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January 10, 2006

Mr. E--- J. M---
N---, M---, P---,
M--- & N---
XXX --- Street, Suite XXX
---, CA XXXXX

Dear Mr. M---:

Re: N--- P--- and A---
SR – XX-XXXXXX

This is in response to your letter dated August 19, 1993. You state:

"Pursuant to Revenue and Taxation Code section 6596, N--- P--- and A--- (NPA) hereby requests written advice on the application of the Printed Sales Message Exemption (section 6379.5/Regulation 1541.5) to the facts as set forth in Part 1 of the Summary Section of the attached Decision and Recommendation. The D & R has gone final, and the refund has been reaudited and approved by the taxpayer.

"1. Claimant is a corporation which operates a graphic arts studio and also does some printing. Part of its business involves the printing and distribution of promotional posters for motion pictures, concerts and other events. Claimant creates and prints the posters to the special order of its customer, then sends them by mail or common carrier to independent contractors for distribution. The independent contractors are hired and paid by claimant, not by claimant's customer. The contractors place the posters in locations where they are likely to be seen by the public.

"According to the staff, the contractors normally place the posters on building walls or telephone poles. Claimant denies that any posters distributed in California are placed on telephone poles, since that is illegal in this state. Claimant informs us that the posters are normally placed on

the walls of boarded-up buildings or temporary walls surrounding construction sites.

"Occasionally, claimant may direct the contractors to place the posters in specific locations or areas. For example, posters advertising a concert of Latin music might be concentrated in Spanish neighborhoods. As a general rule, however, finding a suitable location is left entirely to the discretion of the contractors, since that is their business and they are familiar with the best places.

"Neither claimant nor the contractors normally request permission from the owners of the walls where the posters are placed. (For convenience, we shall hereinafter refer to these persons as the 'property owners'.) According to claimant, the property owners seldom if ever object, however. In fact, most property owners appreciate having the posters on their walls since the posters deter graffiti. In any event, once the posters are in place, neither petitioner nor the contractor has any further interest in them. The posters remain in place until the property owner or someone else removes them.

"Claimant did not charge tax reimbursement or report tax on these transactions. Tax was asserted in an audit, which was the first sales and use tax audit of the business. Claimant paid the determination and filed this claim for refund."

The Decision and Recommendation (D&R) your letter refers to is dated February 23, 1993 and was written by Senior Staff Counsel James E. Mahler.

Revenue and Taxation Code section 6379.5 provides an exemption for certain sales of brochures, circulars, catalogs, and pamphlets consisting substantially of printed sales messages. If your brochure is a printed sales message, the following requirements must be satisfied in order for the printed sales message exemption to apply, as explained in Regulation 1541.5(b):

"[T]ax does not apply to the sale of printed sales messages which are:

"(1) Printed to the special order of the purchaser;

"(2) Mailed or delivered by the seller, the seller's agent or a mailing house acting as the agent for the purchaser, through the United States Postal Service or by common carrier;

"(3) Received by any other person at no cost that person who becomes the owner of the printed material."

We assume the printed message in question qualifies as a printed sales message as defined in Regulation 1541.5(a)(1) which states that in order for the brochure to qualify as a printed sales message, it must be printed for the principal purpose of advertising or promoting goods or services.

The posters are presumably printed to the special order of the purchaser, and the D&R indicates that they are mailed to the contractors hired by the printer to attach the posters. Thus, requirements (1) and (2) of Regulation 1541.5(b) are satisfied. The remaining issue is whether the printed sales message is received at no cost to another person who becomes the owner. (Reg. 1541.5(b)(3).) Regulation 1541.5(a)(6) states that "any other person":

"[M]eans any person, other than the purchaser or the purchaser's agent, who takes physical delivery of the printed sales messages and who exercise dominion and control over the property."

Senior Staff Counsel James E. Mahler addresses this issue in the D&R.

"For sales and use tax purposes, 'delivery' is a term of art which denotes 'the point at which ownership is transferred.' (Satco, Inc. v. State Bd. of Equalization, 144 Cal.App.3d 12 at 17, emphasis in original.) The question raised by the staff thus resolve to a single issue: Do the property owners become the 'owners' of the posters placed on their walls?

"If we understand it correctly, the staff is arguing that [NPA] simply abandons or relinquishes possession of the posters. [NPA] does not intend to make a gift of the posters to any particular property owner, but simply wishes to place the posters in a location visible by the public. The property owners do not give permission for the posters to be placed on their walls, and in fact are not even notified that the posters will be placed, so there is no acceptance of a gift from [NPA]. Thus, the staff believes, there is no transfer of ownership to the property owners.

"We would find some merit in this argument if a transfer of title were a prerequisite to the printed sales message exemption, since mere abandonment does not effect a transfer of title (See Stephens v. Mansfield, 11 Cal. 363; Richardson v. McNulty, 24 Cal. 339; Dresser v. Allen, 25 Cal.App. 124). However, the statute requires only that the recipient become the 'owner' of the property.

"The words 'owner' and 'ownership' are broad terms which do not necessarily encompass title. For example, Civil Code Section 654 provides that 'ownership' refers simply to the right to 'possess and use' the

property 'to the exclusion of others.' In Higgins v. San Diego, 131 Cal. 294, our Supreme Court held that 'owner' as used in a city charter referred to the person who had control of the property without regard to legal title. (See also Government Employees Ins. Co. v. Kinyon, 119 Cal.App.3d 213.)

"In subdivision (a)(6) of Regulation 1541.5, the Board has construed the statutory term 'owner' to mean the person who has 'dominion and control' of the property. Neither the statute nor the regulation mentions 'title'. Therefore, a transfer of title is not a prerequisite to the exemption.

"[NPA] transferred possession of the posters to the property owners by placing or having the posters placed on their walls. [NPA] thereafter disclaimed any interest in the posters. The property owners acquired the right to dispose of the posters in any manner they saw fit...."

Mr. Mahler concluded "that the property owners acquired 'dominion and control' over the posters and thus became the 'owners' of the posters for purposes of section 6379.5."

We agree with Mr. Mahler's conclusion that the property owners became the owners of the posters, and therefore the final requirement that the printed sales message be received by any other person who becomes the owner at no cost to that person has been satisfied.

Based on the facts mentioned above and the assumptions that the poster is a printed sales message, that it is printed to the special order of the purchaser, and that it is mailed or delivered by the seller, the seller's agent or a mailing house acting as the agent for the purchaser, through the United States Postal Service or by common carrier, we conclude that the printer's sales of the posters are exempt under section 6379.5.

Sincerely,

Rachel M. Aragon
Staff Counsel

RMA:ljt

bc: --- - District Administrator