M e m o r a n d u m

280.0800

To: Petition Unit Date: April 16, 1970

From: Tax Counsel (RHA)

This matter was taken under consideration by the Board following a hearing held in Pasadena last November 11, 1969.

A transcript was requested, and it was received on April 15.

There were three items which were originally protested and which were identified numerically in the summary of the case prepared for the Board. Item 1 in the summary was item A in the audit analysis. It represented numerous sales which were disallowed in the audit. However, only a portion of the total (item A) was protested. The protest was over the disallowance of sales of golf clubs made to assistant professional golfers at a 25 percent discount.

The taxpayer's argument on the sale to the assistant professionals was clouded at the hearing when he submitted 21 signed statements from club professionals who held resale certificates. This was identified in the record as exhibit "E". The exhibits were reviewed following the hearing and the --- --- auditors have commented on them. All were originally allowed by the auditor except three. The three represented purchases, from the taxpayer, of items that were "personalized" for the professional, and for that reason were deemed not to have been purchased for resale by the professional. The resale statements were obtained long after the sales had been made and were obtained pursuant to the audit under consideration, and they offer nothing in the way of support to the taxpayer's argument that the sales to the assistant professionals were for resale.

The taxpayer has argued that the sales to the assistant pros were for resale and they were resold and at the same time they were only used by the assistant pros for demonstration and display. Assistant professionals do not hold resale cards. The sales were not made to the professional who held the resale card for resale to the assistant pro - - they were made directly to the assistant professionals.

Item 2, which is item B in the audit analysis, was protested in its entirety. This item represented golf clubs and other items such as golf bags, etc., which were <u>given</u> to club professionals and touring pros for <u>promotional</u> reasons. Taxpayer argues that (1) these were not gifts but were really discounts on other purchases made from the taxpayer; (2) that they were demonstrated and displayed; and (3) that they were sold.

Taxpayer has submitted numerous affidavits signed by professionals in and outside of California to support the argument that the clubs were demonstrated and resold. We do not argue this point and accept this as fact. However, the affidavits clearly and expressly indicate that the golf clubs, etc., were "no charge" items.

Mr. "D", at the hearing, said that the company, upon giving the clubs, etc., away, simply deleted them from inventory. Following the hearing, Mr. "W" tried to verify this, and on November 24, 1969 he wrote that he could not pin down any accounting entry for the clubs. However, as to golf balls given away under the same circumstances and for the same reasons the taxpayer charged them to "promotion expense" and credited purchases and/or inventory.

The third item is item C in the audit analysis. This related to golf balls given away. At the preliminary hearing, the taxpayer made the same argument on the golf ball promotional no-charge gifts as was made on the golf clubs and other related equipment. However, this item was not protested at the hearing before the Board (see the bottom of page 2 of transcript, line 26).

Summarily, we have only two issues to consider. One, whether direct sales to assistant professional golfers of golf clubs for their use may be regarded as sales for resale. We say no, because the assistants do not hold resale cards and the clubs are their personal property. While it is true, they may have eventually been resold by the assistants, they were not sold from the inventory of the pro shop and would not have been sold with sales tax reimbursement. We have nothing to support a finding that they were for resale in the ordinary course of the assistant pros' business activity. The assistant pro is merely an employee of the professional, who operates the golf pro shop.

The second issue is the gift of clubs, etc., to the professional. The taxpayer has changed his theory several times on this item. However, he always comes back to the basic argument that while the clubs were purchased by the taxpayer for resale (from the manufacturer), they were given to the professionals for display and demonstration to induce golfers to buy such equipment.

One theory was that they were not actually given away, but were really a discount item to the pro when he purchased clubs for resale. This is only a theory, and is totally unsupported because there is no relationship between the no-charge clubs and amounts of clubs actually purchased for resale. Mr. Nevins indicates that he thinks the clubs, for all practical purposes, were a discount on future orders.

We firmly believe this would be a departure from the law and would establish a precedent which would be hard to cope with. In our opinion, the gift was a promotional gesture by the taxpayer and was for advertising and goodwill. Naturally if the pro could be induced to use, as his personal set, clubs manufactured by the taxpayer or sold by the taxpayer, it would go a long way toward inducing amateurs to purchase the same make and model, and this is primarily what the taxpayer had in mind when he gave clubs to the professional.

If we allow this, we will have to let every person making sales to retailers for resale to give premiums, merchandise, promotional items, etc. to their customers without any tax liability for making the gift.

Finally, the taxpayer raised a new issue before the Board that was not explored at the preliminary hearing. This was the question of shipments of golf clubs which were given away. He indicated, without any support, that some of the clubs which were given to California professionals may have been mailed or shipped from out-of-state inventories. The argument was made to support a reduction in item No. 2, if the Board deemed that the gift was a taxable use. On the basis that the gift would have occurred when the clubs were placed in mail or shipped from an out-of-state point, there would be no California use tax liability. The argument is sound, but there is nothing to support this, and the taxpayer has had over two years to come up with something to support it. Further, the clubs were manufactured in ---, California. The manufacturer and the taxpayer (wholesaler) are wholly related entities (were before the sale of the business to another firm), and are both located in ---, California. It is highly unlikely that they would ship the clubs to Illinois, for example, and then reship them back to the professionals in California.

Summarily, our position is unchanged, and we still make the same recommendation as before.

A statement of Board action denying the petition is suggested as follows:

> The Board concludes that direct sales, at a 25 percent discount, to assistant professional golfers, salesmen and others who did not hold seller's permits were not sales for resale in the regular course of business of the purchasers.
>
> The Board finds that golf clubs and related equipment sent to professional golfers at no charge were promotional gifts made to build up goodwill and stimulate sales of the type if items given away, and inasmuch as the items given away were purchased by "G" ex tax for resale, the gift amounted to a taxable use of the property by "G".

RHA/vs [1b]