

**STATE BOARD OF EQUALIZATION**

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January 6, 1992

Mr. W--- J. M---, Esq.
S---, C---, M--- & M---
XXXX --- Avenue
P.O. Box XXXX
---, California XXXXX

Re: S--- J--- D--- P--- S---, Inc.

Dear Mr. M---:

Your letter dated September 9, 1991, inquiring about Sales and Use Tax Law has been forwarded to me for a response. You state in your letter that you represent S--- J--- D--- P--- S---, a successor corporation to an unincorporated association which existed for more than 10 years without obtaining a seller's permit or paying sales tax. You raise several issues concerning the activities of S--- J--- D--- which are raised below.

A. Materials Distributed to Students in Yachting Classes

With respect to this activity, you state as follows:

"The corporation is (as was its unincorporated predecessor) a local unit of a national organization, the U--- S--- P--- S--- which is organized to promote skill and safety in the handling of small recreational boats through a system of formal education. All course text material is prepared by the national organization and distributed for a small fee to local S---s throughout the country for use in their classes. The local agency distributes the material, collects the fee from each student and forwards it to national. At the end of each course a student who desires credit must take and pass a written examination prepared and graded by national. A small charge is made for use of the test documents, which are immediately returned to national after each examination.

"In addition to text materials and examinations, national also provides small drafting tools such as protractors, dividers, straight edges, etc. which the students use in piloting and navigation classes. There is a small charge for these items which we collect and forward to national.

“I believe the foregoing items are exempt under R&TC Sec. 6409 and Sec. 1570(e) of the Regulations as safety educational materials routinely sold by a national organization operated for charitable purposes and qualified for the welfare exemption which is engaged in the dissemination of health and safety information.

“In addition, I believe the examination materials also qualify under the lease exception of R&TC Sec. 6006.3 and Section 1660(e) of the regulations because (a) the charge for the test materials is always less than \$20, (b) the test lasts less than one day, (c) it is conducted in a classroom controlled by the S---, and (d) the test is handed out at the beginning of the test and collected at the end and then returned to national headquarters.”

In answering your inquiry concerning instructional texts, tools, and tests, we assume that the national organization is located outside of California and its sales to S--- J--- D--- of these items occur out-of-state.

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property. Note that the sales tax is imposed upon the retailer, not the purchaser, but the retailer may collect sales tax reimbursement (usually itemized on the invoice as “sales tax”) from the purchaser if the contract of sale so provides. Civ. Code § 1656.1.

Revenue and Taxation Code section 6201 imposes an excise tax, commonly referred to as the use tax, on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use or other consumption in this state. The use tax complements the sales tax and is imposed upon out-of-state purchases of property used in California

Sales tax is imposed upon gross receipts from the sale of tangible personal property, not upon charges for a service. Regulation 1501, “Service Enterprises Generally,” sets forth the general rules governing taxation of tangible personal property provided with a service. Persons engaged in the business of rendering services are consumers, not retailers, of tangible personal property which they use incidentally in rendering the service. Tax, accordingly, applies to the sale of the property to the person who is a consumer, i.e., to the person rendering the service, not to his or her customer. If the sale to the consumer occurs in California, sales tax applies. If the sale to the consumer occurs outside of California, use tax applies.

The board’s staff has issued and published opinions on questions similar to yours concerning school materials and test fees in the Sales and Use Tax Annotations of the Business Taxes Law Guide. Annotation 515.0015 provides as follows:

“Schools which provide significant educational services, including classroom instruction, are consumers of printed instructional matter and special instructional sound recordings furnished to students where tuition charges made to student do

not separately state charges for such teaching aids. If a separate charge is made for such teaching aids, tax applies to that charge.

“Materials fees,” which are charges for consumable supplies and materials used in the classroom, are not subject to tax. Schools are consumers of materials and supplies furnished to students for use in the classroom even though a separate “materials fee” may be charged to the student.”

The text materials and drafting tools provided by S--- J--- D--- are instructional matter, not consumable supplies and materials. If S--- J--- D--- charges students a tuition fee and does not make a separate charge for the instructional items, the fee is not subject to sales tax. In that case, S--- J--- D---’s purchases of such items will be subject to use tax measured by its costs of these items unless its purchases of such items come within the exemption under Revenue and Taxation Code section 6409 which is discussed below.

