



STATE BOARD OF EQUALIZATION

August 21, 1964

"L"

This is in reply to your letter of June 26 concerning the taxability of tariffs published by "P". As you suggested, we have considered the matter along with the similar question raised by Mr. "B" on behalf of "PS" and "I".

The facts, as stated in your letter, are as follows:

"P" is an association composed of various companies offering shipping services as common carriers in foreign commerce. It is one of many conferences formed under the authority of the Shipping Act of 1916 for the purpose of fixing rates and establishing common practices which each member is bound to follow in offering its services. The costs of maintaining the conference are covered by the assessment of dues. These consist of a division on a per capita basis of the overhead costs of the prior month and an additional assessment measured by the number of sailings which each member had in that month.

The members of the conference by their vote promulgate rates and the terms and conditions on which they will carry cargoes from the Pacific Coast to the Orient. The rates of the conference members are contained in two tariffs: the Local Tariff which covers, generally, cargoes originating West of the Rockies and moving to the Orient, and the Overland Tariff which covers, generally, cargoes originating East of the Rockies and moving to the Orient. The members of the conference meet on a weekly basis to consider requests for tariff changes and such other business as may appropriately come before the conference. Each meeting results in the adoption of numerous modifications in rates. Most of these occur in the Local Tariff, which is more extensive than the Overland Tariff. Various changes, however, are promulgated each month in the latter.

A common carrier must file with the Maritime Commission its tariffs and changes thereto and also make available upon request to "any person" its current tariffs. These obligations are discharged by the conference for its members. Staff members of the conference prepare the basic tariffs, file them with the Commission, file and circulate notices of tariff changes as the same occur, and prepare correction pages incorporating such changes for substitution in the conference's tariffs.

Regular members of the conference may obtain as an incident of membership a maximum of 20 copies of the tariffs and an equal number of each notice of tariff changes. A fee is charged if

additional copies are requested. The present fee is \$2.50 per copy of the Overland Tariff and \$5.00 per copy of the Local Tariff. This fee also covers notices of changes. Correction pages are made available at an additional fee which is based on a sliding scale dependent upon the number of copies of each correction page requested.

Associate members of the conference are not entitled to any copies of the tariffs or notices of changes as an incident of membership. They are charged \$5.00 per copy of the Overland Tariff and copies of notices of changes therein, and \$7.50 per copy of the Local Tariff and copies of notices of changes therein. Correction pages are made available at the same fee as that charged to regular members.

Members of the public, such as shippers, freight forwarders, etc., may secure the tariffs upon payment of an annual subscription fee of \$25.00. This fee entitles the subscriber to an initial tariff, a copy of any republication of the tariff, all notices of tariff changes, and a copy of each correction page when the same is available.

It is your contention that the tax does not apply to any of the publications furnished under the terms described above. In support of this contention, you state that neither the conference nor any of its members is engaged in the business of publishing and distributing publications as such; that insofar as the members are concerned, the tariff is a means by which the public is informed of the availability and cost of their services; and that insofar as the conference is concerned, the tariff is incidental to its activities as a service organization. You also point out that the regular members of the conference receive a maximum of 20 tariffs as an incident of their membership and without any relationship to their dues, and that the subscription fee charged to members of the public is not dependent on the number of distributions during the year. As for the other fees charged to regular and associate members, you state that they are "primarily incurred to secure current information with respect to conference rates."

An association is a "person" for purposes of the Sales and Use Tax Law (§ 6005). Thus, the nature of the business carried on by individual members of "P" is not a material consideration. The essential question is whether or not the conference is making sales of tangible personal property to its members, or to members of the general public, or to both. In this regard, it is likewise immaterial that the conference is basically a service organization. "As to tangible personal property that it sells, it is a retailer." Market Street Railway Co. v. California State Board of Equalization, 137 Cal. App. 2d 87, 96.

A "sale" is defined in Section 6006 as meaning and including:

"(a) Any transfer of title or possession ... in any manner or by any means whatsoever, of tangible personal property for a consideration.

"(b) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

"(f) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication."

It is clear from these provisions that a "sale" includes the furnishing of printed materials for a consideration. Accordingly, the distribution of tariffs by "P" must be deemed to constitute a "sale" if consideration is received therefore.

The Board has recognized that a so-called service enterprise which makes an incidental use of tangible personal property should be regarded as receiving consideration for its services only. This interpretation is embodied in Ruling 1, which provides, in part, as follows:

"Persons engaged in the business of rendering service are consumers, not retailers, of the tangible personal property which they use incidentally in rendering the service. Tax, accordingly, applies to the sale of the property to them. If in addition to rendering service they regularly sell tangible personal property to consumers, they are retailers with respect to such sales and they must obtain permits, file returns and remit tax measured by such sales."

Borrowing some of this language, you state that the materials distributed by the conference are incidental to its activities as a service enterprise. This could mean one of three things: (1) That the conference is basically a service enterprise which engages in the incidental activity of distributing tariffs; (2) That the materials distributed by the conference are incidental to its information services; or (3) That the distribution of the materials is itself a nontaxable service.

As already indicated, an organization which is primarily engaged in rendering nontaxable services is nevertheless the retailer of tangible personal property which it sells to consumers. The fact that its retail activity is "incidental" to its principal activities is unimportant. In any event, the publication and distribution of tariffs could hardly be considered an incidental activity of "P". We believe it is evident, too, that the printed materials are not incidental to the information services; they are the very means by which the desired information is obtained.

In respect to the third possibility, we would concede that the distribution of tariffs is a service in the sense that it involves a communication of information. The point is, however, that when a transaction calls for the transfer of tangible personal property, rather than for the rendition of services in which an incidental use is made of tangible personal property, there is a sale of such property for purposes of the tax even though the furnishing of the property may be characterized as a service. Many things which are commonly regarded as "services" --- for example, the alteration of a new suit of clothes --- are included within the definition of "sale" for tax purposes. "The price charged for all taxable transfers is more often than not largely a charge for services rendered in connection with the tangible object transferred." People v. Grazer, 138 Cal. App. 2d 274, 278.

We conclude, in summary, that the distribution of tariffs by lip" to non-members on subscription, and to regular or associate members at a designated amount per copy, constitutes a sale of tangible personal property. On the other hand, we agree that the conference should not be regarded as selling the copies which regular members are entitled to receive as an incident of their membership. It has been our position that where a member of an association receives tangible personal property as an incident of his membership, the transfer is not to be treated as a sale unless the receipt of the property is the primary benefit.

We further conclude that, as presently worded and interpreted, Section 6362 is broad enough to exempt the correction pages if issued with the required frequency. Accordingly, the conference may exclude from its taxable receipts the additional fees which it charges regular and associate members for these pages. It may also claim a deduction for that portion of the subscription price properly allocable to the correction pages issued to nonmembers. This allocation might vary from year to year, depending on whether the subscriber receives one or more complete tariffs during the term of the annual subscription.

We hope that you will concur in the views expressed above. If not, we will be pleased to consider any further objections you may wish to assert on your client's behalf.

Very truly yours,

Patricia McKinney
Assistant Counsel

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