, then the copies are self-consumed. Tax applies to the sale of property incorporated into those copies. Tax applies to the sale of property incorporated into the copies used in situation (e). Those copies are consumed by F---.

We hope this answers your questions; however, if you need further information, feel free to write again.

RLD:plh