

M e m o r a n d u m**432.0041.500**

To: Mr. Sid Zigelman
X-----

Date: April 5, 1996

From: David H. Levine
Supervising Staff Counsel

Subject: X-----

This is in response to your memorandum dated February 27, 1996 regarding subdivisions (c)(3) and (c)(4) of Regulation 1541.5. You believe that there is a conflict between these two provisions. We have reviewed these provisions and conclude that there is no conflict.

You are auditing a seller who took a certificate under subdivision (c)(1) of Regulation 1541.5. You note that a person issuing such a certificate is advised in the certificate that if delivery is other than as specified therein, the purchaser owes the tax. Thus, you believe that when the certificate is issued, the seller should not charge tax [reimbursement] and that if delivery is not as stated, it is the purchaser who is liable for the tax. You read subdivision (c)(4) as consistent with this conclusion. You explain:

"On one hand, 1541.5(c)(4) appears that the exemption certificate clears the seller and puts the burden on the purchaser if delivered differently. On the other, 1541.5 (c)(3) appears the seller is responsible regardless of the certificate."

The elements of the section 6379.5 exemption for sales of printed sales messages are 1) the printed matter qualifies as a printed sales message; 2) the ultimate recipient receives the printed sales message at no cost; and 3) the printed matter is delivered in accordance with the exemption, without the purchaser's gaining possession of the property. Either the seller or the purchaser can be responsible for final delivery of the printed sales messages to the recipient, and it is this element of the exemption which is the basis for the difference in treatment reference by your statement quoted above.

When the seller is the person responsible for delivery, the purchaser's certification that the delivery will occur in accordance with the exemption is meaningless because it is the seller, and not the certifying purchaser, responsible for that duty. That is, a seller is not relieved of liability for sales tax based on the taking of an exemption certificate certifying to conditions to an exemption which are within the knowledge or control of the seller. (See, e.g., *Engs Motor Truck*

Co. v. State Board of Equalization (1987) 189 Cal.App.3d 1458 (an exemption certificate taken by a seller in connection with a claimed exempt sale in interstate commerce does not relieve the seller of the burden of establishing the exemption because the elements of the exemption are within the knowledge and control of the seller.)

A review of the certificate set forth in subdivision (c)(1) of Regulation 1541.5 shows that it is consistent with these rules. The title of that subdivision is "Delivery by the Seller," and the wording of the certificate shows that its essential purpose is to certify that the recipients will receive the printed sales messages at no cost. This is the element within the control of the purchaser, and not within the knowledge or control of the seller. If a seller takes such a certificate and the recipients pay something for the printed matter, the taking of the certificate in good faith relieves the seller of liability for tax: the purchaser owes it instead. However, if the seller does not deliver the printed sales messages as required by the exemption, the taking of the certificate does not serve to relieve the seller of liability for sales tax. (Reg. 1541.5(c)(3) (if the printed matter does not qualify as a printed sales message, the taking of a certificate similarly does not relieve the seller of liability for sales tax since that is within the knowledge of the seller).)

The title of subdivision (c)(2) of Regulation 1541.5 indicates when the certificate described therein is properly issued: "Delivery by Mailing House as Agent for Purchaser." Under this situation, it is the purchaser, and not the seller, that is responsible for delivery. Since the seller does not control the delivery, and that form of delivery is authorized by the statute providing the exemption, the seller is relieved of liability if it takes a timely exemption certificate in good faith certifying that the printed sales messages will be delivered in accordance with the exemption's requirements. This is the certificate set forth in subdivision (c)(2), and is the circumstance covered by subdivision (c)(4).

In summary, when the seller is responsible for delivery, the taking of a certificate on that point does not relieve the seller of liability for tax. On the other hand, when the purchaser is responsible for delivery, the taking in good faith of a timely certificate on that point does relieve the seller of showing that such condition was satisfied, and makes the purchaser liable for the applicable tax if the property is not delivered as certified by the purchaser.

DHL/cmm

cc: Mr. Dennis Fox (MIC:92)
X----- District Administrator
Mr. Ronald L. Dick (MIC:82)
Mr. Tony I. Picciano (MIC:82)