

**STATE BOARD OF EQUALIZATION**

March 221, 1957

R--- M--- Corporation
--- Avenue
--- ---, New York

Attention: Mr. H. C. S---
Manager, Tax Division

OHB XX XXXXXX

Gentlemen:

We have reviewed your petitions for redetermination in which you contend that the tax does not apply on prizes furnished to your California salesmen and distributors. The prize plan is conducted under an arrangement with C---, M--- & Co. of ---, Ohio

Under the plan, salesmen and distributors are awarded points. A catalog is furnished to the salesmen and distributors. The catalog lists many items of merchandise with a point value shown for each item. The person who has received prize points makes his own selection of merchandise and sends an order to C---, M--- in ---, together with the necessary number of points for the particular item of merchandise he has selected. C---, M--- delivers the merchandise direct to the salesman or distributor. C---, M--- bills you at a given amount per point redeemed.

The number of points awarded is based on a schedule established by you and which gives effect to the results achieved by the salesmen and distributors. Thus, the number of points awarded bears a close and direct relationship to the value of services performed. It appears to us that the use of points is solely an expeditious method of getting the merchandise into the hands of the salesmen or distributors and of giving them a choice of which merchandise they desire. It is our opinion that there is an exchange of merchandise for services and therefore the transfer of merchandise to a salesman or distributor constitutes a sale because it is a transfer of title to tangible personal property for a consideration.

Since it is our conclusion that you are selling the merchandise to the salesmen and distributors and using C---, M--- as your agent for effecting selection and delivery, the only remaining problem is to determine the measure of tax. Inasmuch as there is no agreed monetary valuation between you and the salesmen and distributors, it appears to us that the most satisfactory method for determining the selling price of the merchandise is to use the amount which you pay C---, M--- for that merchandise.

Even assuming that the interstate shipment would make the merchandise exempt from sales tax, the salesmen and distributors would be subject to use tax. Pursuant to Ruling 74, copy enclosed, you would be required to collect this use tax.

Upon further review of the audit working papers, we note that in Schedule 1A-1 there was included as taxable a sale of eight typewriters in the amount of \$1,334.00 to the United States Property and Fiscal Office, California, for --- --- Air National Guard Base. We understand that in transactions of this type the price is paid out of the United States Treasury and that the United States retains title but allows the California National Guard to use the equipment without charge. Therefore, this is a sale to the United States and not taxable.

The sale to the United States was used to determine a percentage of understatement on sales by out-of-state branches. By removing this sale from the test period only one other taxable sale from an out-of-state branch during the test period was not reported, namely, a sale of four typewriters for \$537 to the F--- L--- Bank, ---. We will consider this \$537 sale to be a nonrecurring item and will not use it to establish a percentage of error. This will result in the measure of tax for out-of-state branch taxable sales under account No. OS X XXXX being reduced from \$8009.60 to \$537 and the measure of tax for the same item under account No. OS X XXXXX being reduced from \$3,879.92 to zero.

It will be our recommendation that your petitions be denied as to the merchandise delivered to salesmen and distributors. Upon redetermination, effect will be given to the adjustments noted above. Inasmuch as you have paid the amount of the determination in full, a refund will be in order and will be received by you in due course.

Very truly yours,

Bill Holden
Associate Tax Counsel

BH:tl

cc: New York