If S--- J--- D--- separately charges students for the instructional items, such charges are subject to sales tax and cannot be exempt under section 6409 since this exemption is a use tax exemption, not a sales tax exemption.

In Annotation 515.1160 the staff determined that an organization whose business was providing aptitude tests carried out by providing schools with test booklets and answer sheets which were returned to the organization marked, and the answer sheets only returned to the schools, rendered a service. However, the booklets and answer sheets were tangible personal property consumed in performing this service. Therefore, the organization was subject to the use tax measured by the cost of the materials.

In your case, the fees paid by the students for the tests are not subject to sales tax because the fees are paid for a service. S--- J--- D---, however, must pay use tax on its costs for the test materials unless the section 6409 exemption applies.

To qualify for the section 6409 exemption, an organization must qualify for the “welfare exemption” under Revenue and Taxation Code section 214. The Board’s Assessment Standards Division, here in Sacramento, keeps a listing of organizations and locations holding the welfare exemption from property taxes. We have checked with Assessment Standards and were unable to find a welfare exemption issued to S--- J--- D--- P--- S---. Therefore, we assume that you do not qualify for the welfare exemption and, consequently, do not qualify for the exemption under section 6409. If you believe that S--- J--- D--- is eligible for the welfare exemption, we recommend that it immediately apply for the exemption with the local county assessor. If S--- J--- D--- does not own the real property upon which it conducts its classes, it must receive the welfare exemption on its personal property, i.e., inventory, furnishings, and fixtures.

B. Banquets for S--- Members

With respect to this issue, you state:

“The S--- sponsors banquets for its members at Christmas, on the date when new officers are installed, and perhaps once or twice more during each year. Each event is held either in the banquet room of a restaurant or, if elsewhere, food is supplied by an outside caterer. In either case payment to the supplier is made by the S---, which collects from the members attending. Guest may attend such events, but all food or drink is paid for by members only. We believe that under section 1603(h) and (i) of the regulations the restaurant or caterer (and not the S---) is responsible for the payment of any sales tax on such meals.”

Regulation 1603(i) provides:

“The tax applies to receipts from the furnishing of meals, food, and drink by social clubs and fraternal organization unless furnished: (1) exclusively to members; and also, (2) less frequently than once a week. Both of these requirements must be met. If the club or organization furnishes meals, food or drink to nonmembers, all receipts from the furnishing of meals, food or drink are subject to tax whether furnished to members or nonmembers, including receipts on occasions when furnished exclusively to members. Meals, food or drink paid for by members are considered furnished to them even though consumed by guests who are not members.”

With respect to your client, as long as the meals are paid for by members only and are served less frequently than once a week, the caterers and restaurants furnishing meals to your client are responsible for the payment of the sales tax.

C. Sales of Yachting Paraphernalia

With respect to this issue, you state:

“The S--- also sells name tags, officers’ insignia, USPS flags and similar articles to its members, and these appear to be taxable under R&TC Sec. 6006(c). During the past several years sales of these items have averaged \$30 per month or \$360 per year.”

Since name tags, insignia, USPS flags, etc. are tangible personal property and there is no statute which exempts retail sales of such items, your client must pay sales tax on these items.

D. Sales Tax Liabilities Incurred by the Predecessor Organization

From your letter we assume that the unincorporated predecessor to S--- J--- D--- P--- S--- was incurring sales and use tax liability by selling yachting paraphernalia and by consuming instructional aids. If that is the case, S--- J--- D--- is liable for those taxes under California Corporations Code section 5121(f) and should reconstruct the total sales and use tax liability for its predecessor, file sales and use tax returns for the last eight years, and remit payment to the Board

with the returns. In addition, S--- J--- D--- may also be liable as a successor under Revenue and Taxation Code section 6811 and 6812 if its acquisition of its predecessor's business is deemed a purchase. If the predecessor organization paid sales or use tax on any items it purchased and subsequently resold in a transaction subject to sales tax, S--- J--- D--- may take a tax paid purchases resold deduction as explained in Regulation 1701, a copy of which is enclosed.

If you have further questions regarding Sales and Use Tax Law, please do not hesitate to write again.

Sincerely,

Elizabeth Abreu
Tax Counsel

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Enclosure